

**This volume was donated to LLMC
to enrich its on-line offerings and
for purposes of long-term preservation by**

Northwestern University School of Law

THE
FEDERAL REPORTER.

VOLUME 46.

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

JUNE—SEPTEMBER, 1891.

ST. PAUL:
WEST PUBLISHING CO.
1891.

[Faint, illegible text, likely bleed-through from the reverse side of the page]

COPYRIGHT, 1891,

BY

WEST PUBLISHING COMPANY.

JUDGES
OF THE
CIRCUIT AND DISTRICT COURTS
OF THE
UNITED STATES.

FIRST CIRCUIT.

HON. HORACE GRAY, CIRCUIT JUSTICE.
HON. LE BARON B. COLT, CIRCUIT JUDGE.
HON. NATHAN WEBB, DISTRICT JUDGE, MAINE.
HON. EDGAR ALDRICH, DISTRICT JUDGE, NEW HAMPSHIRE.
HON. THOMAS L. NELSON, DISTRICT JUDGE, MASSACHUSETTS.
HON. GEORGE M. CARPENTER, DISTRICT JUDGE, RHODE ISLAND.

SECOND CIRCUIT.

HON. SAMUEL BLATCHFORD, CIRCUIT JUSTICE.
HON. WILLIAM J. WALLACE, SENIOR CIRCUIT JUDGE.
HON. E. HENRY LACOMBE, JUNIOR CIRCUIT JUDGE.
HON. NATHANIEL SHIPMAN, DISTRICT JUDGE, CONNECTICUT.
HON. ALFRED C. COXE, DISTRICT JUDGE, N. D. NEW YORK.
HON. ADDISON BROWN, DISTRICT JUDGE, S. D. NEW YORK.
HON. CHARLES L. BENEDICT, DISTRICT JUDGE, E. D. NEW YORK.
HON. HOYT H. WHEELER, DISTRICT JUDGE, VERMONT.

THIRD CIRCUIT.

HON. JOSEPH P. BRADLEY, CIRCUIT JUSTICE.
HON. MARCUS W. ACHESON, CIRCUIT JUDGE.
HON. LEONARD E. WALES, DISTRICT JUDGE, DELAWARE.
HON. EDWARD T. GREEN, DISTRICT JUDGE, NEW JERSEY.
HON. WILLIAM BUTLER, DISTRICT JUDGE, E. D. PENNSYLVANIA.
HON. JAMES H. REED, DISTRICT JUDGE, W. D. PENNSYLVANIA.

FOURTH CIRCUIT.

HON. MELVILLE W. FULLER, CIRCUIT JUSTICE.
HON. HUGH L. BOND, CIRCUIT JUDGE.
HON. THOMAS J. MORRIS, DISTRICT JUDGE, MARYLAND.
HON. AUGUSTUS S. SEYMOUR, DISTRICT JUDGE, E. D. NORTH CAROLINA.
HON. ROBERT P. DICK, DISTRICT JUDGE, W. D. NORTH CAROLINA.
HON. CHARLES H. SIMONTON, DISTRICT JUDGE, SOUTH CAROLINA.
HON. ROBERT W. HUGHES, DISTRICT JUDGE, E. D. VIRGINIA.
HON. JOHN PAUL, DISTRICT JUDGE, W. D. VIRGINIA.
HON. JOHN J. JACKSON, JR., DISTRICT JUDGE, WEST VIRGINIA.

FIFTH CIRCUIT.

HON. LUCIUS Q. C. LAMAR, CIRCUIT JUSTICE.
HON. DON A. PARDEE, CIRCUIT JUDGE.
HON. JOHN BRUCE, DISTRICT JUDGE, M. AND N. D. ALABAMA.
HON. HARRY T. TOULMIN, DISTRICT JUDGE, S. D. ALABAMA.
HON. CHARLES SWAYNE, DISTRICT JUDGE, N. D. FLORIDA.
HON. JAMES W. LOCKE, DISTRICT JUDGE, S. D. FLORIDA.
HON. WILLIAM T. NEWMAN, DISTRICT JUDGE, N. D. GEORGIA.
HON. EMORY SPEER, DISTRICT JUDGE, S. D. GEORGIA.
HON. EDWARD C. BILLINGS, DISTRICT JUDGE, E. D. LOUISIANA.
HON. ALECK BOARMAN, DISTRICT JUDGE, W. D. LOUISIANA.
HON. ROBERT A. HILL, DISTRICT JUDGE, N. AND S. D. MISSISSIPPI.¹
HON. HENRY C. NILES, DISTRICT JUDGE, N. AND S. D. MISSISSIPPI.²
HON. DAVID E. BRYANT, DISTRICT JUDGE, E. D. TEXAS.
HON. A. P. MCCORMICK, DISTRICT JUDGE, N. D. TEXAS.
HON. THOMAS S. MAXEY, DISTRICT JUDGE, W. D. TEXAS.

SIXTH CIRCUIT.

HON. HENRY B. BROWN, CIRCUIT JUSTICE.
HON. HOWELL E. JACKSON, CIRCUIT JUDGE.
HON. JOHN WATSON BARR, DISTRICT JUDGE, KENTUCKY.
HON. HENRY H. SWAN, DISTRICT JUDGE, E. D. MICHIGAN.
HON. HENRY F. SEVERENS, DISTRICT JUDGE, W. D. MICHIGAN.
HON. AUGUSTUS J. RICKS, DISTRICT JUDGE, N. D. OHIO.
HON. GEORGE R. SAGE, DISTRICT JUDGE, S. D. OHIO.
HON. D. M. KEY, DISTRICT JUDGE, E. AND M. D. TENNESSEE.
HON. ELI S. HAMMOND, DISTRICT JUDGE, W. D. TENNESSEE.

¹Retired Aug. 1, 1891.

²Appointed Aug. 11, 1891.

SEVENTH CIRCUIT.

HON. JOHN M. HARLAN, CIRCUIT JUSTICE.
 HON. WALTER Q. GRESHAM, CIRCUIT JUDGE.
 HON. HENRY W. BLODGETT, DISTRICT JUDGE, N. D. ILLINOIS.
 HON. WILLIAM J. ALLEN, DISTRICT JUDGE, S. D. ILLINOIS.
 HON. WILLIAM A. WOODS, DISTRICT JUDGE, INDIANA.
 HON. JAMES G. JENKINS, DISTRICT JUDGE, E. D. WISCONSIN.
 HON. ROMANZO BUNN, DISTRICT JUDGE, W. D. WISCONSIN.

EIGHTH CIRCUIT.

HON. DAVID J. BREWER, CIRCUIT JUSTICE.
 HON. HENRY C. CALDWELL, CIRCUIT JUDGE.
 HON. JOHN A. WILLIAMS, DISTRICT JUDGE, E. D. ARKANSAS.
 HON. ISAAC C. PARKER, DISTRICT JUDGE, W. D. ARKANSAS.
 HON. MOSES HALLETT, DISTRICT JUDGE, COLORADO.
 HON. OLIVER P. SHIRAS, DISTRICT JUDGE, N. D. IOWA.
 HON. JAMES M. LOVE, DISTRICT JUDGE, S. D. IOWA.¹
 HON. JOHN S. WOOLSON, DISTRICT JUDGE, S. D. IOWA.²
 HON. CASSIUS G. FOSTER, DISTRICT JUDGE, KANSAS.
 HON. RENSSELAER R. NELSON, DISTRICT JUDGE, MINNESOTA.
 HON. AMOS M. THAYER, DISTRICT JUDGE, E. D. MISSOURI.
 HON. JOHN F. PHILIPS, DISTRICT JUDGE, W. D. MISSOURI.
 HON. ELMER S. DUNDY, DISTRICT JUDGE, NEBRASKA.
 HON. ALFRED D. THOMAS, DISTRICT JUDGE, NORTH DAKOTA.
 HON. ALONZO J. EDGERTON, DISTRICT JUDGE, SOUTH DAKOTA.
 HON. JOHN A. RINER, DISTRICT JUDGE, WYOMING.

NINTH CIRCUIT.

HON. STEPHEN J. FIELD, CIRCUIT JUSTICE.
 HON. LORENZO SAWYER, CIRCUIT JUDGE.³
 HON. OGDEN HOFFMAN, DISTRICT JUDGE, N. D. CALIFORNIA.⁴
 HON. WM. W. MORROW, DISTRICT JUDGE, N. D. CALIFORNIA.⁵
 HON. ERSKINE M. ROSS, DISTRICT JUDGE, S. D. CALIFORNIA.
 HON. HIRAM KNOWLES, DISTRICT JUDGE, MONTANA.
 HON. CORNELIUS H. HANFORD, DISTRICT JUDGE, WASHINGTON.
 HON. THOMAS P. HAWLEY, DISTRICT JUDGE, NEVADA.
 HON. MATTHEW P. DEADY, DISTRICT JUDGE, OREGON.
 HON. JAMES H. BEATTY, DISTRICT JUDGE, IDAHO.

¹Deceased.³Died Sept. 7, 1891.²Appointed Aug. 14, 1891.⁴Deceased.⁵Appointed Sept. 18, 1891.

CASES REPORTED.

	Page		Page
A. Backus, Jr., & Sons, Grand Trunk Ry. Co. v.	211	Barkentine Portland, The, Pacific Coast S. S. Co. v.	877
Adee v. J. L. Mott Iron-Works.	39	Burling, Bank of British North America v.	357
Adee v. J. L. Mott Iron-Works.	77	Baughman v. National Water-Works Co.	4
Alexander, United States v.	728	Baxter, United States v.	350
Alpi, Jacobson v., seven cases.	767	Baynes, Grier v.	523
Amacker, Northern Pac. R. Co. v.	233	Beach v. United States.	754
Amato v. Northern Pac. R. Co.	561	Beard, Stearns v.	193
American Live-Stock & Meat Transp. Co. v. Street Stable-Car Line.	782	Belmont Nail Co. v. Columbia Iron & Steel Co.	8
American Loan & Trust Co. v. East & West R. Co. of Alabama.	101	Belmont Nail Co. v. Columbia Iron & Steel Co.	336
American Petroleum Co. v. The Veendam.	489	Belvin, United States v., three cases	381
American Preservers' Trust v. Taylor Manuf'g Co.	152	Berg, Hat-Sweat Manuf'g Co. v.	757
American Wheel Co., Brown v.	733	Berry v. Knights Templars' & Masons' Life Indemnity Co.	439
Anderson v. Eller.	777	Blewett, Hershberger v.	704
Anderson v. Mackay.	105	Blythe, Bollin v.	181
Anderson v. Saint.	760	Board of County Com'rs of Carlton County, Smith v.	340
Anderson v. The Rence.	805	Boese, United States v.	917
Anglo-American Packing & Provision Co., Chicago & A. Bridge Co. v.	584	Bollin v. Blythe.	181
Anjer Head, The, United States v.	664	Bombay, The, United States v.	665
Armstrong v. Brolaski.	903	Boss, Rice v.	195
Arnold, In re.	510	Bound v. South Carolina Ry. Co.	315
Arnold v. Chesebrough.	700	Bowring v. Providence Washington Ins. Co.	119
Arrowsmith v. Gleason.	256	Bradford, Ex parte.	508
Atchison, T. & S. F. R. Co., Kimball v.	888	Bradstreet Co., Dow v.	824
Atmore v. Walker.	429	Braker v. The Gloaming.	671
Aultman & Co., Marvin v.	338	Branagh v. Smith.	517
Austin, Hat-Sweat Manuf'g Co. v.	757	Brewster, Haynes v.	471
Ayers v. Manning.	19	Bridgeport Chain Co., Smith & Egge Manuf'g Co. v.	393
Ayres, United States v.	651	Brolaski, Armstrong v.	903
Babbott v. Tewksbury.	86	Brooklyn, The, Empire Warehouse Co. v.	132
Back v. Sierra Nevada Con. Min. Co.	673	Brown v. American Wheel Co.	733
Backus, Jr., & Sons, Grand Trunk Ry. Co. v.	211	Brown v. Florida Ry. & Nav. Co.	641
Baker, Murbarger v.	286	Brown, The W. F., Lawrence v.	290
Baker-Whitely Co. v. The Khio.	207	Brown Folding-Mach. Co., Stone-metz Printers' Machinery Co. v.	72
Balbach, Camprelle v.	81	Brown Folding-Mach. Co., Stone-metz Printers' Machinery Co. v.	851
Bangor Sav. Bank v. City of Stillwater.	899	Brueggeman-Reinert Distilling Co., Hostetter Co. v.	188
Bankers' & Merchants' Mut. Life Ass'n of United States, D'Orlu v.	355	Brush Electric Co. v. New American Electrical Arc Light Co.	79
Bank of British North America v. Barling.	357	Bunker Hill & S. Mining & Concentrating Co., Burke v.	644
Barden, Northern Pac. R. Co. v.	592		

	Page		Page
Bunker Hill & S. Mining & Concentrating Co. Johnson v.....	417	City of Stillwater, Bangor Sav. Bank v.....	899
Burke v. Bunker Hill & S. Mining & Concentrating Co.....	644	Claasen, United States v.....	67
Burnett, The Robert.....	415	Clark, Haffcke v.....	770
Burnham, Uhle v.....	500	Clark, Pope Manuf'g Co. of Connecticut v.....	789
Bushnell v. Park Bros. & Co.....	209	Clark, United States v.....	633
Byers v. Coleman.....	224	Cockcroft, New York, N. H. & H. R. Co. v.....	881
Cahalan v. McTague.....	251	Coffin v. The Progresso.....	292
Cahn v. Western Union Tel. Co.....	40	Coleman, Byers v.....	224
Calvin S. Edwards, The, Sharp-ley v.....	815	Coleman, Cheney v.....	224
Camprelle v. Balbach.....	81	Coleman, Crissey v.....	224
Cannon, Northern Pac. R. Co. v.....	224	Coleman, Hoey v.....	221
Cannon, Northern Pac. R. Co. v.....	237	Columbia Iron & Steel Co., Belmont Nail Co. v.....	8
Cargo of Pine Piles, Isham v.....	403	Columbia Iron & Steel Co., Belmont Nail Co. v.....	336
Carrie, The, Jones v.....	796	Commodore Perry, The.....	874
Carrier, In re.....	850	Complete Electric Const. Co., Quinn v.....	506
C. Aultman & Co., Marvin v.....	338	Comstock v. Tracey.....	162
Cedar Point Club Co., Crane Creek Shooting Club Co. v.....	273	Connecticut Fire Ins. Co., Hamilton v.....	42
Center v. The M. E. Staples.....	303	Connecticut Mut. Life Ins. Co., McNulty v.....	305
Central Trust Co. of New York v. Florida Ry. & Nav. Co.....	641	Consolidated Bunting Apparatus Co. v. Metropolitan Brewing Co.....	288
Central Trust Co. of New York v. Wabash, St. L. & P. Ry. Co.....	26	Cooper, Dobson v.....	184
Central Trust Co. of New York v. Wabash, St. L. & P. Ry. Co.....	156	Cooper, Jessup & Moore Paper Co. v.....	186
Challenge Corn-Planter Co. v. Gearhardt.....	768	Coschina v. The Virgo.....	294
Chamberlain v. The Torgorm.....	202	Costello, The Nora, Morrissey v.....	869
Chamberlain, Hyer v.....	341	Cotton Exchange Real Estate Co., Northwestern Mut. Life Ins. Co. v.....	22
Chandler v. Pomeroy.....	533	Covel, Wilkin v.....	925
Chapman v. Keindel.....	99	Cover, United States v.....	284
Charles Hebard, etc., The, Lyons v.....	137	Cowley v. Northern Pac. R. Co.....	325
Charles Runyon, The, Morse v.....	813	Cox, Healy v.....	663
Charleston, C. & C. R. Co., Finance Co. of Pennsylvania v.....	426	Cox, Mellor v.....	662
Charleston, C. & C. R. Co., Finance Co. of Pennsylvania v.....	508	Crane Creek Shooting Club Co. v. Cedar Point Club Co.....	273
Charm, The.....	860	Crissey v. Coleman.....	224
Chase, The Senator D. C., Lehigh Valley Coal Co. v.....	874	Crosby Lumber Co., Smith v.....	819
Cheney v. Coleman.....	224	Cuff v. Ninety-Five Tons of Coal.....	670
Chertizza v. The Virgo.....	294	Cunard S. S. Co., Fabre v.....	301
Chesapeake & O. Ry. Co. v. The Panama.....	496	Curtain v. Talley.....	580
Chesebrough, Arnold v.....	700	Cutting v. Florida Ry. & Nav. Co.....	641
Chicago, B. & Q. R. Co., Lowry v.....	83	Dabinovich v. The Virgo.....	294
Chicago, M. & St. P. Ry. Co., McClary v.....	343	Dale, The, Mumpton v.....	670
Chicago, R. I. & P. Ry. Co. v. Denver & R. G. R. Co.....	145	Dasori, The.....	415
Chicago & A. Bridge Co. v. Anglo-American Packing & Provision Co.....	584	Davis v. Chicago & N. W. Ry. Co.....	307
Chicago & N. W. Ry. Co., Davis v.....	307	De Estrada v. San Felipe Land & Water Co.....	280
Ciampa v. The F. W. Vosburgh.....	866	Deisler, Enterprise Manuf'g Co. v.....	854
Ciampa Emilia, The, Somers v.....	866	De La Vergne Refrigerating Mach. Co. v. Montgomery Brewing Co.....	829
Cilley, Patten v.....	892	Dent, Ferguson v.....	88
City of New York, Owl Transportation Co. v.....	415	Denver & R. G. R. Co., Chicago, R. I. & P. Ry. Co. v.....	145
City of Spokane Falls, Spokane St. Ry. Co. v.....	322	Detweiler, Truax v.....	117
		Diefenthal v. Hamburg-Amerikanische Packetfahrt Actien-Gesellschaft.....	397

	Page		Page
Dillon, The John, Starin v.....	527	Florida Ry. & Nav. Co., Brown v..	641
Dishong v. Finkbinder.....	12	Florida Ry. & Nav. Co., Central	
Dixie, The, Vanderbilt v.....	403	Trust Co. of New York v.....	641
Dobson v. Cooper.....	184	Florida Ry. & Nav. Co., Cutting v..	641
D'Orlu v. Bankers' & Merchants'		Florida Ry. & Nav. Co., Guaranty	
Mut. Life Ass'n of United States	355	Trust & Safe-Deposit Co. v.....	641
Dorr, Maryland Hominy & Coralline		Florida Ry. & Nav. Co., Meyer v....	641
Co. of Baltimore City v.....	773	Foard Transp. Co. v. The Khio.....	207
Doud, The Reuben, Hoxsie v.....	800	Freese, Lambert v.....	807
Dow v. Bradstreet Co.....	824	F. W. Vosburgh, The, Ciampa v....	866
Doyle v. San Diego Land & Town			
Co.....	709	Galbes v. Girard.....	500
Doyle v. The Jersey City.....	134	Garrison, The E. H.....	143
Dozier v. Fidelity & Casualty Co. of		Gearhardt, Challenge Corn-Planter	
New York.....	446	Co. v.....	768
Du Bois, Kirk v.....	486	Georgia, The, Howard v.....	669
Dunklin County, Lemoine v.....	219	Gibson, Vermont Farm Mach. Co. v.	488
Durant, United States v.....	753	Gilmer v. Morris.....	333
		Girard, Galbes v.....	500
Easton & Amboy Co. v. The Scow		Gleason, Arrowsmith v.....	256
No. 19.....	406	Glenn v. McAllister's Ex'rs.....	883
East & West R. Co. of Alabama,		Glidden v. Whittier.....	437
American Loan & Trust Co. v....	101	Gloaming, The, Braker v.....	671
Edwards, The Calvin S., Sharpley v.	815	Gloucester, The, Empire Ware-	
E. H. Garrison, The.....	143	house Co. v.....	132
Eiler, Anderson v.....	777	Godwin, In re.....	361
Ellor, Hat-Sweat Manuf'g Co. v....	757	Goodwin, Shain v.....	564
Emilia, The Ciampa, Somers v.....	866	Goodyear Dental Vulcanite Co. v.	
Emma Kate Ross, The, Myers Ex-		White, two cases.....	273
cursion & Nav. Co. v.....	872	Grand Trunk Ry. Co. v. A. Backus,	
Emmons, Haltern v.....	452	Jr., & Sons.....	211
Emperor, The, Hudson River Ce-		Grier v. Baynes.....	523
ment Co. v.....	143	Griffith v. Murray.....	660
Empire Warehouse Co. v. The		Grimsley v. Hankins.....	400
Brooklyn.....	132	Guaranty Trust & Safe-Deposit Co.	
Empire Warehouse Co. v. The		v. Florida Ry. & Nav. Co.....	641
Gloucester.....	132	Guigon, United States v.....	381
Empire Warehouse Co. v. The Virgo	294	Gunby v. The Khio.....	207
Engeman, United States v.....	898		
Engerman, United States v.....	176	Haffcke v. Clark.....	770
Enterprise Manuf'g Co. v. Deisler..	854	Hahn v. Erhardt.....	519
Enterprise Manuf'g Co. v. Wana-		Half Moon, The, Jones v.....	812
maker.....	854	Haltern v. Emmons.....	452
Erhardt, Hahn v.....	519	Hamburg-Amerikanische Packet-	
Express, The, New York & C. Mail		fahrt Actien-Gesellschaft, Diefen-	
S. S. Co. v.....	860	thal v.....	397
		Hamilton v. Connecticut Fire Ins.	
Fabre v. Cunard S. S. Co.....	301	Co.....	42
Farris v. Magone.....	845	Hamilton v. The Walla Walla.....	198
Ferguson v. Dent.....	88	Hankins, Grimsley v.....	400
Fern Holme, The.....	119	Harris Drug Co. v. Stucky.....	624
Fidelity & Casualty Co. of New		Hart, Ex parte.....	426
York, Dozier v.....	446	Hat-Sweat Manuf'g Co. v. Austin..	757
Finance Co. of Pennsylvania v.		Hat-Sweat Manuf'g Co. v. Berg....	757
Charleston, C. & C. R. Co.....	426	Hat-Sweat Manuf'g Co. v. Ellor....	757
Finance Co. of Pennsylvania v.		Hat-Sweat Manuf'g Co. v. McChes-	
Charleston, C. & C. R. Co.....	508	ney.....	757
Finkbinder, Dishong v.....	12	Hat-Sweat Manuf'g Co. v. McGall..	757
First Nat. Bank of Plattsburgh v.		Hat-Sweat Manuf'g Co. v. Porter..	757
Sowles.....	731	Hat-Sweat Manuf'g Co. v. Waring..	87
First Nat. Bank of St. Albans,		Hat-Sweat Manuf'g Co. v. Waring..	106
Sowles v.....	513	Hayes, McDougall v.....	817
Flannery v. The Medusa.....	303	Haynes v. Brewster.....	471
Flinn, Rocker Spring Co. v., six		Healy v. Cox.....	663
cases.....	109	Hebard, etc., The Charles, Lyons v.	137

	Page		Page
Hershberger v. Blewett.....	704	Kimball v. Atchison, T. & S. F. R. Co.....	888
Hicklin v. Marco.....	424	King, In re.....	905
Hicks, Wirt v.....	71	Kinney, Inez Min. Co. v.....	832
Higgerson, United States v.....	750	Kirk v. Du Bois.....	486
Hoey v. Coleman.....	221	Knights Templars' & Masons' Life Indemnity Co., Berry v.....	439
Hoffman, The Maria.....	408	Knipe, Kenyon v.....	309
Holme, The Fern.....	119	Lake v. The Manhattan.....	797
Home Ins. Co., Switzer v.....	50	Lambert v. Freese.....	807
Hostetter Co. v. Brueggeman-Reinert Distilling Co.....	188	Lawrence v. The W. F. Brown.....	290
House, Simon v.....	317	Lee, In re.....	59
Howard v. The Georgia.....	669	Lehigh Valley Coal Co. v. The Senator D. C. Chase.....	874
Hoxsie v. The Reuben Doud.....	800	Lemoine v. Dunklin County.....	219
Hudson River Cement Co. v. The Emperor.....	143	Lewis, Shainwald v.....	839
Hughes v. The Pieter de Conick.....	795	L. H. Harris Drug Co. v. Stucky.....	624
Humason, In re.....	388	L. H. Smith Wooden-Ware Co., Strobridge v.....	922
Huston Electric Co. v. Sperry Electric Co.....	75	Lombard, Ayres & Co. v. The R. H. Williams.....	414
Hyer v. Chamberlain.....	341	Low Moor Iron Co. of Virginia, Shoe v.....	125
Iberia, The.....	301	Lowry v. Chicago, B. & Q. R. Co.....	83
Independent School-Dist. of Rock Rapids, Richards v.....	460	Lyon County, United States Bank v.....	514
Inez Min. Co. v. Kinney.....	832	Lyons v. The Charles Hebard, etc.....	137
Investment Co. of Philadelphia v. Ohio & N. W. R. Co.....	696	Luckenbach v. Proceeds of The Virgo.....	294
Isaac May, The.....	79	McAllister's Ex'rs, Glenn v.....	883
Isham v. A Cargo of Pine Piles.....	403	McCabe, Ex parte.....	363
Jacobson v. Alpi, seven cases.....	767	McCarty, In re.....	360
James v. St. Louis & S. F. Ry. Co.....	47	McChesney, Hat-Sweat Manuf'g Co. v.....	757
Jayne v. The Railway.....	809	McClary v. Chicago, M. & St. P. Ry. Co.....	343
J. C. Rich, The, Scott v.....	136	McDonald v. Yungbluth.....	836
Jellico Mountain Coal & Coke Co., United States v.....	432	McDougall v. Hayes.....	817
Jersey City Gas-Light Co. v. United Gas Imp. Co.....	264	McGall, Hat-Sweat Manuf'g Co. v.....	757
Jersey City, The, Doyle v.....	134	Mackay, Anderson v.....	105
Jessup & Moore Paper Co. v. Cooper J. L. Mott Iron-Works, Adey v.....	39	McKinnon v. McKinnon.....	713
J. L. Mott Iron-Works, Adey v.....	77	McNulty v. Connecticut Mut. Life Ins. Co.....	305
John Dillon, The, Starin v.....	527	McTague, Cahalan v.....	251
Johnson, In re.....	477	Magee v. Oregon Ry. & Nav. Co.....	734
Johnson v. Bunker Hill & S. M. & C. Co.....	417	Magone, Farris v.....	845
Johnson v. Northern Pac. Ry. Co.....	347	Majors, Paton v.....	210
Joliet Steel Co., Price v.....	107	Manhattan, The, Lake v.....	797
Jones v. The Carrie.....	796	Manning, Ayers v.....	19
Jones v. The Half Moon.....	812	Marco, Hicklin v.....	424
Joseph R. Foard Transp. Co. v. The Khio.....	207	Maria Hoffman, The.....	408
Kansas & A. Val. R. Co., Payne v.....	546	Marquandt, In re.....	52
Keindel, Chapman v.....	99	Marshall v. Wabash R. Co.....	269
Kelly, In re.....	653	Martin, Ex parte.....	482
Kenyon v. Knipe.....	309	Martinez v. Moll.....	724
Kenyon v. Squire, two cases.....	309	Marvin v. C. Aultman & Co.....	338
Khio, The, Baker-Whitely Co. v.....	207	Maryland Hominy & Coralline Co. of Baltimore City v. Dorr.....	773
Khio, The, Gunby v.....	207	May, The Isaac.....	79
Khio, The, Joseph R. Foard Transp. Co. v.....	207	Meadows, Northern Pac. R. Co. v.....	254
Khio, The, Umbach v.....	207	Medusa, The, Flannery v.....	303
Kie, Ex parte.....	485	Mellor v. Cox.....	662
		Merritt Wrecking Co. v. The Virgo.....	294

	Page		Page
M. E. Staples, The Center v.	308	Ohio & N. W. R. Co., Investment	
Metropolitan Brewing Co., Consol-		Co. of Philadelphia v.	696
idated Bunting Apparatus Co. v.	288	One Hundred and Twenty-Nine	
Metropolitan St. Ry. Co., Shanken-		Bales of Merchandise, United	
berry v.	177	States v.	468
Meus v. The Orange.	408	Orange, The, Meus v.	408
Meyer v. Florida Ry. & Nav. Co.	641	Orange, The, Ronan v.	411
Meyer v. Richards.	727	Oregon Ry. & Nav. Co., Magee v.	734
Millard v. The Rahway.	809	Overman Wheel Co. v. Pope Man-	
Miller v. Wheeler & Wilson Man-		uf'g Co.	577
uf'g Co.	882	Owl Transportation Co. v. City of	
Mills v. United States.	738	New York.	415
Moll, Martinez v.	724		
Monroe, In re.	52	Pacific Coast S. S. Co. v. The Bark-	
Montgomery Brewing Co., De La		entine Portland.	877
Vergne Refrigerating Mach. Co.		Paine v. Snowden.	189
v.	829	Panama, The, Chesapeake & O. Ry.	
Morris, Gilmer v.	333	Co. v.	496
Morrissey v. The Nora Costello.	869	Papa, The, Williams v.	576
Morse v. The Charles Runyon.	813	Park Bros. & Co., Bushnell v.	209
Mott Iron-Works, Adece v.	39	Paton v. Majors.	210
Mott Iron-Works, Adece v.	77	Patten v. Cilley.	892
Mumpton v. The Dale.	670	Patteson, United States v., two	
Murbarger v. Baker.	286	cases.	381
Murray, Griffith v.	660	Patton, United States v.	461
Myers Excursion & Nav. Co. v. The		Payne v. Kansas & A. Val. R. Co.	546
Emma Kate Ross.	872	Perry, The Commodore.	874
		Phillips, United States v.	466
National Typographic Co. v. New		Pieter de Conick, The, Hughes v.	795
York Typograph Co.	114	Pomeroy, Chandler v.	533
National Water-Works Co., Baugh-		Pope v. Seckworth.	858
man v.	4	Pope Manuf'g Co., Overman Wheel	
N. B. Starbuck, The.	860	Co. v.	577
Neely, Williams v.	450	Pope Manuf'g Co. of Connecticut	
Nelson, Nordlinger v.	859	v. Clark.	789
New American Electrical Arc Light		Porter, Hat-Sweat Manuf'g Co. v.	757
Co., Brush Electric Co. v.	79	Portland, The Barkentine, Pacific	
New England Terminal Co. v. The		Coast S. S. Co. v.	877
Niagara.	860	Price v. Joliet Steel Co.	107
New Jersey & N. Y. Ry. Co., Young		Progresso, The, Coffin v.	292
v.	160	Providence Washington Ins. Co.,	
New York, N. H. & H. R. Co. v.		Bowring v.	119
Cockcroft.	881	Provincial Dry-Dock Co. v. The	
New York Typograph Co., National		Virgo.	294
Typographic Co. v.	114		
New York & C. Mail S. S. Co. v.		Quinn v. Complete Electric Const.	
The Express.	860	Co.	506
Niagara, The, New England Ter-			
minial Co. v.	860	Rackett, Russell v.	200
Nichols, United States v.	359	Rahway, The, Jayne v.	809
Ninety-Five Tons of Coal, Cuff v.	670	Rahway, The, Millard v.	809
Nora Costello, The, Morrissey v.	869	Rahway, The, Winnett v.	809
Nordlinger v. Nelson.	859	Rence, The, Anderson v.	805
Northern Pac. R. Co. v. Amacker.	233	Renner v. Northern Pac. Ry. Co.	344
Northern Pac. R. Co. v. Barden.	592	Reuben Doud, The, Hoxsie v.	800
Northern Pac. R. Co. v. Cannon.	224	R. H. Williams, The, Lombard,	
Northern Pac. R. Co. v. Cannon.	237	Ayres & Co. v.	414
Northern Pac. R. Co. v. Meadows.	254	Rice v. Boss.	195
Northern Pac. R. Co. v. Sanders.	229	Rich, The J. C., Scott v.	136
Northern Pac. R. Co., Amato v.	561	Richards v. Independent School-	
Northern Pac. R. Co., Cowley v.	325	Dist. of Rock Rapids.	460
Northern Pac. R. Co., Johnson v.	347	Richards, Meyer v.	727
Northern Pac. R. Co., Renner v.	344	Richardson v. Travelers' Ins. Co.	843
Northwestern Mut. Life Ins. Co. v.		Roanoke, The.	297
Cotton Exchange Real-Estate Co.	22	Robert Burnett, The.	415

	Page		Page
Rochester Coach-Lace Co. v. Schaefer.....	190	Sperry Electric Co., Thomas Huston Electric Co. v.....	75
Rocker Spring Co. v. Flinn, six cases.....	109	Spokane St. Ry. Co. v. City of Spokane Falls.....	322
Rogers, United States v.....	1	Squire, Kenyon v., two cases.....	309
Ronan v. The Orange.....	411	Staples, The M. E. Center v.....	303
Ross, The Emma Kate, Myers Excursion & Nav. Co. v.....	872	Starbuck, The N. B.....	860
Runyon, The Charles, Morse v.....	813	Starin v. The John Dillon.....	527
Russell v. Rackett.....	200	State of California, The, Simpson v.....	877
Sackett v. Smith.....	39	Stearns v. Beard.....	193
Saint, Anderson v.....	760	Stebbins v. Proceeds of The Virgo.....	294
St. Louis & S. F. Ry. Co., James v.....	47	Stephens, United States v.....	381
Sanders, Northern Pac. R. Co. v.....	239	Stonemetz Printers' Machinery Co. v. Brown Folding-Mach. Co.....	72
San Diego Land & Town Co., Doyle v.....	709	Stonemetz Printers' Machinery Co. v. Brown Folding-Mach. Co.....	851
San Felipe Land & Water Co., De Estrada v.....	280	Straus, In re.....	522
Sarah Thorp, The, Thames Tow-Boat Co. v.....	816	Street Stable-Car Line, American Live-Stock & Meat Transp. Co. v.....	782
Schaefer, Rochester Coach-Lace Co. v.....	190	Strobridge v. L. H. Smith Wooden-Ware Co.....	923
Scott v. The J. C. Rich.....	136	Stucky, L. H. Harris Drug Co. v.....	624
Scow No. 19, The, Easton & Amboy Co. v.....	406	Sunny South, The.....	290
Seckworth, Pope v.....	858	Switzer v. Home Ins. Co.....	50
Senator D. C. Chase, The, Lehigh Valley Coal Co. v.....	874	Switzerland Marine Ins. Co. v. The Umbria.....	927
Sbain v. Goodwin.....	564	Talley, Curtain v.....	580
Shainwald v. Lewis.....	839	Tatum, Wells v.....	572
Shankenbery v. Metropolitan St. Ry. Co.....	177	Taylor Manuf'g Co., American Preservers' Trust v.....	152
Sharpley v. The Calvin S. Edwards Shoe v. Low Moor Iron Co. of Virginia.....	815	Tewksbury, Babbott v.....	86
Sierra Nevada Con. Min. Co., Back v.....	673	Thames Tow-Boat Co. v. The Sarah Thorp.....	816
Simmons, United States v.....	65	Thomas Huston Electric Co. v. Sperry Electric Co.....	75
Simon v. House.....	317	Thorp, The Sarah, Thames Tow-Boat Co. v.....	816
Simpson v. The State of California.....	877	350 Tons of Mahogany and Cedar, Snow v.....	125
Sioux City & St. P. Ry. Co., United States v.....	502	Timor, The.....	859
Smith v. Board of County Com'rs of Carlton County.....	340	Torgorm, The, Chamberlain v.....	202
Smith v. Crosby Lumber Co.....	819	Tracey, Comstock v.....	162
Smith, Branagh v.....	517	Travelers' Ins. Co., Richardson v.....	843
Smith, Sackett v.....	39	Truax v. Detweiler.....	117
Smith Wooden-Ware Co., Strobridge v.....	922	Trumbull, United States v.....	755
Smith & Egge Manuf'g Co. v. Bridgeport Chain Co.....	393	Two Barges, Wood v.....	204
Snow v. 350 Tons of Mahogany and Cedar.....	129	Uhle v. Burnham.....	500
Snowden, Paine v.....	189	Umbach v. The Khio.....	207
Societe Anonyme v. Western Distilling Co.....	921	Umbria, The, Switzerland Marine Ins. Co. v.....	927
Somers v. The Ciampa Emilia.....	866	United Gas Imp. Co., Jersey City Gas-Light Co. v.....	264
South Carolina Ry. Co., Bound v.....	315	United States v. Alexander.....	728
Southern Pac. R. Co., United States v., two cases.....	683	United States v. Ayres.....	651
Sowles v. First Nat. Bank of St. Albans.....	513	United States v. Baxter.....	350
Sowles v. Witters.....	497	United States v. Belvin, three cases.....	381
Sowles, First Nat. Bank of Plattsburgh v.....	731	United States v. Boese.....	917
		United States v. Claasen.....	67
		United States v. Clark.....	633
		United States v. Cover.....	284
		United States v. Durant.....	753
		United States v. Engeman.....	898
		United States v. Engerman.....	176

	Page		Page
United States v. Guigon.....	381	Wabash, St. L. & P. Ry. Co., Central	
United States v. Higginson.....	750	Trust Co. of New York v.....	26
United States v. Jellico Mountain		Wabash, St. L. & P. Ry. Co., Central	
Coal & Coke Co.....	432	Trust Co. of New York v.....	156
United States v. Nichols.....	359	Walbridge, White v.....	526
United States v. One Hundred and		Walcott v. Watson.....	529
Twenty-Nine Bales of Merchan-		Walker, Atmore v.....	429
dise.....	468	Wallace, United States v.....	569
United States v. Patteson, two cases	381	Walla Walla, The, Hamilton v.....	198
United States v. Patton.....	461	Wanamaker, Enterprise Manuf'g	
United States v. Phillips.....	466	Co. v.....	854
United States v. Rogers.....	1	Ware Tobacco-Works, Wellman &	
United States v. Simmons.....	65	Dwire Tobacco Co. v.....	289
United States v. Sioux City & St. P.		Waring, Hat-Sweat Manuf'g Co. v.	87
Ry. Co.....	502	Waring, Hat-Sweat Manuf'g Co. v.	106
United States v. Southern Pac. R.		Watson, Walcott v.....	529
Co., two cases.....	683	Wellman & Dwire Tobacco Co. v.	
United States v. Stevens.....	381	Ware Tobacco-Works.....	289
United States v. The Anjer Head.....	664	Wells v. Tatum.....	572
United States v. The Bombay.....	665	Wells City, The.....	292
United States v. Trumbull.....	755	Wempe, Young v.....	354
United States v. Wallace.....	569	Western Distilling Co., Societe	
United States v. Wilson.....	748	Anonyme v.....	921
United States v. Wolters.....	509	Western Union Tel. Co., Cahn v....	40
United States, Beach v.....	754	W. F. Brown, The, Lawrence v....	290
United States, Mills v.....	738	Wheeler & Wilson Manuf'g Co.,	
United States, Van Hoorebeke v....	456	Miller v.....	882
United States Bank v. Lyon County	514	White v. Walbridge.....	526
		White, Goodyear Dental Vulcanite	
Vanderbilt v. The Dixie.....	403	Co. v., two cases.....	278
Van Hoorebeke v. United States...	456	Whittier, Glidden v.....	437
Veendam, The, American Petro-		Wilder v. Virginia, T. & C. Steel &	
leum Co. v.....	489	Iron Co.....	676
Vermont Farm Mach. Co. v. Gibson	488	Wilkin v. Covell.....	925
Virginia, T. & C. Steel & Iron Co.,		Williams v. Neely.....	450
Wilder v.....	676	Williams v. The Papa.....	576
Virgo, The, Chertizza v.....	294	Williams, The R. H., Lombard, Ayres	
Virgo, The, Coschina v.....	294	& Co. v.....	414
Virgo, The, Dabinovich v.....	294	Wilson, United States v.....	748
Virgo, The, Empire Warehouse Co.		Winnett v. The Rahway.....	809
v.....	294	Wirt v. Hicks.....	71
Virgo, The, Merritt Wrecking Co. v.	294	Witters, Sowles v.....	497
Virgo, Proceeds of The, Lucken-		Wolters, United States v.....	509
bach v.....	294	Wood v. Two Barges.....	204
Virgo, Proceeds of The, Stebbins v.	294	Woodcock v. Woodcock.....	629
Virgo, The, Provincial Dry-Dock			
Co. v.....	294	Young v. New Jersey & N. Y. Ry.	
Vosburgh, The F. W., Ciampa v....	866	Co.....	160
		Young v. Wempe.....	354
Wabash R. Co., Marshall v.....	269	Yungbluth, McDonald v.....	836

CASES REPORTED.

**ARRANGED UNDER THEIR RESPECTIVE CIRCUITS
AND DISTRICTS.**

FIRST CIRCUIT.

CIRCUIT COURT, D. MASSACHUSETTS.

Johnson, In re.....	477
United States v. Nichols.....	839

CIRCUIT COURT, D. NEW HAMPSHIRE.

Patten v. Cilley....	893
----------------------	-----

SECOND CIRCUIT.

CIRCUIT COURT, D. CONNECTICUT.

New York, N. H. & H. R. Co. v. Cockcroft.....	881
Overman Wheel Co. v. Pope Manuf'g Co.....	577
Smith & Egge Manuf'g Co. v. Bridgeport Chain Co.....	893

DISTRICT COURT, D. CONNECTICUT.

Sarah Thorp, The.....	816
Thames Tow-Boat Co. v. The Sarah Thorp.....	816
Thorp, The Sarah.....	816

CIRCUIT COURT, E. D. NEW YORK.

Arnold v. Chesebrough.....	700
Consolidated Bunting Apparatus Co. v. Metropolitan Brewing Co..	238
Young v. New Jersey & N. Y. Ry. Co.....	160

DISTRICT COURT, E. D. NEW YORK.

Braker v. The Gloaming.....	671
Bombay, The.....	665
Calvin S. Edwards, The.....	815
Carrie, The.....	796
Center v. The M. E. Staples.....	303

	Page
Charles Runyon, The.....	813
Chertizza v. The Virgo.....	294
Chesapeake & O. Ry. Co. v. The Panama.....	496
Coffin v. The Progresso.....	293
Coschina v. The Virgo.....	294
Cuff v. Ninety-Five Tons of Coal..	670
Dabinovich v. The Virgo.....	294
Dale, The.....	670
Edwards, The Calvin S.....	815
Empire Warehouse Co. v. The Virgo	294
Fabre v. Cunard S. S. Co.....	301
Flannery v. The Medusa.....	303
Georgia, The.....	669
Gloaming, The.....	671
Half Moon, The.....	812
Howard v. The Georgia.....	669
Hughes v. The Pieter de Conick...	795
Iberia, The.....	301
Jayne v. The Rahway.....	809
Jones v. The Carrie.....	796
Jones v. The Half Moon.....	812
Lombard, Ayres & Co. v. The R. H. Williams.....	414
Luckenbach v. Proceeds of The Virgo.....	294
Medusa, The.....	303
Merritt Wrecking Co. v. The Virgo	294
M. E. Staples, The.....	303
Millard v. The Rahway.....	809
Morse v. The Charles Runyon.....	813
Mumpton v. The Dale.....	670
Orange, The.....	411
Panama, The.....	496
Pieter de Conick, The.....	795
Progresso, The.....	292
Provincial Dry-Dock Co. v. The Virgo.....	294
Rahway, The.....	809
R. H. Williams, The.....	414
Ronan v. The Orange.....	411
Runyon, The Charles.....	813
Sharpley v. The Calvin S. Edwards	815
Staples, The M. E.....	303
Stebbins v. Proceeds of The Virgo..	294
Switzerland Marine Ins. Co. v. The Umbria.....	927
Umbria, The.....	927
United States v. Engeman.....	898

	Page
United States v. Engerman.....	176
United States v. The Bombay.....	665
Virgo, The.....	294
Williams, The R. H.....	414
Winnett v. The Railway.....	809

CIRCUIT COURT, N. D. NEW YORK.

Brown v. American Wheel Co.....	733
Grier v. Baynes.....	523
Murbarger v. Baker.....	286
Rice v. Boss.....	195
Rochester Coach-Lace Co. v. Schaefer.....	193
Stearns v. Beard.....	193

DISTRICT COURT, N. D. NEW YORK.

Isaac May, The.....	79
---------------------	----

CIRCUIT COURT, S. D. NEW YORK

Adee v. J. L. Mott Iron-Works.....	39
Adee v. J. L. Mott Iron-Works.....	77
Amato v. Northern Pac. R. Co.....	561
Anderson v. Mackay.....	105
Arnold, In re.....	510
Babbott v. Tewksbury.....	86
Branagh v. Smith.....	517
Brush Electric Co. v. New American Electrical Arc Light Co.....	79
Bushnell v. Park Bros. & Co.....	209
Byers v. Coleman.....	224
Camprelle v. Balbach.....	81
Cheney v. Coleman.....	224
Crissey v. Coleman.....	224
Farris v. Magone.....	845
Godwin, In re.....	361
Goodyear Dental Vulcanite Co. v. White, two cases.....	278
Hahn v. Erhardt.....	519
Hat-Sweat Manuf'g Co. v. Waring.....	87
Hat-Sweat Manuf'g Co. v. Waring.....	106
Hoey v. Coleman.....	231
Jacobson v. Alpi, seven cases.....	767
McCarty, In re.....	360
National Typographic Co. v. New York Typograph Co.....	114
Quinn v. Complete Electric Const. Co.....	506
Sackett v. Smith.....	39
Straus, In re.....	522
Truax v. Detweiler.....	117
Uhle v. Burnham.....	500
United States v. Claisen.....	67
United States v. Simmons.....	65
Wirt v. Hicks.....	71

DISTRICT COURT, S. D. NEW YORK.

American Petroleum Co. v. The Veendam.....	489
Bowring v. Providence Washington Ins. Co.....	119

Brooklyn, The.....	132
Burnett, The Robert.....	415
Charm, The.....	860
Chase, The Senator D. C.....	874
Commodore Perry, The.....	874
Costello, The Nora.....	869
Dasori, The.....	415
Dixie, The.....	403
Doyle v. The Jersey City.....	134
Easton & Amboy Co. v. The Scow No. 19.....	406
Empire Warehouse Co. v. The Brooklyn.....	132
Empire Warehouse Co. v. The Gloucester.....	132
Express, The.....	830
Fern Holme, The.....	119
Gloucester, The.....	132
Hoffman, The Maria.....	408
Hudson River Cement Co. v. The Emperor and The E. H. Garrison	143
Isham v. A Cargo of Pine Piles....	403
Jersey City, The.....	134
Lehigh Valley Coal Co. v. The Senator D. C. Chase and The Commodore Perry.....	874
Maria Hoffman, The.....	408
Meus v. The Orange and The Maria Hoffman.....	408
Morrissey v. The Nora Costello.....	869
N. B. Starbuck, The.....	860
New England Terminal Co. v. The Niagara, The N. B. Starbuck, and The Charm.....	860
New York & C. Mail S. S. Co. v. The Express, The N. B. Starbuck, and The Charm.....	860
Niagara, The.....	860
Nora Costello, The.....	869
Nordlinger v. Nelson.....	859
Orange, The.....	408
Owl Transportation Co. v. The Mayor, etc., of City of New York and The Robert Burnett.....	415
Perry, The Commodore.....	874
Robert Burnett, The.....	415
Russell v. Rackett.....	200
Scow No. 19, The.....	406
Senator D. C. Chase, The.....	874
Shoe v. Low Moor Iron Co. of Virginia.....	125
Snow v. 350 Tons of Mahogany and Cedar.....	129
Starbuck, The N. B.....	860
Fimor, The.....	859
Vanderbilt v. The Dixie.....	403
Veendam, The.....	489

CIRCUIT COURT, D. VERMONT.

First Nat. Bank of Plattsburgh v. Sowles.....	731
Sowles v. First Nat. Bank of St. Albans.....	513

	Page		Page
Sowles v. Witters.....	497	United States v. Patton.....	461
Vermont Farm Mach. Co. v. Gibson	488	United States v. Phillips.....	466
White v. Walbridge.....	526	Williams v. The Papa.....	576

THIRD CIRCUIT.

CIRCUIT COURT, D. DELAWARE.

Atmore v. Walker.....	429
-----------------------	-----

CIRCUIT COURT, D. NEW JERSEY.

Chandler v. Pomeroy.....	538
Emma Kate Ross. The.....	872
Griffith v. Murray.....	660
Hat-Sweat Manuf'g Co. v. Austin..	757
Hat-Sweat Manuf'g Co. v. Berg....	757
Hat-Sweat Manuf'g Co. v. Ellor...	757
Hat-Sweat Manuf'g Co. v. McChes-	757
ney.....	757
Hat-Sweat Manuf'g Co. v. McGall..	757
Hat-Sweat Manuf'g Co. v. Porter..	757
Jersey City Gas-Light Co. v. United	264
Gas Imp. Co.....	264
Myers Excursion & Nav. Co. v. The	872
Emma Kate Ross.....	872
Ross, The Emma Kate.....	872

DISTRICT COURT, D. NEW JERSEY.

Anjer Head, The.....	664
Ciampa v. The F. W. Vosburgh....	866
Ciampa Emilia, The.....	866
Dillon, The John.....	527
F. W. Vosburgh, The.....	866
John Dillon, The.....	527
Somers v. The Ciampa Emilia.....	866
Starin v. The John Dillon.....	527
United States v. The Anjer Head..	664
Vosburgh, The F. W.....	866

CIRCUIT COURT, D. PENNSYLVANIA.

Kirk v. Du Bois.....	486
Strobridge v. L. H. Smith Wooden-	922
Ware Co.....	922

CIRCUIT COURT, E. D. PENNSYLVANIA.

Enterprise Manuf'g Co. v. Deisler..	854
Enterprise Manuf'g Co. v. Wana-	854
maker.....	854
Paine v. Snowden.....	189

DISTRICT COURT, E. D. PENNSYLVANIA.

Dobson v. Cooper.....	184
Jessup & Moore Paper Co. v. Cooper	186
Papa, The.....	576
United States v. One Hundred and	468
Twenty-Nine Bales of Merchan-	468
dise.....	468

CIRCUIT COURT, W. D. PENNSYLVANIA.

Anderson v. Eiler.....	777
Anderson v. Saint.....	760
Belmont Nail Co. v. Columbia Iron	8
& Steel Co.....	8
Belmont Nail Co. v. Columbia Iron	336
& Steel Co.....	336
Dishong v. Finkbinder.....	12
L. H. Harris Drug Co. v. Stucky...	624
Smith v. Crosby Lumber Co.....	819
Stonemetz Printers' Machinery Co.	72
v. Brown Folding-Mach. Co.....	72
Stonemetz Printers' Machinery Co.	851
v. Brown Folding-Mach. Co.....	851

DISTRICT COURT, W. D. PENNSYLVANIA.

Carrier, In re.....	850
Pope v. Seckworth.....	858
United States v. Cover.....	284

FOURTH CIRCUIT.

CIRCUIT COURT, D. MARYLAND.

Baker-Whitely Co. v. The Khio....	207
Foard Transp. Co. v. The Khio....	207
Gunby v. The Khio.....	207
Haffcke v. Clark.....	710
Joseph R. Foard Transp. Co. v. The	207
Khio.....	207
Khio, The.....	207
Maryland Hominy & Coralline Co.	773
of Baltimore City v. Dorr.....	773
Pope Manuf'g Co. of Connecticut	789
v. Glark.....	789
Umbach v. The Khio.....	207

CIRCUIT COURT, D. SOUTH CAROLINA.

Bollin v. Blythe.....	181
Bound v. South Carolina Ry. Co....	315
Bradford, Ex parte.....	508
Finance Co. of Pennsylvania v.	426
Charleston, C. & C. R. Co.....	426
Finance Co. of Pennsylvania v.	508
Charleston, C. & C. R. Co.....	508
Hart, Ex parte.....	426
Healy v. Cox.....	663
Hyer v. Chamberlain.....	341
Mellor v. Cox.....	662
Williams v. Neely.....	450

DISTRICT COURT, D. SOUTH CAROLINA.

Chamberlain v. The Torgorm.....	202
United States v. Wallace.....	569

	Page		Page
DISTRICT COURT, E. D. SOUTH CAROLINA.		Diefenthal v. Hamburg-Amerikanische Packeffahrt Actien-Gesellschaft.....	397
United States v. Durant.....	753	Lawrence v. The W. F. Brown and The Sunny South.....	290
CIRCUIT COURT, E. D. VIRGINIA.		Sunny South, The.....	290
Curtain v. Talley.....	580	W. F. Brown, The.....	290
United States v. Belvin, three cases	381	DISTRICT COURT, D. MISSISSIPPI.	
United States v. Guigon.....	381	Lee, In re.....	59
United States v. Patteson, two cases	381	CIRCUIT COURT, E. D. MISSISSIPPI.	
United States v. Stephens.....	381	Cahn v. Western Union Tel. Co....	40
CIRCUIT COURT, W. D. VIRGINIA.		CIRCUIT COURT, S. D. MISSISSIPPI, W. D.	
Glenn v. McAllister's Ex'rs.....	883	Switzer v. Home Ins. Co.....	50
Wilder v. Virginia, T. & C. Steel & Iron Co.....	676	CIRCUIT COURT, W. D. TEXAS, SAN ANTONIO DIV.	
FIFTH CIRCUIT.		Simon v. House.....	317
CIRCUIT COURT, M. D. ALABAMA.		DISTRICT COURT, W. D. TEXAS, AUSTIN DIV.	
De La Vergne Refrigerating Mach. Co. v. Montgomery Brewing Co..	829	McCabe, Ex parte.....	363
Gilmer v. Morris.....	333	DISTRICT COURT, W. D. TEXAS, SAN ANTONIO DIV.	
CIRCUIT COURT, S. D. ALABAMA, S. D.		Haynes v. Brewster.....	471
American Loan & Trust Co. v. East & West R. Co. of Alabama.....	101	SIXTH CIRCUIT.	
DISTRICT COURT, N. D. ALABAMA.		CIRCUIT COURT, E. D. MICHIGAN.	
Grimsley v. Hankins.....	400	Grand Trunk Ry. Co. v. A. Backus, Jr., & Sons.....	211
J. C. Rich, The.....	136	DISTRICT COURT, E. D. MICHIGAN.	
Scott v. The J. C. Rich.....	186	Charles Hebard, etc., The.....	137
CIRCUIT COURT, N. D. FLORIDA.		Doud, The Reuben.....	800
Brown v. Florida Ry. & Nav. Co....	641	Hebard, etc., The Charles.....	137
Central Trust Co. of New York v. Florida Ry. & Nav. Co.....	641	Hoxsie v. The Reuben Doud.....	800
Cutting v. Florida Ry. & Nav. Co..	641	Lyons v. The Charles Hebard, etc..	137
Guaranty Trust & Safe-Deposit Co. v. Florida Ry. & Nav. Co.....	641	Reuben Doud, The.....	800
Meyer v. Florida Ry. & Nav. Co....	641	CIRCUIT COURT, N. D. OHIO, E. D.	
DISTRICT COURT, S. D. GEORGIA.		Marvin v. C. Aultman & Co.....	338
Mills v. United States.....	738	Rocker Spring Co. v. Flinn, six cases.....	109
CIRCUIT COURT, E. D. LOUISIANA.		CIRCUIT COURT, N. D. OHIO, W. D.	
Martinez v. Moll.....	724	Arrowsmith v. Gleason.....	256
Meyer v. Richards.....	727		
Paton v. Majors.....	210		
Wood v. Two Barges.....	204		
DISTRICT COURT, E. D. LOUISIANA.			
Brown, The W. F.....	290		

	Page
Crane Creek Shooting Club Co. v. Cedar Point Club Co.....	273

CIRCUIT COURT, S. D. OHIO, E. D.

Challenge Corn-Planter Co. v. Gearhardt.....	768
Woodcock v. Woodcock.....	629

CIRCUIT COURT, S. D. OHIO, W. D.

Hamilton v. Connecticut Fire Ins. Co.....	42
Investment Co. of Philadelphia v. Ohio & N. W. R. Co.....	696
McDonald v. Yungbluth.....	886
Marshall v. Wabash R. Co.....	269
Wells v. Tatum.....	572

CIRCUIT COURT, M. D. TENNESSEE.

United States v. Jellico Mountain Coal & Coke Co.....	432
---	-----

CIRCUIT COURT, W. D. TENNESSEE.

Ferguson v. Dent.....	88
King, In re.....	905

SEVENTH CIRCUIT.

CIRCUIT COURT, N. D. ILLINOIS.

American Live-Stock & Meat Transp. Co. v. Street Stable-Car Line.....	782
Price v. Joliet Steel Co.....	107
Richardson v. Travelers' Ins. Co....	843
Thomas Huston Electric Co. v. Sperry Electric Co.....	75
Wilkin v. Covel.....	925

DISTRICT COURT, N. D. ILLINOIS.

United States v. Rogers.....	1
------------------------------	---

CIRCUIT COURT, S. D. ILLINOIS.

Ayers v. Manning.....	19
-----------------------	----

DISTRICT COURT, S. D. ILLINOIS.

Van Hoorebeke v. United States...	456
-----------------------------------	-----

CIRCUIT COURT, D. INDIANA.

Central Trust Co. of New York v. Wabash, St. L. & P. Ry. Co.....	26
--	----

DISTRICT COURT, E. D. WISCONSIN.

Roanoke, The.....	297
-------------------	-----

EIGHTH CIRCUIT.

CIRCUIT COURT, W. D. ARKANSAS.

James v. St. Louis & S. F. Ry. Co.....	47
Marquandt, In re.....	52
Monroe, In re.....	52
Payne v. Kansas & A. Val. R. Co..	546

CIRCUIT COURT, D. COLORADO.

Chicago, R. I. & P. Ry. Co. v. Denver & R. G. R. Co.....	145
--	-----

CIRCUIT COURT, N. D. IOWA, C. D.

Davis v. Chicago & N. W. Ry. Co..	307
-----------------------------------	-----

CIRCUIT COURT, N. D. IOWA, E. D.

McNulty v. Connecticut Mut. Life Ins. Co.....	305
---	-----

CIRCUIT COURT, N. D. IOWA, W. D.

Richards v. Independent School-Dist. of Rock Rapids.....	460
United States v. Sioux City & St. P. Ry. Co.....	502
United States Bank v. Lyon County	514

CIRCUIT COURT, S. D. IOWA, W. D.

Dow v. Bradstreet Co.....	824
---------------------------	-----

CIRCUIT COURT, D. MINNESOTA.

Comstock v. Tracey.....	162
-------------------------	-----

CIRCUIT COURT, D. MINNESOTA, THIRD Div.

Bangor Sav. Bank v. City of Stillwater.....	899
Wellman & Dwire Tobacco Co. v. Ware Tobacco-Works.....	289

CIRCUIT COURT, D. MINNESOTA, FIFTH Div.

Smith v. Board of County Com'rs of Carlton County.....	340
--	-----

	Page		Page
CIRCUIT COURT, E. D. MISSOURI, E. D.		Shain v. Goodwin.....	564
American Preservers' Trust v. Tay- lor Manuf'g Co.....	152	Young v. Wempe.....	354
Armstrong v. Brolaski.....	908		
Central Trust Co. of New York v. Wabash, St. L. & P. Ry. Co.....	156	DISTRICT COURT, N. D. CALIFORNIA.	
Hostetter Co. v. Brueggeman-Rein- ert Distilling Co.....	188	Anderson v. The Rence	805
Kimball v. Atchison, T. & S. F. R. Co.....	888	Barkentine Portland, The.....	877
Lemoine v. Dunklin County.....	219	Lambert v. Freese.....	807
Miller v. Wheeler & Wilson Man- uf'g Co.....	882	Pacific Coast S. S. Co. v. The Bark- entine Portland.....	877
Northwestern Mut. Life Ins. Co. v. Cotton Exchange Real-Estate Co.	22	Portland, The Barkentine.....	877
Société Anonyme v. Western Dis- tilling Co.....	921	Rence, The.....	805
		Shainwald v. Lewis.....	538
CIRCUIT COURT, W. D. MISSOURI.		Simpson v. The State of California	877
Berry v. Knights Templars' & Ma- sons' Life Indemnity Co.....	439	State of California, The.....	877
		United States v. Boese.....	917
CIRCUIT COURT, W. D. MISSOURI, W. D.			
Baughman v. National Water-Works Co.....	4	CIRCUIT COURT, S. D. CALIFORNIA.	
Dozier v. Fidelity & Casualty Co. of New York.....	446	De Estrada v. San Felipe Land & Water Co.....	280
McClary v. Chicago, M. & St. P. Ry. Co.....	343	Doyle v. San Diego Land & Town Co.....	709
Shankenbery v. Metropolitan St. Ry. Co.....	177	Galbes v. Girard.....	500
		United States v. Southern Pac. R. Co., two cases.....	683
CIRCUIT COURT, W. D. MISSOURI, ST. JOSEPH DIV.		United States v. Wolters.....	509
Chicago & A. Bridge Co. v. Anglo- American Packing & Provision Co.....	584		
McKinnon v. McKinnon.....	713	CIRCUIT COURT, D. IDAHO.	
		Back v. Sierra Nevada Con. Min. Co.	673
CIRCUIT COURT, D. NEBRASKA.		Burke v. Bunker Hill & S. Mining & Concentrating Co.....	644
Lowry v. Chicago, B. & Q. R. Co... 83		Gildden v. Whittier.....	437
		Inez Min. Co. v. Kinney.....	832
DISTRICT COURT, D. SOUTH DAKOTA.		Johnson v. Bunker Hill & S. M. & C. Co.....	417
United States v. Ayres.....	651	United States v. Higginson.....	750
		United States v. Wilson.....	748
NINTH CIRCUIT.		DISTRICT COURT, D. IDAHO.	
		United States v. Alexander.....	728
CIRCUIT COURT, N. D. CALIFORNIA.			
Bank of British North America v. Barling.....	357	CIRCUIT COURT, D. MONTANA.	
Beach v. United States.....	754	Cahalan v. McTague.....	251
D'Orlu v. Bankers' & Merchants' Mut. Life Ass'n of United States	355	Northern Pac. R. Co. v. Amacker... 233	
		Northern Pac. R. Co. v. Barden... 593	
		Northern Pac. R. Co. v. Cannon... 224	
		Northern Pac. R. Co. v. Cannon... 237	
		Northern Pac. R. Co. v. Meadows... 254	
		Northern Pac. R. Co. v. Sanders... 239	
		CIRCUIT COURT, D. NEVADA.	
		Walcott v. Watson.....	529
		CIRCUIT COURT, D. OREGON.	
		Hicklin v. Marco.....	424
		Kelly, In re.....	653

	Page		Page
CIRCUIT COURT, D. WASHINGTON, E. D.		Kenyon v. Knipe.....	309
		Kenyon v. Squire, two cases.....	309
Cowley v. Northern Pac. R. Co.....	325	Magee v. Oregon Ry. & Nav. Co....	734
Johnson v. Northern Pac. Ry. Co..	347	United States v. Baxter.....	350
Renner v. Northern Pac. Ry. Co....	344	Walla Walla, The.....	198
Spokane St. Ry. Co. v. City of Spo-			
kane Falls.....	322	DISTRICT COURT, D. WASHINGTON, N. D.	
		Lake v. The Manhattan.....	797
DISTRICT COURT, D. WASHINGTON, E. D.		Manhattan, The.....	797
Humason, In re.....	388	United States v. Trumbull.....	755
CIRCUIT COURT, D. WASHINGTON, N. D.		CIRCUIT COURT, D. WASHINGTON, W. D.	
Hamilton v. The Walla Walla.....	193	Chapman v. Keindel.	99
Hershberger v. Blewett.....	704	McDougall v. Hayes.....	817

CASES

ARGUED AND DETERMINED

IN THE

United States Circuit and District Courts.

UNITED STATES *v.* ROGERS.

(*District Court, N. D. Illinois.* February 9, 1891.)

1. FEDERAL COURTS—CRIMINAL JURISDICTION—GREAT LAKES.

Under Act Cong. Sept. 4, 1890, extending the criminal jurisdiction of the federal courts to offenses committed upon any vessel registered or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, "or any of the waters connecting any of the said lakes," such courts have no jurisdiction of a larceny committed upon a steam-barge while lying in the Menominee river, a tributary of Lake Michigan, half a mile from its mouth.

2. SAME—BRINGING STOLEN PROPERTY WITHIN THE JURISDICTION.

The United States courts have no common-law jurisdiction in criminal matters, and can only take such jurisdiction as is given them by statute; and the fact that, though the larceny was committed within the limits of a state, the stolen property was not discovered in defendant's possession until the vessel was upon Lake Michigan, will not aid their jurisdiction.

At Law. Indictment for larceny.

Thomas E. Milchrist, U. S. Dist. Atty.

Jesse A. Baldwin, for defendant.

BLODGETT, J. The defendant was indicted at the late session of the grand jury of this court, charging that, while on board a certain vessel, called the "S. K. Martin," the same being a vessel enrolled under the laws of the United States, and being on a voyage upon the waters of Lake Michigan, the said vessel being then in the waters of the Menominee river, one of the tributaries of Lake Michigan, and within the jurisdiction of this court, the defendant did feloniously take, steal, and carry away a large number of gold coins, to-wit, 10 gold coins of the denomination and value of \$10 each, and 10 gold coins of the denomination and value of \$5 each, the same being then and there the property of one William H. Evans. A plea of "not guilty" was entered, and upon a trial before a jury a verdict of guilty was rendered. Thereupon a motion in arrest of judgment was made in behalf of defendant. This motion is based upon the ground that the indict-

ment upon its face shows that the offense was not committed within the jurisdiction of this court, as it is insisted that the Menominee river is no part of Lake Michigan. The indictment was intended to bring the case within the provisions of the act of September 4, 1890, entitled "An act extending the criminal jurisdiction of the circuit and district courts to the Great Lakes and their connecting waters," (see Acts 1st Sess. 51st Cong. p. 424,) which provides:

"Section 1. That every person who shall upon any vessel registered or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, namely, Lake Superior, Lake Michigan, Lake Huron, Lake St. Clair, Lake Erie, Lake Ontario, or any of the waters connecting any of the said lakes, commit or be guilty of any of the acts, neglects, or omissions respectively mentioned in chapter 3, tit. 70, of the Revised Statutes of the United States, shall, upon conviction thereof, be punished with the same punishment in the said title and chapter respectively affixed to the same offense there mentioned respectively. Sec. 2. That the circuit and district courts of the United States, respectively, are hereby vested with the same jurisdiction in respect to all the offenses mentioned in the first section of this act that they by law have and possess in respect to the offenses in the said chapter and title in the first section of this act mentioned; and said courts respectively are, for the purposes of this act, vested with all and the same jurisdiction they respectively have by force of title 13, c. 7, of the Revised Statutes of the United States."

Upon the trial before the jury the testimony showed the facts substantially as stated in the indictment,—that is, that the defendant was employed as cook on the steam barge or vessel S. K. Martin, which was a vessel duly enrolled and licensed for the coasting trade, and while said vessel was lying in the Menominee river, about half a mile above its mouth or entrance into Lake Michigan, taking on a cargo of lumber to be transported from said point to the city of Chicago by means of a voyage in the waters of Lake Michigan, the larceny charged was committed by breaking into the captain's office on said steamer, and stealing therefrom the money described in the indictment; that, after the vessel had left the Menominee river and was proceeding on her voyage upon the waters of Lake Michigan to the port of Chicago, the defendant was suspected of the crime, and, on being charged with guilt by the captain, he told the captain where he had concealed a part of the money, and the same was found in the place of concealment he had indicated. So that both by the terms of the indictment and the proof on the trial, the facts appear that the office was broken into and the money taken therefrom while the vessel was lying in the Menominee river. The act of congress quoted only gives the United States circuit and district courts jurisdiction of the crime of larceny (punishable under section 5356) when committed on board a vessel enrolled or registered under the laws of the United States while on a voyage upon the waters of any of the Great Lakes or the waters connecting any of said lakes. The vessel upon which this larceny was committed was not at the time of said larceny on a voyage on any of the Great Lakes or the waters connecting any of said lakes, but she was lying in the waters of the Menominee river. This river does not connect any of the Great Lakes, but, as the

indictment states, is a tributary of Lake Michigan,—that is, it does not connect Lake Michigan with any of the other lakes, but simply empties its waters into Lake Michigan; and, as the river forms the boundary between the states of Michigan and Wisconsin for many miles up from its mouth, the offense was committed in either the state of Michigan or Wisconsin, according to the side of the river on which the vessel was lying at the time the stealing was done. It matters not that the vessel was lying within a half mile of the mouth of the river; so long as she was in the river,—that is, between the banks,—she was within the body of a state and county, and not upon the waters of Lake Michigan, and the United States courts have no jurisdiction of the crime. It is urged, however, that as part of the stolen money was found in defendant's control under such circumstances that he may be said to have had possession of it, because it was concealed in a place on the vessel where he had placed it, and no one else seems to have known of its place of concealment, therefore he may be said to have had the stolen property upon the waters of Lake Michigan; and that this court, therefore, has jurisdiction. The authorities in the state courts of this country and in England are in the main to the effect that personal property stolen in one county, and carried into another county, and found there in possession of the thief, will give the courts of the county where the goods are found the same jurisdiction to try and punish the offender as is given to the authorities of the county where the original crime is perpetrated. 2 Archb. Crim. Pr. (8th Ed.) p. 1141; 1 Bish. Crim. Law, § 136 *et seq.*; *Myers v. People*, 26 Ill. 176; *Stinson v. People*, 43 Ill. 400. But the United States courts have no common-law jurisdiction in criminal matters, and can only take such jurisdiction as is given them by statutes. *U. S. v. Worrall*, 2 Dall. 384; *U. S. v. Hudson*, 7 Cranch, 32; *U. S. v. Coolidge*, 1 Wheat. 415; *U. S. v. Britton*, 108 U. S. 193, 2 Sup. Ct. Rep. 526. It having been decided that the United States had no jurisdiction over crimes committed upon the waters of the Great Lakes, (*Ex parte Byers*, 32 Fed. Rep. 404,) congress in September last passed the law just quoted, to confer jurisdiction; and jurisdiction can only be taken under that act, and to the extent there granted. The jurisdiction taken by common-law courts in cases of constructive larceny makes the possession of the stolen goods elsewhere than in the jurisdiction where the crime of actual larceny was committed in respect to said goods a felonious possession as against the law of the place where he has such possession, but that rule does not apply to courts that have no common-law jurisdiction. To hold that this court has jurisdiction to try this defendant because of the fact that he had in his possession, on board of an enrolled vessel, while on a voyage upon the waters of the Great Lakes, property which had been stolen in the Menominee river, would be in effect to hold that any person who takes his passage upon an enrolled vessel for a voyage, either long or short, on the Great Lakes, can be indicted and tried in the United States circuit or district courts if he has with him on such vessel property he has stolen elsewhere. But a more conclusive reason in this particular case in answer to this position on the part of

the prosecution is that the indictment itself is defective in showing that the crime was committed in a place over which this court had no jurisdiction, and the prosecution on the trial should have been limited to proof of the offense in the place alleged. The motion in arrest of judgment is sustained, and an order will be entered quashing the indictment for want of jurisdiction, and discharging the prisoner.

BAUGHMAN v. NATIONAL WATER-WORKS CO.

(Circuit Court, W. D. Missouri, W. D. March 23, 1891.)

REMOVAL OF CAUSES—CITIZENSHIP OF CORPORATION.

The citizenship and residence of a corporation within the meaning of the removal acts are fixed in the state granting its charter, although it may be organized for the purpose of doing business chiefly in other states.

At Law.

C. R. Pearce, for plaintiff.

Karnes, Holmes & Krauthoff, for defendants, cited:

Fales v. Railroad Co., 32 Fed. Rep. 673; *Booth v. Manufacturing Co.*, 40 Fed. Rep. 1; *Purcell v. Land, etc., Co.*, 42 Fed. Rep. 465; *Henning v. Telegraph Co.*, 43 Fed. Rep. 97; *Myers v. Murray*, Id. 695; and *National Typographical Co. v. New York, etc., Co.*, 44 Fed. Rep. 711.

PHILIPS, J., (orally.) The case of Baughman against the National Water-Works Company of New York, standing on motion to remand, I had hoped Judge CALDWELL would determine for himself before he left. He was called away unexpectedly and abruptly by reason of his indisposition, and left a letter, in which he requested me to pass upon this question. We had some consultation over the matter, and it is but just to Judge CALDWELL that I should state that while he entertains the opinion, if this were a question of first impression, and he was left to decide the case on what he believes is the better reason, rather than on authority, this court should have no jurisdiction over this case except to remand it. At the same time he is of the opinion that the weight of authority is in favor of the jurisdiction of this court, and has left me to express my own views about the matter. This suit was instituted in the state court against the National Water-Works Company of New York, and upon the petition of the defendant it was removed to this court on the ground that it was a controversy between citizens of different states, and was within the contemplation of the judiciary act in respect of a non-resident of the state. The contention on the part of plaintiff, the promoter of this motion to remand, is that, whilst the National Water-Works Company is a corporation created under the laws of the state of New York, nevertheless, in contemplation of law, it is a resident of this state, because its principal business is conducted at this city, and because it has its manager of the Kansas City water-works in this city, with his

office and supply clerks and employes; and the principal business done by this company is in Kansas City, Mo., in supplying water to the city; and, although it is chartered by the state of New York, under authority of the laws of that state, it is exerting its corporate functions almost exclusively in this state, and to all practical purposes is to be regarded as a resident of this state. The counter-affidavit filed by the defendant company discloses about this state of facts: That the plant of these water-works is in the state of Kansas; that it has a large number of employes in that state, and is supplying water to Kansas City, Kan., a city now composed of the city of Wyandotte and other villages appurtenant thereto; that it is exercising its corporate franchise and functions in that state as well as in this; and while the manager of these works has his head-quarters and clerical force in this city, he makes daily reports to the principal office in the state of New York, where it has a large force of employes, and where its principal business is transacted. By direction of the court the defendant has furnished to the court a copy of the charter of the company, to enable the court to better understand what are the powers of this corporation, and for what purpose it was created. The second section of the charter provides that—

“The object for which this company is formed is to establish, construct, and maintain water-works in or adjacent to any city, town, or village in the United States of America or elsewhere, and to supply the said city, town, or village and the inhabitants thereof with water.”

The eighth section declares that—

“The said company is formed for the purpose of carrying on some part of its business out of the state of New York, namely, in or adjacent to any city, town, or village in the United States of America or elsewhere; and the city of New York, in the county and state of New York, is the place where the principal part of the business of said company within this state is to be transacted, and where the general office of said company is to be located.”

I take it that there can be no question but the holding of the supreme court of the United States has long been that these corporations have their citizenship and residence fixed by the state granting the charter; that where the charter is granted, there the citizenship or residence exists. And there can be no question upon the further proposition that, taking the decisions of the supreme court ever since it announced this doctrine up to the 122 U. S. Reports, it has always maintained that the terms “citizenship” and “residence” in respect of corporations are synonymous; that they mean one and the same thing; that “residence” is inseparable from “citizenship;” that the charter fixes citizenship, and residence and citizenship are one and the same thing in their legal import. Reference to the authorities will sustain this proposition beyond controversy or cavil. In the case of *Insurance Co. v. Francis*, 11 Wall. 210, 216, the court said:

“The declaration avers that the plaintiff in error, the defendant in the court below, is a corporation created by an act of the legislature of the state of New York, located in Aberdeen, Miss., and doing business there under the laws of the state. This, in legal effect, is an averment that the defendant was a citizen of New York, because a corporation can have no legal existence outside

of the sovereignty by which it was created. Its place of residence is there, and can be nowhere else. Unlike a natural person, it cannot change its domicile at will; and, although it may be permitted to transact business where its charter does not operate, it cannot on that account acquire a residence there."

In *Ex parte Schollenberger*, 96 U. S. 377, the court used this language:

"A corporation cannot change its residence or its citizenship. It can have its legal home only at the place where it is located by or under the authority of its charter."

And in the case of *Railroad Co. v. Kootz*, 104 U. S. 5, the court said:

"By doing business away from their legal residence they do not change their citizenship, but simply the field of their operations; they reside at home, and do business abroad."

And again, the case of *Goodlett v. Railroad Co.*, 122 U. S. 391, 7 Sup. Ct. Rep. 1254, is still more pronounced. That was a controversy as to whether the Louisville & Nashville Railroad Company, which was originally chartered by the state of Kentucky, was also a citizen or resident of the state of Tennessee. While the original charter was granted by the state of Kentucky, authorizing the company to extend its line into another state, the contention of counsel was that under the peculiar circumstances of the case it ought also to be deemed as having a double citizenship or residence, because by the act of the legislature of Tennessee it was authorized to extend its road into that state, and was given certain privileges and rights which were not guaranteed by the original charter granted by the state of Kentucky; and therefore, inasmuch as it was recognized by the state of Tennessee, etc., and inasmuch as its road is located through the latter state, with its agents and employes and officers at different points therein, it was to all practical intents and purposes a resident of the state of Tennessee. And yet, notwithstanding all that, it was held by the supreme court in a most elaborate opinion, reviewing the authorities, that it continued to be a citizen of the state of Kentucky. It was said:

"Upon the authority of the cases cited we are of the opinion that the Louisville & Nashville Railroad Company is a corporation of Kentucky, and not of Tennessee; and, consequently, the action was removable, upon its petition and bond, into the circuit court of the United States."

It is difficult to conceive of a case where the question of citizenship and residence could more squarely be presented on the issue of the right of removal under the act as it then stood. I do not presume there would ever have been a question raised of the applicability of these rulings, so often repeated, but for the phraseology employed in the act of 1887, which has been seized upon as distinguishing between citizenship and residence. The act of 1887 provides that the United States courts shall have jurisdiction of all cases in which there shall be a controversy between citizens of different states, when the amount involved exceeds \$2,000. It gives jurisdiction to the United States courts upon the ground of diverse citizenship. Then the removal act in the next section says:

"That any suit of a civil nature at law or in equity arising under the constitution or laws of the United States, or treaties made, or which shall be made under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought in any state court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district. Any other suit of a civil nature at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought in any state court, may be removed into the circuit court for the proper district by the defendant or defendants therein being non-residents of that state; and when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in this controversy may remove said suit into the circuit court of the United States for the proper district."

A controversy has sprung up as to the meaning of the terms "citizens" and "residents." It seems to me that these terms in the act, as evidenced by the last clause, are interchangeably used, and are employed as synonymous. There is another rule of law, which I think ought to apply to this statute, that whenever a certain term or phrase has received by the repeated construction of the highest courts of the state or the nation a given significance or meaning, and is employed in a subsequent statute, the construction and interpretation placed upon it by the courts of the land preceding the enactment are supposed to have been in the mind of the legislator who framed the statute, and that he has employed it in the sense given it by the courts. The courts had held, as I have already shown, that whenever a corporation was a citizen of a state it was a resident of that state; and when they have spoken of citizenship and residence, especially in respect of these corporations, the courts treated them as one and the same. And I believe if it had been in the mind of congress to deny the right of removal to these corporations as heretofore allowed, it would have employed, for the purpose of restricting the jurisdiction of the United States courts, terms so exact, so specific, and direct, as not to leave it to mere speculation; that, if it intended to deny to these corporations the right of removal by reason of the fact that they had offices in the respective states, and officers and employes upon whom service of process could be had, it would have said so by such apt and explicit terms as not to have left the matter open to controversy. I am furthermore constrained to the position I occupy from this consideration: Mr. Justice BREWER, when on this circuit, in *Booth v. Manufacturing Co.*, 40 Fed. Rep. 1, maintained strongly that the right of removal in these cases was to be determined by the citizenship of the corporation. He is now the associate justice assigned to this circuit; so this is the opinion of the justice of this circuit. It is true that Mr. Justice MILLER, in a very brief opinion delivered by him in Iowa a short time before his death, seemed to take the opposite view. The general opinion among the circuit and district judges, so far as I am advised, is that the right of removal exists, under the state of facts here disclosed. Until this question is more authoritatively settled I deem it conservative to follow what is the general practice. The motion to remand is denied.

BELMONT NAIL CO. *v.* COLUMBIA IRON & STEEL CO. *et al.*

(Circuit Court, W. D. Pennsylvania. April 6, 1891.)

RECEIVER—CORPORATIONS—ASSIGNMENT FOR BENEFIT OF CREDITORS.

An assignment for the benefit of creditors, made by a corporation after service of process on it in a suit by a creditor for the appointment of a receiver, does not deprive the court of jurisdiction to appoint such receiver.

In Equity. On motion for appointment of a receiver.

P. C. Knox, for complainant.

Geo. C. Wilson and *C. A. O'Brien*, for defendants.

REED, J. The complainant has filed the bill in this case as a corporation of the state of West Virginia against the Columbia Iron & Steel Company, a corporation of the state of Pennsylvania, joining as a co-defendant the trustee named in the general mortgage of the defendant company, the trustee also being a corporation of the state of Pennsylvania. The bill alleges the insolvency of the defendant company; the improper disposition of its assets by its officers, since its insolvency, by the payments and preference of certain of its creditors; the pendency of suits and attachments against the company; and that it is disposing of certain of its assets by shipping them to foreign states, and converting them by sale into book-accounts, which are liable to attachment by the creditors of the defendant; that the complainant is a creditor of the defendant company to a large amount, a portion of the indebtedness held by it having matured, and payment refused by the company; that the company has a large amount of assets, consisting of lands, factories, buildings, machinery, rolls, stock on hand, material unfinished and partly finished, book-accounts, and bills receivable; that the interest on its mortgage bonds will mature April 1, 1891, and that defendant company has no funds on hand to pay the same, and by the terms of the mortgage the mortgage debt may become due if the interest is not paid; that there is danger of the assets of the company being dissipated by sales on executions and otherwise; that said assets should be preserved and ratably distributed among all the creditors of the defendant company, in proportion to the amounts of their several debts, either due or to become due. The bill prays that the assets be decreed to be a trust fund for the benefit of all the creditors of the company; that an account be taken of all its debts; that its assets may be applied in payment of the indebtedness of the corporation in proportion to the whole thereof; that the defendant company be restrained by injunction from disposing of its assets; that a receiver be appointed to take and hold the said assets of the company. This bill was filed March 26, 1891, and the return of the marshal shows the subpoena to have been served the same day on C. Yeager, president of the defendant company. On April 2, 1891, a notice was served by the solicitor for the complainant upon C. Yeager, president, notifying him that an application would be made on Saturday, April 4, 1891, for the appointment of a receiver, and for an injunction as prayed for in the bill.

At the hearing, on April 4th, affidavits were read by the solicitor for the complainant in support of the averments of the bill. These affidavits show the insolvency of the company; that a number of suits are pending against it for large amounts, some of which have been overdue for several weeks; and that a portion of the claim of the complainant is due and unpaid, although its book-keeper made personal application at the office of the defendant for its payment; but was there informed that the company had no funds or other assets with which to pay the claim. Affidavits were also presented of other creditors whose claims are unpaid. The affidavit of Mr. Boggs, to which I will refer again, establishes the fact of insolvency beyond question. The defendant company presented no affidavits, at the hearing on the motion, to controvert either the allegations of the bill or of the affidavits read in its support, and the statements of fact presented by complainants are uncontradicted. The case, as made out by the bill and affidavits, (other than that of Mr. Boggs,) would, in my judgment, be a proper one for the appointment of a receiver.

The affidavit of R. H. Boggs, however, raises an unusual question, which must be considered. It sets forth that he is a member of the board of directors of the defendant company; that a meeting of the board was held on Friday, April 3, 1891, (the day following the service of the notice of the hearing, and the day previous to the hearing;) that at said meeting it was resolved that the defendant company was insolvent, and the question of the application for a receiver in the present case was taken up and discussed, and it was finally decided by the majority of the board of directors, (the affiant and Mr. Buhl, another director, voting against the same,) that, for the purpose of preventing a receiver being appointed in this case by the court, an assignment be made to Charles A. O'Brien, which was accordingly done, against the protest of Messrs. Boggs and Buhl, who notified the directors that they had been advised by counsel that the United States court had obtained jurisdiction of the subject-matter and the parties, and such action on the part of the company was improper. At the hearing of the motion counsel for the defendant company appeared, stating that such an assignment to Mr. O'Brien had been made in pursuance of the action of the board of directors, which assignment was made in the afternoon of April 3, 1891, and that the assignment was to Mr. O'Brien in trust for the benefit of creditors, and conveyed to him all the property of the company for that purpose. Mr. O'Brien, it was stated by counsel, was, up to the time of his appointment as assignee, the attorney of the company, and was present during the deliberations of the board detailed in Mr. Boggs' affidavit. It was claimed by defendants' counsel that, under this state of facts, the complainant's application for a receiver must be refused.

It is well settled that the assets of a private corporation constitute a trust fund for the payment of its debts, and that, in the event of insolvency, creditors may proceed in a court of equity to have such trust fund administered and applied in equality to the payment of the claims of the creditors of the corporation. "The assets of such a corporation are

a fund for the payment of its debts. If they are held by the corporation itself, and so invested as to be subject to legal process, they may be levied on by such process. If they have been distributed among stockholders, or gone into the hands of others than *bona fide* creditors or purchasers, leaving debts of the corporation unpaid, such holders take the property charged with the trust in favor of creditors, which a court of equity will enforce, and compel the application of the property to the satisfaction of their debts." *Curran v. Arkansas*, 15 How. 307. "Equity regards the property of a corporation as held in trust for the payment of the debts of the corporation, and recognizes the right of creditors to pursue it into whosoever possession it may be transferred, unless it has passed into the hands of a *bona fide* purchaser." *Railroad Co. v. Howard*, 7 Wall. 409. The right of the complainant, upon the insolvency of the defendant company, to file its bill for the benefit of itself and such other creditors as might join, for the purpose of obtaining the aid of the court sitting in equity to apply the assets of the corporation to the payment of its debts, being unquestioned, it necessarily follows that, upon the service of the subpoena upon the defendant company, the jurisdiction of this court was complete, both as to the parties and the subject-matter. This, as the record shows, was on the 26th day of March, 1891. Hence the relation of the parties and the *status* of the property in question must be considered as of that date. No subsequent action of one of the parties could affect the rights of the other party. Any disposition by the defendant company of its assets (except the sale of personal property or transfer of negotiable securities to *bona fide* purchasers) would be invalid, as against the rights of the other party. Particularly would this be the case where the transfer was made to the attorney of the company, without consideration, and for the express purpose of defeating the complainant in this proceeding, even though the transfer was in trust to pay creditors out of the assets. The complainant has a right to have these assets applied to that purpose, under the direction of the court whose aid it has invoked, and cannot be compelled to await and accept a distribution and payment by the chosen agent of the debtor, in a mode which the debtor sees fit to adopt, without consultation with the creditor. In the case of *Dovey's Appeal*, 97 Pa. St. 160, the court say:

"It [*lis pendens*] affects a purchaser, not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the other party. * * * This is a rule of public policy, and the object of it is to prevent the parties from making a conveyance *pendente lite* of the property or thing which is the subject matter of the controversy, and thus to defeat the execution of the decree of the court. The effect of it is to impose a disability to convey from the time of the service of the subpoena upon the defendant. The court, in the execution of its decree, pays no regard even to a *bona fide* purchaser. In other words, no change of ownership during a suit will prevent the execution of a decree, as it would have been executed had there been no change."

In the case of *Tilton v. Cofield*, 93 U. S. 168, the supreme court say:

"The law is that he who intermeddles with property in litigation does it at his peril, and is as conclusively bound by the results of the litigation, whatever they may be, as if he had been a party to it from the outset."

In the case of *Mellen v. Iron-Works*, 131 U. S. 371, 9 Sup. Ct. Rep. 781, the court say:

"Purchasers of property involved in a pending suit may be admitted as parties, in the discretion of the court; but they cannot demand, as of absolute right, to be made parties, nor can they complain if they are compelled to abide by whatever decree the court may render within the limits of its power, in respect to the interest their vendor had in the property purchased by them *pendente lite*. As said in *Bishop of Winchester v. Paine*, [11 Ves. 194, 197,] the litigating parties are exempted from the necessity of taking any notice of a title so acquired. As to them it is as if no such title existed."

To the same effect is the ruling in the case of *Union Trust Co. v. Southern Inland Nav. & Imp. Co.*, 130 U. S. 565, 9 Sup. Ct. Rep. 606. In the case of *Eyster v. Gaff*, 91 U. S. 521, the court held that, where an assignee in bankruptcy of a mortgagor is appointed, during the pendency of proceedings in a state court for the foreclosure and sale of the mortgaged premises, he stands as any other purchaser would stand on whom the title had fallen after the commencement of the suit. The ruling and opinion in the case of *Buck v. Insurance Co.*, 4 Fed. Rep. 849, are applicable to the present case. In that case the board of directors of the company, without any authority from its stockholders, conveyed its property to its vice-president in trust to pay its debts. Subsequently a bill was filed in the circuit court for the eastern district of Virginia by a non-resident creditor, setting up the insolvency of the company, and the execution of the deed of trust, and praying that the said deed be declared void, and a receiver appointed to administer the assets and pay the debts of the company upon an account taken under the direction of the court. Judge HUGHES said:

"The defendant company is admittedly insolvent. Being a life insurance company, insolvency, and an assignment of all its effects in liquidation, is final and irretrievable death to its corporate existence. It is incapable of taking care of its own effects, and has itself confessed the fact by assigning them to a trustee. * * * It is useless to contend that courts should observe extreme caution in entering upon the appointment of receivers. Such caution is only necessary where the company's insolvency is denied, where the company is in the full exercise of its franchises and use of its property, and where the act of the court would abruptly and harshly arrest it in its career of action, and wrest its property from its use and control. It is true that in such a case a court should consider well the consequences of its action, and adopt the extreme recourse only when the facts of the case most clearly justify the measure. But this defendant company is already extinct, its franchises are already forfeited and abandoned, its property already put by its own act out of its own use and possession, and committed to liquidation. Having thus made a case for a receiver, and actually anticipated a court in appointing one, this court is relieved from the painful inquiries and delicate responsibility usually devolved upon courts in passing upon applications for receivers; and therefore I am confronted with but a single question, which is whether or not this court will allow the defendant company to appoint its receiver for it."

In the present case the defendant is admittedly insolvent, has undertaken in consequence of such insolvency to provide for liquidation, and had anticipated the court in the appointment of a trustee for that purpose; but, jurisdiction in this proceeding having vested before such appointment, the complainant has the right to say whether it acquiesces in such liquidation by the company's trustee. As it objects, and insists upon its rights as they existed upon the service of the subpoena upon the defendant company, and as the facts justify the appointment of a receiver, I am of the opinion that the receiver should be appointed, regardless of the assignment by the officers of the company of its assets to Mr. O'Brien. Let an order be drawn accordingly.

DISHONG *v.* FINKBINER.

(*Circuit Court, W. D. Pennsylvania.* April 18, 1891.)

INJUNCTION—TO RESTRAIN ACTION AT LAW—EJECTMENT.

A second action of ejectment, involving the same issues of fact as those decided against the plaintiff in the first action, is not vexatious litigation, which will be enjoined by a court of equity, where the statutes of the state where the land lies allow a defeated party in ejectment to bring a second action.

In Equity. On demurrer to bill.

John C. Shoemaker and James R. Macfarlane, for complainant.

George M. Reade, for defendant.

REED, J. The bill alleges that the plaintiff is in possession of a tract of land in Fulton county, Pa., which he holds under a deed of conveyance from George W. Leighty, dated July 7, 1866, title to which land the latter claims under proceedings in partition between himself and his brother and sister, as the heirs at law of John Leighty, who died December 10, 1863, they being the children of John Leighty and Catherine Leighty, alleged by plaintiff to have been the lawful wife of the said John Leighty. Plaintiff has been in possession since July 7, 1866. The bill further alleges that one William Leighty claims that he is the son and only legitimate child of John Leighty, being the son of John Leighty and Lydia Leighty, (or Walters,) who was the lawful wife of John Leighty, their marriage having taken place in 1826, and the said William having been born in 1827. He claims that this marriage antedates the alleged marriage between John Leighty and Catherine Leighty, (his mother being alive, and still the wife of John Leighty at the time,) and therefore he, William Leighty, is the legitimate and only heir of John Leighty, entitled to the said land. That he brought an action of ejectment against the plaintiff in the court of common pleas of Fulton county on August 12, 1876, in which suit a verdict in favor of the present plaintiff was rendered October 6, 1877, and on February 18, 1884,

judgment was entered on the verdict. The bill avers that the sole question at issue in that proceeding was the alleged marriage between John Leighty and Lydia Walters. Subsequently the present defendant, claiming under a deed from William Leighty, began in this court, on February 1, 1883, an action of ejectment against the present plaintiff. This case was put at issue April 3, 1883. On July 9, 1884, an order was made, on the motion of plaintiff, that the plaintiff in ejectment give security for costs, and that in the mean time proceedings in the ejectment suit should be stayed. The security has not been given and the case has remained in that condition until the present time. The bill further avers:

"Your orator is informed and believes that the said conveyance [the deed from William Leighty to Finkbinder] was improperly and collusively made for the sole purpose of conferring jurisdiction upon this court, and that there was no valuable consideration given therefor; that the said William Leighty is still beneficially interested in said claim of title; that the said Isaac Finkbinder has been improperly and collusively made party plaintiff for the purpose of creating a case cognizable in this court, and that he is holding and pressing the same for the benefit of the said William Leighty."

The bill further avers that the claim of the defendant, Finkbinder, and the pending action of ejectment are clouds upon plaintiff's title. That a certain lien against George W. Leighty, arising upon a recognizance given by him in the partition proceedings is being pressed for collection against the said real estate of plaintiff, and by reason of the cloud upon his title plaintiff is unable to use the land as security, and to raise money to pay off this incumbrance. The bill further avers the great age of the witnesses who are cognizant of the facts relative to John Leighty's alleged marriage. It prays that the defendant be enjoined from further proceeding in his said action of ejectment, and from transferring his alleged interest in said real estate, until final disposition of this case, and for general relief. The defendant has filed a general demurrer to the bill, and the question argued was whether the bill has shown such a case as will enable a court of equity to take jurisdiction, and enter a decree for the plaintiff, according to the prayers of the bill.

The general principles which relate to the jurisdiction of courts of equity in cases of this character are well settled. The supreme court in the case of *Holland v. Challen*, 110 U. S. 19, 3 Sup. Ct. Rep. 495, say:

"The equity of the plaintiff in such cases arose from the protracted litigation for the possession of the property, which the action of ejectment at common law permitted. That action being founded upon a fictitious demise, between fictitious parties, a recovery in one action constituted no bar to another similar action, or to any number of such actions. A change in the date of the alleged demise was sufficient to support a new action. Thus the party in possession, though successful in every instance, might be harassed and vexed, if not ruined, by a litigation constantly renewed. To put an end to such litigation, and give repose to the successful party, courts of equity interfered and closed the controversy."

In the present case, however, it appears that there has been but one trial at law involving the title to the real estate in question. This trial

resulted in favor of the plaintiff in the bill. He now seeks to enjoin the trial of the second action of ejectment, brought by the vendee of the former plaintiff, in which second action the same questions of fact will arise which were tried and disposed of in the former suit. Will equity interfere in such case after but one trial at law? In the case of *Holland v. Challen*, *supra*, it was held that—

“To entitle the plaintiff to relief in such cases the concurrence of three particulars was essential: He must have been in possession of the property, he must have been disturbed in its possession by repeated actions at law, and he must have established his right by successive judgments in his favor. Upon these facts appearing, the court would interpose and grant a perpetual injunction to quiet the possession of the plaintiff against any further litigation from the same source. It was only in this way that adequate relief could be afforded against vexatious litigation and the irreparable mischief which it entailed.”

And the court further says that in most of the states the common-law action of ejectment, with its fictions, has been abolished; that the action for the possession of property is not essentially different in form from actions for other property; that the right of possession in such cases may, and generally does, involve a consideration of the actual ownership of the property, and in such cases the judgment is as much a bar to future litigation between the parties as a judgment in other actions is a bar to future litigation upon the subjects determined. “Where this new form of action is adopted,” the court say, “and this rule as to the effect of a judgment therein obtains, there can be no necessity of repeated adjudications at law upon the right of the plaintiff as a preliminary to his invoking the jurisdiction of a court of equity to quiet his possession against an asserted claim to the property.” In *Equator Co. v. Hall*, 106 U. S. 87, 1 Sup. Ct. Rep. 128, Justice MILLER said:

“The evil of this want of conclusiveness in the result of this form of action led to the interposition of a court of equity, in which, after repeated verdicts and judgments in favor of the same party, and upon the same title, that court would enjoin the unsuccessful party from further disturbance of the one who had recovered these judgments. * * * A title to real estate has, under the traditions of the common law, been held, in all the states where that law prevailed, to be too important, we might almost say too sacred, to be concluded forever by the result of one action between the contesting parties. Hence those states which by abolishing the fictions of the action at the common law, and substituting a direct suit between the parties actually claiming under conflicting titles which, according to the nature of this new proceeding would end in a judgment concluding both parties, have found it necessary to provide for new trials to such extent as each state legislature has thought sound policy to require. The provisions for new trials in actions of ejectment are not the same in all the states, but it is believed that almost all of them which have abolished the common-law action have made provision for one or more new trials as a matter of right.”

In *Miles v. Caldwell*, 2 Wall. 40, the supreme court say:

“It was this difficulty of enforcing at law the estoppel of former verdicts and judgments in ejectments that induced courts of equity (which, unrestrained by the technicality, could look past the nominal parties to the real ones) to interfere, after a sufficient number of trials had taken place to determine fairly the

validity of the title, and by injunction, directed to the unsuccessful litigant, compel him to cease from harassing his opponent by useless litigation."

Counsel for plaintiff cited two cases in which there had been but one trial between the parties prior to the filing of the bill in each case. One was the case of *Craft v. Lathrop*, 2 Wall. Jr. 103. In that case there had been but one trial at law between the parties, but the question of title had been before the courts three times, in suits by different plaintiffs claiming in different rights, the defendant, however, defending all three suits under one claim of title, and each case was decided favorably to the title of the plaintiff in the bill. Justice GRIER says, referring to the case of *Bath v. Sherwin*, Finch, Prec. 261:

"The ground of the decision undoubtedly was that this was the only adequate means of suppressing oppressive litigation and hindering irreparable mischief. This doctrine has ever since been steadily adhered to by courts of equity; and now, wherever a right has been satisfactorily established at law, a court of equity will interfere to prevent further litigation, without inquiring particularly what number of trials in ejectment had taken place. * * * Our inquiry in the present case will be * * * whether he has shown a case which entitles him to relief from this court, sitting as a court of chancery, with full power to administer equity; or, in other words, has the complainant so satisfactorily established his title at law as to entitle him to invoke the aid of this court to suppress and prevent further litigation of the same question?"

After a consideration of the cases in which the question of title had been decided, the court held that the complainant was entitled to relief because—

"His title has in fact been three times declared valid by the courts of law as against the claim set up by the respondent. The complainant is now harassed with a fourth ejectment on the desperate speculation that possibly the courts of the United States may be persuaded to overrule and reverse the decision of the supreme court of Pennsylvania on a question of title to real property depending on the peculiar laws of that state."

The other case cited by plaintiff's counsel was the case of *Harmer v. Gwynne*, 5 McLean, 313. The court there said that it had not been usual to exhibit a bill in chancery for the quieting of a title between two individual claimants until after several verdicts at law; that it does not seem to have been held that any precise number of verdicts at law was necessary before a bill of peace could be sustained, but the better rule would seem to require that the title at law has been fully and fairly established by one or more trials. In that case it appeared that there had been but one trial at law, but exceptions had been taken to the admission of facts in evidence, and the principles of law involved in the case had been twice considered and decided, first in the court below, and afterwards, on appeal, in the supreme court; that there had been long-continued possession, and from lapse of time a presumed acquiescence in the first decision might be drawn, and the court hesitatingly concluded that all these considerations might afford grounds on which to quiet the title. The court really gave relief, however, to the complainant under a statute of the state of Ohio, which gave the right, to proceed to quiet his title to a legal owner in possession, without the prerequisite of a trial at law.

In 2 Story, Eq. Jur. § 859, the rule is stated to be that courts of equity will not interfere in such cases before a trial at law, nor until the right has been satisfactorily established at law. But if the right is satisfactorily established, it is not material what number of trials have taken place, whether two only or more. In 1 Pom. Eq. Jur. p. 265, the rule is thus stated:

"Equity will not interfere on behalf of the plaintiff, and restrain the defendant's proceedings, until the plaintiff's title has been sufficiently established by the decision of at least one action at law in his favor. Indeed, the interference of equity assumes that the plaintiff's legal rights and title have been clearly determined; and its sole object is to quiet that title by preventing the continuance of a litigation at law, which has become vexatious and oppressive, because it is unnecessary and unavailing. A court of equity will not, therefore, interfere to restrain the defendant's litigation so long as the plaintiff's title is uncertain."

In *Railroad Co. v. Jersey City*, 9 N. J. Eq. 438, the defendant demurred on the grounds of want of equity, and the court said, speaking of the rule that the right of the complainant must be established at law:

"This is not a technical rule by which the jurisdiction of this court is made to depend upon the number of trials. * * * In some cases one trial would not be considered as conclusive or satisfactory, as when facts are in dispute, depending on the testimony of witnesses, and the trial, necessarily, by jury."

It seems clear, therefore, from the authorities, that any precise number of trials is not necessary, in order to justify the action of a court of equity; that the principle governing is the prevention of useless, vexatious, and harassing litigation, where the plaintiff's rights have been conclusively and satisfactorily settled by a previous trial or trials at law. But in the application of the rule the circumstances of each case must govern. Where the case turns upon questions of law, as in the construction of a will, the trial court has passed upon the questions involved, the appellate court has fully considered and passed upon the same questions, and the plaintiff's title has been settled as a matter of law, evidently a second suit, involving the same disputed questions of law upon the same state of facts, would be useless and vexatious litigation. On the other hand, where there were disputed questions of fact, the law being clear, many witnesses examined, and a verdict of a jury, one such trial might not establish the plaintiff's title in the clear and satisfactory manner required to authorize equity to interfere. A second trial, or even a third trial, might not be useless and vexatious litigation. In this connection, the policy of the law of the state of Pennsylvania in actions of ejectment should be considered. By the act of assembly of April 13, 1807, it is provided that where two verdicts shall in any writ of ejectment between the same parties be given in succession for the plaintiff or defendant, and judgment be rendered thereon, no new ejectment shall be brought; but where there may be verdict against verdict between the same parties, and judgment thereon, a third ejectment in such case, and verdict and judgment thereon, shall be final and conclusive, and bar the right. By the act of May 21, 1881, it is provided that, where there has been one verdict and judgment, or one verdict and judg-

ment against one verdict and judgment, the party in possession may enter a rule upon the adverse party, claiming title, requiring him to commence his second or third action of ejectment within six months thereafter, or show cause why the same cannot be brought; and whenever the party upon whom the rule is served shall not bring his suit within six months after such service, or show cause why he cannot bring such suit, then it shall be the duty of the court to enter judgment, and make the rule absolute against the party so failing, which judgment shall be final and conclusive between the parties, their heirs and assigns, in the same manner as a second or third verdict and judgment between the parties would be, if regularly rendered upon trial. "By the clear intention of this statute, as by its uniform interpretation by the supreme court of Pennsylvania, it requires two concurring verdicts and judgment thereon, in a common-law ejectment, between the same parties, upon the same title, to conclude the right. The words 'the same parties' of course include their heirs or assigns." *Britton v. Thornton*, 112 U. S. 535, 5 Sup. Ct. Rep. 291. While the jurisdiction of the United States courts in equity cannot be affected by state legislation, yet undoubtedly, in order to ascertain the extent and nature of the injury complained of by the plaintiff, from which he seeks the protection of a court in equity, it is necessary to know just how far he can be harassed and vexed by litigation, and, when it is found that by the laws of Pennsylvania two verdicts and judgments in his favor will terminate all litigation, a court of equity should require to be shown a very clear and satisfactory title on the part of the plaintiff, and manifestly useless and vexatious litigation on the part of the defendant. Particularly is this so when the policy of the state is to require two concurring verdicts and judgments to settle a disputed title to any portion of the land within its territory, and which, as is said in *Britton v. Thornton*, is a rule of property, concerning the title to land within the state, and binding upon the courts of the United States, as well as the courts of the state.

Turning now to the record in this case, a demurrer was filed by the defendant, and the question arises what facts are to be held admitted by the demurrer. A demurrer only admits facts positively alleged, and not conclusions of law, or mere pretenses or suggestions, nor the correctness of the ascription of a purpose to parties not justified by the language used and facts positively alleged. *Dillon v. Barnard*, 21 Wall. 430. A demurrer admits the truth of facts well pleaded in the bill; but when the bill shows the source and nature of complainant's title, although containing an allegation that the complainant's title is clear and undisputed, the demurrer admits only the existence of such a title as the facts stated disclose, and the averment that complainant has a clear title will be treated as the statement of a conclusion of law. *Preston v. Smith*, 26 Fed. Rep. 884. Facts well pleaded are admitted by a demurrer, but it does not admit matters of inference or argument. *U. S. v. Ames*, 99 U. S. 45. Where the bill charges, upon the complainant's information merely, that a certain fact exists, its existence is not admitted by a demurrer. *Williams v. Presbyterian Soc.*, 1 Ohio St. 478. Nor does a demurrer ad-

v.46f.no.1—2

mit facts stated on information and belief. Post. Fed. Pr. 114. Tested by these rules, the demurrer admits the following facts, which are relevant and material in this case: The possession by the plaintiff of the land, under claim of title through the children of John Leighty and Catherine Leighty, (whom plaintiff claims is the lawful wife of John Leighty;) the trial of the action of ejectment, brought against the plaintiff by William Leighty, claiming to be the legitimate child of John Leighty by his lawful wife, Lydia; the introduction of testimony by plaintiff and defendant in that trial relative to the alleged marriages, which were the questions at issue in the case; the verdict of the jury in favor of the defendant, and judgment on the verdict; the pendency of a second action of ejectment in this court, brought by the present defendant against the present plaintiff, which involves the same questions at issue in the former suit; the stay of proceedings in the second suit, at the application of the present plaintiff, until security should be given for costs, which has not been done; that the claim of the defendant is a grievous burden to plaintiff, casts a cloud on his title, and destroys the value of the property; and that after the first trial William Leighty conveyed his interest in or claim to said real estate to the present defendant. The demurrer does not admit the allegation in the bill that the plaintiff is informed and believes that this conveyance was improperly and collusively made for the sole purpose of conferring jurisdiction upon this court, and that there was no consideration given therefor, and that William Leighty is still beneficially interested in the property. Even conceding that these latter allegations are admitted, still they are not relevant in this case, nor will they afford a ground for equitable relief. They should be made in the ejectment proceeding, and may be inquired into summarily, and, if found to be true, the court has full control of that suit, and ample power to act at any time. Nor do I think the fact that the defendant has failed to give the security required by the order of the court in the ejectment suit, can give a court of equity jurisdiction to enjoin further proceedings in that case. There may or may not be some way in which a penalty can be imposed, in the ejectment proceeding, upon the defendant for failure to give security, but the court has no jurisdiction, as a court of equity, to impose the penalty. The plaintiff's case, therefore, in my judgment, rests upon the facts which I have enumerated as admitted by the demurrer, (excluding the failure to give security.) These show that the issue in the former trial was a question of fact, no questions of law appearing to have been in dispute; certainly none arose that controlled the decision, and the verdict upon the testimony introduced in that trial was in favor of the defendant in that case. To sustain the bill I must find that the facts were so clear, and the plaintiff's testimony so overwhelming, that the result of a second trial must necessarily be in his favor. It is not alleged that the defendant in the bill has no other and additional testimony to offer in the second trial. Another jury may, even from the same testimony offered in the former trial, come to an entirely different conclusion. While I recognize the hardship of the case to the plaintiff, still I must give due regard to the rights of the defendant. The law of Pennsylvania has said that he is entitled to retry the

questions involved, and that he cannot be concluded until after a second verdict and judgment in favor of the plaintiff in the bill. No reason appears why a court of equity should deprive him of that right. The plaintiff's rights and title have not been clearly and satisfactorily established, nor is it shown that the defendant's second suit is useless and vexatious litigation. In my judgment, the demurrer must be sustained. Let a decree be drawn accordingly

AYERS v. MANNING *et al.*

(Circuit Court, S. D. Illinois. April, 1891.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—ACTIONS BY ASSIGNEE—PARTIES.

A non-resident partnership owned lands in Illinois, which it placed in charge of an agent, under an agreement that his compensation should be one-half of the net profits realized on a sale of the land. Subsequently the partnership made a voluntary assignment for the benefit of creditors; and its resident creditors, including the agent, after learning of this fact, attached the land. *Held*, that such attachments, being by resident creditors, were valid as against the assignee, who claimed under non-resident debtors; and that the attaching creditors, other than the agent, were not proper parties to an action brought by the assignee to have the title to the land judicially vested in him, and to compel an accounting by the agent.

In Equity. Bill for injunction.

Smith & Harlan, for complainants.

John M. Palmer and William W. Clemens, for defendants.

Before GRESHAM and ALLEN, JJ.

GRESHAM, J. This is a suit by Marshall Ayers, assignee of Sawyer, Wallace & Co., and the members of that firm, Samuel A. Sawyer, David L. Wallace, and Thomas Miller, all citizens and residents of New York and New Jersey, against Michael W. Manning, for an accounting, and against others, as attaching creditors of the firm, all residents of Illinois. The bill, as first filed, charged that, for some years, the firm carried on a commission business with its principal office in the city of New York, and in connection therewith became the owner of farming lands, and implements thereon, in Williamson and Franklin counties, Ill., the title to which was vested in Sawyer in trust for the firm; that the facts connected with the purchase of the lands, and their subsequent improvement and management, up to September 4, 1890, appeared upon the books of the firm; that the defendant Michael W. Manning was employed as agent to manage the lands and superintend their cultivation, which he did himself, and through tenants; that during his agency he paid the taxes, received money from the firm to pay for improvements, implements, and animals, and made remittances to the firm; "that a contract in writing was made on or about the 1st day of May, 1888, by and between the said firm and said Manning, by the terms of which it was, among other things, provided that when the said lands should be sold the said Manning should be entitled to one-half of the amount which should be realized upon a sale of said premises in excess of the cost there-

of, which cost was to be fixed by taking the amount then standing upon the books of said firm as the cost of said premises, and adding thereto the amount that might thereafter be expended for permanent improvements;" that on September 2, 1890, Sawyer and wife, by deed, duly executed, undertook to convey to Sawyer, Wallace, and Miller, as partners, the lands and personal property thereon, which deed was recorded in Franklin county on September 4, and in Williamson county on the day following; that this deed was executed after the partners had determined to make a voluntary assignment in New York, under the laws of that state, for the equal benefit of all their creditors, the firm being then insolvent; that on September 4 such an assignment was executed to the complainant, Ayers, vesting in him the title to the entire property and assets of the firm of every kind and nature, as well as the individual property of each member of the firm; that before the deed of assignment was recorded in Franklin county on September 6, and in Williamson county on September 10, the assignee notified Manning of its execution, and the insolvency of the firm, who agreed that he would thereafter act as the agent of the assignee, as he had previously acted for the firm; that on September 9, and after he had become the agent of the assignee, Manning commenced a suit in attachment in the Williamson county circuit court of Illinois against Sawyer, Wallace & Co., for an alleged indebtedness of \$2,500, and on the same day the sheriff levied the writ on part of the lands embraced in the deed of assignment; that W. T. Davis, Westbrook & Sons, Arthur B. Manning, and Charles Carroll commenced similar suits in the same court against Sawyer, Wallace & Co., and caused their attachment writs to be levied on other lands embraced in the deed of assignment; that some of the latter levies were made before the deed of assignment was recorded in Illinois, and some afterwards, but the attachment suits were all commenced after the plaintiffs had received actual notice of the assignee's acceptance of the trust. The bill also charged that the attaching creditors commenced their suits for the purpose of obtaining preferences in violation of the laws of Illinois, and to defeat the trust created by the assignment; that, in order to enable the assignee to dispose of the lands advantageously, it was necessary that the title thereto, with power of sale, should be vested in him by a decree, and that his right to the lands should be ascertained and established against all the defendants; "that the defendant Michael W. Manning claims a lien upon said lands, and the right to retain said personal property until the claim which he makes shall have been satisfied;" that, instead of having any valid claim against the firm, an accounting would show him to be indebted to it; and that, if the proceeds of the lands were divided ratably among all the creditors of the insolvent firm, they would sell for more than could otherwise be realized from them. The bill prayed for an accounting between the complainants and Michael W. Manning; that he be decreed to have no title or interest in the property by reason of his contract of agency; that the title be vested in the assignee, free of any interest or claim of Manning growing out of his contract of agency; that neither he, nor any of the other attaching creditors, acquired any lien by the commencement of their suits in the

state court, and the levy of their writs of attachment; and that they all be perpetually enjoined from prosecuting their suits, and required to accept their ratable share of the proceeds of the sale of the assigned property in common with the other creditors,—and for other proper relief. After the defendants, except the two Mannings, who answered, had demurred to the bill, it was amended by striking out so much of it as sought to enjoin the prosecution of the suits in the state court, and the same defendants again demurred. It is urged by the complainants' counsel that on the averments of the bill the agent has an interest in the lands, the extent of which can be ascertained only by a sale; that, although the other defendants are not interested in the accounting, it should be determined in advance of an order of sale what, if any, right they have acquired to the attached premises; and that they are therefore proper parties. It does not appear that the agent was to be compensated for his services otherwise than by receiving half the net proceeds arising from a sale of the lands, nor does it appear how long he was to discharge the duties of the agency for this uncertain compensation, or how or when the lands were to be sold. It is plain, however, that even if the agent acquired a lien or interest in the lands under the contract set out in the bill (which it would be difficult to maintain) he has no right to insist upon their sale, unless it is made to appear that, including permanent improvements, they are worth or will sell for more than the purchase price. The agent's compensation, by his own agreement, became contingent, and it is not averred that the lands were worth more than they cost, or that they will sell for more. But the bill does aver that there is nothing due the agent, and that may explain why, during the argument, it was asserted by the counsel for the defendants, and not denied by the complainants, that the value of the lands did not exceed half their cost. The deed of assignment vested in the assignee in trust the title to the property of the non-resident insolvents in Illinois, subject to the rights of resident creditors. The effect would have been different had the conveyance been to a purchaser for a valuable consideration. A state may determine for itself the extent to which such grants shall be operative on property within its own limits, against its own citizens. It may say that, before an assignee removes such property to a foreign jurisdiction for administration, resident creditors shall be paid. Such legislation or judicial determination would not violate the right or privilege of a citizen of one state to acquire and hold property in another state. It is settled law in Illinois that a voluntary assignment by an insolvent non-resident debtor will not hold property here against resident attaching creditors, whether the attachment suit be commenced before or after notice of the assignment. *Heyer v. Alexander*, 108 Ill. 385; *May v. Bank*, 122 Ill. 551, 13 N. E. Rep. 806. If the demurrants are seeking to recover more than is justly due them,—and it is not averred that they are,—the assignee's right to become a party to the attachment suits is clear. The demurrants are not interested in the accounting between the complainants and the agent; no decree can be entered against them touching the accounting; there is no reason why

they should be harassed with litigation in which they are not concerned; and we are unable to see that, in any view of the case, they are proper parties. The demurrers are sustained.

NORTHWESTERN MUT. LIFE INS. CO. *v.* COTTON EXCHANGE REAL ESTATE CO. *et al.*

(Circuit Court, E. D. Missouri, E. D. April 6, 1891.)

1. CORPORATION—STOCKHOLDERS' LIABILITY—PAYMENT OF STOCK IN PROPERTY—OVERVALUATION.

A bill by a judgment creditor of a corporation, which charges that defendants are the stockholders and directors of the company; that the stock therein of \$125,000 was paid by the conveyance of a lot and building suitable for its business, at a valuation of \$200,000, though it was at no time worth more than \$157,000; that the bonds of the company secured by mortgage on the building were issued to defendants to make up the deficit; that defendants were at the time stockholders and directors in the real estate company which owned the building and lot and made the conveyance, and were personally aware of the overvaluation, and benefited by it,—sufficiently charges fraud, although no actual fraud is alleged, and a demurrer thereto will be overruled.

2. SAME—NOTICE.

Nor is it a valid ground of objection that the bill fails to charge that complainant became a creditor of the company in ignorance of the way in which its stock was floated as paid up, for knowledge of such facts on its part is a matter of defense, to be pleaded by way of answer.

In Equity. On demurrer to bill.

Complainant is a judgment creditor of the Cotton Exchange Real Estate Company, and as such sues the individual defendants, who are its stockholders, to compel them to pay certain amounts alleged to be unpaid on the stock by them held in the company. Defendants demur to the bill. The following is a brief synopsis of the material allegations of the bill: In April, 1882, there was a corporation in existence styled the "St. Louis Cotton Exchange Building Company," hereafter called the "Building Company," of which the defendants William T. Wilkins, Leonard Matthews, and William L. Black were the sole stockholders and directors. The Building Company then owned a lot in the city of St. Louis, Mo., and had erected a building thereon, which was then nearly completed, and was intended to be used as a cotton exchange, and for offices, stores, etc. The total cost of said lot and building when completed was \$157,319.76. On March 30, 1882, the above-named directors of the Building Company organized the Cotton Exchange Real Estate Company, the defendant herein, and hereafter called the "Real Estate Company," with a capital stock of \$125,000, divided into 1,250 shares of \$100 each. This latter company was organized to buy the property of the Building Company. Its stock (1,250 shares) was all issued to the persons who were stockholders and directors of the Building Company, so that the stock of both corporations was owned by the same persons, and both companies were controlled by the same

board of directors. The Building Company paid for the stock of the Real Estate Company, which had been issued to the directors of the Building Company, by conveying its lot and building to the Real Estate Company at an agreed valuation of \$200,000. For the difference between the par value of the stock, to-wit, \$125,000, and the agreed valuation aforesaid, the Real Estate Company executed and delivered to the Building Company bonds to the amount of \$75,000, which were secured by a first mortgage on the property so as aforesaid purchased and conveyed to it. Then the directors of the Building Company divided among themselves, in proportion to their several holdings of stock, all of the assets of the Building Company, including the bonds received from the Real Estate Company;— the three individual defendants herein, to-wit, Wilkins, Matthews, and Black, each receiving on such division something over \$27,000. Afterwards Wilkins, Matthews, and Black sold the bonds of the Real Estate Company, which they had acquired as aforesaid, to the complainant. The interest thereon was paid for a short time, but eventually there was a default, and the mortgage securing the bonds was foreclosed. At the mortgage sale the complainant herein bought the mortgaged property for \$50,000. For the balance due on the bonds the complainant has since recovered judgment against the Real Estate Company in the sum of \$35,983.50, which is the judgment that forms the basis of this suit. It is averred in the bill that by reason of the transactions aforesaid the par value of the stock of the Real Estate Company has not been paid; that the subscriptions to its capital stock are unpaid to the extent of \$50,000, that being about the difference between the par value of the stock and bonds of the Real Estate Company and the value of the lot and building conveyed to it by the Building Company; that the lot and building conveyed to the Real Estate Company to pay for its stock were at no time up to the present day worth, and could not at any time have been sold for, more they they cost, as the defendants well knew; and that said lot and building were not worth the value placed upon them in the transfer to the Real Estate Company, as the said defendants also well knew.

Lee & Ellis, for complainant.

Silas B. Jones and Pollard & Werner, for defendants.

THAYER, J., (*after stating the facts as above.*) The sufficiency of the bill is questioned on two grounds. In the first place it is said by one of defendants' solicitors that the bill does not show that the property conveyed to the Real Estate Company in payment for its stock was intentionally overvalued, or the extent of such overvaluation. Stating the objection in a different form, and in the language of another of defendants' solicitors, it is said that the bill does not show that there was any fraud in the transaction by which the stock was paid for. I shall concede that under Missouri laws stock in a corporation like the Real Estate Company may be paid for in property, and that this implies a power on the part of the subscriber and the corporation to bargain and agree as to the value of property exchanged for stock, and that such agreements as to

value are binding between the stockholder and the corporation, and that they are also binding between the stockholder and a corporate creditor, unless it appears that the property has been intentionally valued at a sum considerably in excess of its reasonable value. I shall also concede that a stockholder cannot be successfully proceeded against by a corporate creditor as a holder of unpaid stock, merely because property given in exchange for stock does not ultimately prove to be as valuable as it was supposed to be at the time of the exchange; in other words, where stock may be paid for in property, a stockholder cannot be charged because of an honest mistake of judgment. It is also true, no doubt, that when a person becomes a creditor of a corporation with full knowledge that its stock has been paid up in property at an overvaluation, he is precluded by such knowledge from afterwards asserting that the stock of such corporation is not fully paid. One who voluntarily gives credit to a corporation under such circumstances does so with his eyes wide open, is not defrauded, and ought not afterwards to be heard to complain. These general propositions seem to have been settled by the supreme court of the United States, and must be accepted as the law for present purposes. *Coit v. Amalgamating Co.*, 119 U. S. 343, 7 Sup. Ct. Rep. 231, 14 Fed. Rep. 12; *Bank v. Alden*, 129 U. S. 372, 9 Sup. Ct. Rep. 332; *Burke v. Smith*, 16 Wall. 390.

But, conceding the law to be as above stated, I am nevertheless of the opinion that the first objection to the bill is untenable. As I construe it, the bill avers that the lot and building conveyed to the Real Estate Company in exchange for stock was at no time worth more than \$157,-319.76, and that the directors of the Real Estate Company, who were also the persons to whom its stock was issued, and who were personally benefited by the overvaluation, were aware of that fact; nevertheless, as the bill further shows, these same directors, with knowledge that the property was not worth to exceed the sum aforesaid, accepted it for and in behalf of the corporation at a valuation of \$200,000, and issued therefor to themselves all of the stock of the corporation of the par value of \$125,000, and, in addition, caused to be executed and delivered bonds of the corporation of the value of \$75,000, which they shortly afterwards divided among themselves, acting in that matter as directors of the Building Company. It appears to the court that the bill not only shows an intentional overvaluation of property by the directors while acting in the dual capacity of vendors and purchasers, but that it also shows with sufficient certainty the extent of the overvaluation, and the further fact that the directors made large personal gains by means of the alleged overvaluation.

With reference to the contention that the bill shows no actual fraud in the transaction, it is sufficient to say that the court regards an intentional overvaluation of property to the extent, and made under the circumstances, disclosed by the bill as fraudulent, in the sense that the complainant is bound to allege and prove fraud. The law regards such a transaction as constructively fraudulent so far as corporate creditors are concerned; or, to state the proposition in a different form, the pay-

ment of a stock subscription in such manner and under such circumstances is invalid, and not binding on a creditor of the corporation; and, where the law determines the quality of a transaction described in a pleading, it is unnecessary to aver that it was unlawful or fraudulent.

The second objection to the bill is that the complainant should have averred that it became a creditor of the Real Estate Company in ignorance of the fact that its stock had been paid up in the manner hereinbefore stated. It is conceded by counsel for defendants that they have found no case holding that it is necessary for a complainant to make such an averment in a bill of this character. They rely, however, on certain general expressions found in *Coit v. Amalgamating Co.*, *supra*. An examination of that case shows that it was submitted on the bill, answer, and proofs. The case was decided upon the facts appearing in evidence, and nothing was said that can be regarded as authoritative concerning the question of pleading raised in the case at bar. No question of pleading was presented by the record in that case. On the other hand, the very objection made to the bill by defendants' counsel was made by demurrer to a similar bill in the case of *Gogebic Inv. Co. v. Iron Chief Min. Co.*, 47 N. W. Rep. 726, (Sup. Ct. Wis.,) and was overruled after full consideration. In the absence of any adjudications on the subject, I should entertain no doubt that it is for the defendants to allege and prove, if it be a fact, that the complainant became a creditor of the Real Estate Company with full knowledge of the manner in which its stock had been floated as fully paid. That is defensive matter. Complainant makes out a *prima facie* case in its own favor by stating the manner in which the individual defendants acquired the stock of the Real Estate Company. It shows that the pretended payment for the stock was not in fact full payment, and that the pretended cancellation of the stock liability in the mode described is not binding on corporate creditors. There is no presumption that the complainant was aware of the wrongful manner in which the stock liability had been canceled when it became a creditor of the corporation, nor do the averments of the bill raise such an inference. It is therefore the duty of the defendants to show that the acts complained of were not harmful to the complainant, and that it has no right to complain, because it had knowledge of the same before it dealt with the Real Estate Company.

The demurrer is overruled.

CENTRAL TRUST CO. OF NEW YORK v. WABASH, ST. L. & P. RY. CO.
et al., (SWAYNE, Intervenor.)

(Circuit Court, D. Indiana. February 10, 1891.)

RAILROAD MORTGAGE—LEASED LINES—PRIORITIES.

Where an insolvent railroad company upon its own petition procures the appointment of receivers, to take possession of its road and leased lines, and in the same suit trustees of a mortgage upon the property ask and are denied an appointment of receivers or an extension of the receivership under their cross-bill, but obtain a decree of foreclosure and a sale of the property thereon, the rentals of the leased lines while in the possession of the receivers do not become a charge upon the *corpus* of the property to be paid in preference to the mortgage debt.

In Equity. On exceptions to master's report.

The intervenor, as trustee of mortgages upon what was known as the "Indianapolis, Peru & Chicago Railroad," extending from Indianapolis to Michigan City, claims compensation for the use of that road and its equipment by the receivers herein. The demand is made in the alternative, either for the net earnings of the road while in the possession of the receivers, or for the amount which under the contracts of June 1, 1881, the Wabash Company, if it had remained in control, would have been bound to pay for the use during the same period of time. The net earnings the master has reported at \$261,906.70, the rental under the contracts at \$226,053.65, and, following the decision in *Brown v. Railroad Co.*, 35 Fed. Rep. 444, has recommended that the latter sum be allowed. Numerous objections are made to the report, but the principal question is one of priority of right or of lien upon the property which must be charged with the payment of the claim, if payment should be ordered. There is no fund out of which direct payment can be made, but by the terms of the decree entered at St. Louis on January 6, 1885, foreclosing the general mortgage upon the Wabash road, by virtue of which decree the road was sold, the court reserved the power to resume possession and to order a resale of the property, if necessary, for the discharge of liabilities or claims entitled to preference over mortgage indebtedness; and the question is whether or not this claim is of that character. By the two contracts of June 1, 1881, one of which was made by the Indianapolis, Peru & Chicago Railroad Company and the other by the Michigan City & Indianapolis Company, the roads composing the Indianapolis, Peru & Chicago road, with appurtenances and equipment, were leased to the Wabash, St. Louis & Pacific Railway Company for the term of forty years. Included in the contract of the Indianapolis, Peru & Chicago Company was that part of the road between Peru and La Porte, owned by the Chicago, Cincinnati & Louisville Company, and of which the Indianapolis, Peru & Chicago Company had possession under a contract dated November 15, 1872, subject to a mortgage for \$1,000,000, executed January 1, 1867, to George T. M. Davis, trustee. The Indianapolis, Peru & Chicago road proper, extending from Indianapolis to Peru, was also subject to a mortgage for \$275,000. In consideration of the execution of these leases, the Wabash Company, besides

assuming all liabilities of the lessor companies, executed its negotiable forty-year bonds, bearing six per cent. annual interest, payable semi-annually, to the Indianapolis, Peru & Chicago Company for \$1,350,000, and to the Michigan City & Indianapolis Company for \$325,000; and, to secure the payment of the bonds delivered to it, each of those companies executed a mortgage or trust-deed of its road to Abram W. Hendricks and the intervenor, as trustees. In those deeds, and also in the contracts of lease, it was provided that for any default of the Wabash Company, continued for ninety days, to pay interest due upon its bonds, the trustees or lessors might re-enter and repossess the leased roads and rolling stock. The Wabash Company gave no security for the performance of its covenants, or for the payment of principal or interest of its bonds, though its entire tangible property was at the time subject to the general mortgage of June 1, 1880, made to secure an issue of bonds for \$50,000,000, of which issue bonds to the amount of \$17,000,000 had been executed and were outstanding, and the lines of road on the east side of the Mississippi river were also under the mortgages of 1867 and 1879 for large amounts. By an agreement between William Cutting, as executor of the will of Francis P. Cutting, and Solon Humphreys, as president of the Wabash Company, which, though bearing a later date, seems to have been made before the contracts of lease, Cutting undertook to procure the execution of those contracts by the railroad companies, and to cause the capital stock of those companies, excepting the shares necessary to keep the organizations alive, to be deposited with Swayne and Hendricks, trustees, for certain specified uses during the term of the lease, and stipulated that at the end of that term the stock should become the absolute property of the Wabash Company, if meanwhile it had performed its covenants and paid the interest upon its bonds. Under the contracts so made, the Indianapolis, Peru & Chicago road became and continued to be a part of the Wabash system until May 29, 1884, when, upon the petition of the Wabash Company, avowing its own insolvency and inability, without the aid of the court, to retain control of leased lines and keep the system intact, the United States circuit court sitting at St. Louis appointed Messrs. Humphreys and Tutt receivers, and put them in possession. Two days later, on June 1st, the company made default in the payment of interest upon its bonded indebtedness, including that of which the intervenor was trustee, and within a few days thereafter the Central Trust Company and James E. Cheney, trustees, filed a cross-bill in the case for the foreclosure of the general mortgage, in which they prayed for the appointment of a receiver in the interests of their trust; but the application, though renewed in October and November of the same year, was in each instance denied. Afterwards the trustees filed original bills for the foreclosure of the general mortgage in the courts of the states in which the different lines of the system were situate, and upon removal of the suits to the United States courts, where a consolidation with the original suit of the Wabash Company was soon ordered, the trustees made application to have receivers appointed, or for an extension of the existing receivership to the general mortgage, and this application was also de-

nied. Pending these proceedings, Wager Swayne and Abram W. Hendricks were parties to the suit, as trustees, and had entered their appearance. Wager Swayne was also counsel for the Wabash, St. Louis & Pacific Railway Company, and presented the bill upon which Messrs. Humphreys and Tutt were appointed receivers. George T. M. Davis, trustee of the Chicago, Cincinnati & Louisville mortgage, was also a party to the suit, and had entered his appearance therein. The consolidated cause for foreclosure of the general mortgage, at St. Louis, went to decree in January, 1886; and the lines of railway composing the Wabash system, excepting such of them as had been surrendered by the receivers to trustees and others by order of the court, were sold to a committee of general mortgage bondholders in April, 1886, which sale was confirmed, and the receivers were ordered to deliver the property to the purchasers. Before delivery the receivers were removed from the possession of the lines east of the Mississippi river, and another receiver was appointed for those lines by the United States circuit court for the southern district of Illinois, who took possession on January 1, 1887. The lines on the east side of the river were sold afterwards upon a decree rendered in the seventh circuit, foreclosing the mortgages of 1867 and 1879, and were purchased by the same committee which purchased under the decree at St. Louis. This sale was also subject to a reserved power of the court to retake possession, if necessary, to enforce payment of claims or liabilities entitled to preference over the mortgage debts. While the decree foreclosing the general mortgage declared that the lien of that mortgage attached to leased lines "to the extent of the interest of the Wabash Company therein," it excepted the Indianapolis, Peru & Chicago and some other lines from the order of sale. The order of court appointing Humphreys and Tutt receivers, besides directing the payment of rentals and other claims out of the income which should come to their hands, contained the following, viz.: "That such receivers keep such accounts as may be necessary to show the sources from which all such income and moneys shall be derived, with reference to the interest of all parties herein, and the expenditures made by them." And on June 28, 1884, the court directed the receivers to keep accounts of all the earnings and income from, as well as of all the operating expenses and cost of maintenance and taxes of, certain named lines or divisions, including the Indianapolis, Peru & Chicago road; "and make quarterly reports thereof, showing not only the income and expenses of each of the lines aforesaid, but also the methods by which the incomes and expenses of the lines were respectively ascertained." Reports were made accordingly, which showed a net income from the Indianapolis, Peru & Chicago lines, while in the hands of the receivers, of \$100,-760.70; and, no exceptions having been filed, the reports were confirmed by an order of court entered on the 10th day of October, 1887. On April 16, 1885, an opinion and order was rendered and entered by Circuit Judge BREWER, (23 Fed. Rep. 865,) containing the following:

"Subdivisional accounts must be kept separately, * * * in order that the particular equities of each one of these divisions, as between themselves,

may be ascertained. When any subdivision earns a surplus over expenses, the rental or subdivisonal interest will be paid to the extent of the surplus. * * * Any net earnings should be paid over to the lessor, or, if there be a subdivisonal mortgage, to the mortgagee. There will be no modification of the order heretofore entered concerning receivers' certificates, but all equities respecting them, as between various subdivisions, will be adjusted in the final decree. * * * When it comes to a sale of the road or other final disposition of the matter, it may be there will be such equities as will justify the casting the burden of these certificates upon one division rather than another."

On the 23d of October, 1885, in obedience to an order of the court made at the instance of the intervenor, the receivers surrendered to him the road in question, and its equipment, except that portion covered by the mortgage to Davis, trustee, which under a like order had been surrendered to him on the preceding 8th of June. The orders of the court, in addition to the surrender of possession by the receivers, authorized Davis and Swayne, as trustees, to prosecute suits in this court for the foreclosure of their respective mortgages, and directed the receivers to appear here, and present for adjudication any demand they had as receivers against the Indianapolis, Peru & Chicago road, or its subdivisions, for operating expenses, or on account of receivers' certificates issued under orders of the court for liabilities antedating the appointment of receivers; and also to appear to, answer, and litigate to final adjudication any claims, by way of set-off or counter-claim, against them, growing out of and properly connected with any such claims presented by them as receivers. Accordingly, upon cross-bills filed here in the consolidated cause, Swayne and Davis, as trustees, procured decrees foreclosing their respective mortgages, under which the several properties were sold in 1886, and passed into the possession of the Lake Erie & Western Railway Company, which still owns them. The issues joined between the parties, in respect to the matters now in dispute, need not be more particularly stated.

McDonald, Butler & Snow, for intervenor.

Wells H. Blodgett and C. B. & W. V. Stuart, for respondent.

WOODS, J., (*after stating the facts as above.*) If the intervenor's claim has any just foundation, it is in the doctrine of *Fosdick v. Schall*, 99 U. S. 235. That doctrine has been defined and illustrated in a number of later cases, quotations from two of which (*St. Louis, etc., R. Co. v. Cleveland, etc., Ry. Co.*, 125 U. S. 668, 8 Sup. Ct. Rep. 1011, and *Kneeland v. Trust Co.*, 136 U. S. 89, 10 Sup. Ct. Rep. 950) will be found to be especially applicable here. In the first case it is said:

"It is undoubtedly true that operating expenses, debts due to connecting lines growing out of an interchange of business, and debts due for the use and occupation of leased lines, are chargeable upon gross income before that net revenue arises which constitutes the fund applicable to the payment of the interest on mortgage bonds. But there is here no question in respect to current income. The fund in court is the proceeds of the sale of the property, and represents its *corpus*; and it cannot be claimed that ordinarily the unsecured debts of an insolvent railroad company can take precedence, in the distribution of the proceeds of a sale of the property itself, over the creditors who are

secured by prior and express liens. There are cases, it is true, where, owing to special circumstances, an equity arises in favor of certain classes of creditors of an insolvent railroad corporation, otherwise unsecured, by which they are entitled to outrank, in priority of payment, even upon the distribution of the proceeds of a sale of the body of the property, those who are secured by prior mortgage liens. The rule governing in all these cases was stated by Chief Justice WAITE in *Burnham v. Bowen*, 111 U. S. 776, 783, 4 Sup. Ct. Rep. 675, as follows: 'That, if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has thus been improperly applied to their use.' There has been no departure from this rule in any of the cases cited; it has been adhered to and reaffirmed in them all. * * *

It cannot be said that the application of earnings to the payment of the interest on the first mortgage bonds is chargeable to the holders of the second and third mortgage bonds; the latter alone are interested in the fund for distribution. That fund, in the sense of the rule sought to be applied, cannot be said to have been benefited by the payment to other bondholders from the gross earnings applicable to the payment of rent. The equity of the petitioner, if in fact it exists, is against the holders of the first mortgage bonds who have actually received the money to which it claims to be equitably entitled."

In *Kneeland v. Trust Co.* the claims were for the rental of rolling stock, which had been obtained by the railroad company on conditional contracts of purchase, in the form of leases, reserving title in the vendors, with right to retake possession on default in the payment of certain annual sums called "rent." The first application for a receiver was made August 1, 1883, by a judgment creditor. The trustees in the mortgages upon the road were made parties to the bill, and entered their appearance, neither objecting nor consenting, and a receiver was appointed, who continued in possession until the ensuing December 1st, when, upon bills brought by those trustees, the court appointed another receiver and, in accordance with the prayer of the bill, put him in possession both of the road and the rolling stock. The claims presented were for rentals during both receiverships, and, there being no other resource, payment was asked out of the proceeds of sale, to the exclusion *pro tanto* of the mortgage debts. The court, among other things, said:

"Upon these facts we remark, first, that the appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. Because in a few special and limited cases this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. * * * One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. So, when a court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this court, have been declared to have an equitable priority. No one is bound to sell to a railroad company, or to work for it, and whoever has dealings with a company whose property is mortgaged must be presumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception, and not the rule, that such priority of liens can be displaced. * * * So that these intervenors acquired no

right of priority by virtue of their antecedent contracts of sale. But it is argued, and with force, that the court did not allow contract price, but only rental; and the question is asked, may a court, through its receiver, take possession of property, and pay no rental for it? If it may legitimately compel the operation of a railroad in the hands of its receiver, in order to discharge the obligations of the company to the public, may it not also, and must it not also, burden that receivership, and the property in charge of the receiver, with all the expenses connected with the operation of the road, together with reasonable rentals for the property used and necessary for the operation of the road? As to the general answer to these inquiries we have no doubt. A court which appoints a receiver acquires, by virtue of that appointment, certain rights and assumes certain obligations; and the expenses which the court creates in discharge of those obligations are burdens necessarily on the property taken possession of; and this, irrespective of the question who may be the ultimate owner, or who may have the preferred lien, or who may invoke the receivership. So if, at the instance of any party entitled thereto, a court should appoint a receiver of property, the same being railroad property, and therefore under obligations to the public of continued operation, it, in the administration of such receivership, might rightfully contract debts necessary for the operation of the road, either for labor, supplies, or rentals, and make such expenses a prior lien on the property itself. * * * The holder of the lien upon the realty commences suit to foreclose its lien, and asks the court to take possession, through its receiver, of both the real and personal property. In the latter it had a remote interest, though subordinate to existing liens. The court, responding to its demands, takes possession of all the property, real and personal. Now, when the holder of a first lien upon the realty alone asks the court in chancery to take possession, not only of the real, but also of personal, property, and for the benefit of the real, that application is a consent on its part that the rental value of the personalty thus taken possession of and operated for the benefit of the realty shall be paid in preference to its own claim. The proposition is a simple one. The application may not be a consent that the contract price of the personalty shall be paid in preference to his lien; but it certainly is a consent that the rental value of that personalty, during the time of the possession by the receiver, appointed at his instance, may have priority to his claim. If the holder of a lien upon the realty does not think that the continued possession of the personalty is a benefit to his lien, he should simply omit the personalty from his bill, and ask the court to take possession of the realty alone. * * * The conclusion is irresistible that, under the circumstances, reasonable rental value was properly allowed as a prior claim to the mortgage indebtedness."

Upon these considerations the decrees of this court in which the cases originated were reversed, "with instructions to strike out all allowances for rental prior to December 1, 1883, the time when the receiver was appointed at the instance of the mortgagors, and to allow the rentals as fixed for the time subsequent thereto."

No suggestion to the contrary having been made at the hearing, I shall assume that the contracts of June 1, 1881, were valid, though, under the decision in *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 6 Sup. Ct. Rep. 1094, it would seem clear that they were *ultra vires* and void; and, if so, the petitioner, without regard to the objections that were urged against his right to intervene, has no standing in court. The mortgages of which he is trustee are void if the contracts are. It would follow, further, from the illegality of the contracts, that, if

the receivers are liable for the use of the Indianapolis, Peru & Chicago lines of road, it is not for the price stipulated in the contracts with the Wabash Company, but for the reasonable value of the use, as if no special agreements had been made or attempted; and, indeed, upon the facts of the case, I am convinced that this would be so, even upon the assumption that the contracts, as between the parties, were valid and determinative of their rights. It is true that in *Brown v. Railroad Co.*, 35 Fed. Rep. 444, it was held that these receivers, by taking possession of a leased line under the order of the court, "became assignees of the lease, and, as such, liable for the rent;" but a rehearing has been granted in that case, since the report of the master in this was filed, and, while the doctrine of it is, perhaps, the established rule of cases which involve only private rights, the reported decisions show that it has seldom, if ever, been deemed applicable to receivers of railroads who had taken possession of leased roads, or of leased rolling stock found in use upon, or in connection with, the main or trunk lines over which they were appointed; for the reason, I suppose, that the taking of possession of the leased property, ordinarily, is not a purely voluntary act, amounting to an election, on the part either of the receiver or of the court appointing him, but is compelled by that public policy which requires a railroad of established use to be kept in operation. Indeed, it is sometimes a physical necessity. In this case, for instance, an immediate separation of the leased lines from the Wabash roads proper, and from each other, for the purpose of surrendering any of them, with its rolling stock, to its owner, was manifestly impracticable; even if it appeared, as it does not, that the owner was ready and willing to resume possession, and to discharge the duty to the public of keeping the road in operation.

Besides, the laborers who were or had been employed by the Wabash Company, whether upon profitable or unprofitable lines, and, likewise, those who had furnished supplies, had a right to look for their pay to the revenues of the entire system, and not alone to the earnings of the particular subdivision to the operation of which they had contributed. Giving credit, as in the nature of things they must have done, to the company for the time being in charge, they were not required to know the relations to each other of the different branches composing the system, nor bound to inquire into the contracts, whether of consolidation or of lease, by which the combination was effected.

It is to be observed, too, that the leasehold of the Indianapolis Peru & Chicago lines was a valuable part of the assets of the Wabash Company, which the receivers, by virtue of their appointment upon the petition of that company, were necessarily bound to take into possession and preserve, equally with other assets, for disposition according to the rights of claimants, as they should be finally established. The first default in the payment of interest due to the bondholders represented by the intervenor occurred June 1, 1884, just after the appointment of receivers. The intervenor, as trustee, had no right to possession, except upon a default continued for ninety days; so that until the ensuing August 30th the right of the receivers to hold possession and to receive the earnings

in dispute was absolute, and until after that date it was not in the rightful power of the court, without the consent of parties interested, to have ordered a surrender of possession. If the application for the appointment of receivers had been by a mortgagee of the Wabash Company, instead of the company itself, the applicant might have so framed his bill as to escape responsibility, on the theory of consent, for any action of the court or its receivers in respect to leased roads. In this respect the opinion in *Kneeland v. Trust Co.* is quite as explicit as in the recognition of the doctrine, in which the cases following *Fosdick v. Schall* agree, that the mortgagee or lienholder, who procures a receivership, thereby consents to the subjection of his interest in the property, of which possession is taken at his instance, to the discharge of liabilities and expenses incurred by the receiver under the proper orders of the court. When, therefore, as in this case, receivers are appointed upon the petition of an insolvent debtor, and there is behind the court no responsible party who has an interest in the property which may be applied to the payment of court debts and expenses, the situation is essentially different, and the administration of the trust and the adjustment of liabilities for past and current expenses, it would seem, must be upon principles somewhat different from what should otherwise govern. It is certainly not true in this case, as counsel for the intervenor have strenuously insisted, "that the court took possession of the leased lines for the benefit of the Wabash Company and its mortgagees and creditors, and not for the benefit of the lessor companies and their mortgagees." On the contrary, under the contracts of lease, the lessor companies and their mortgagees were themselves creditors of the Wabash Company, and the action of the court in appointing receivers, upon the motion of that company, was necessarily, in law and in equity, as much for their benefit as for the benefit of any other mortgagee or creditor. And it follows that the rights of all the parties must be determined and enforced with due reference to the respective contracts and mortgages under which they claim, or out of which their rights have arisen.

The general mortgage executed by the Wabash Company, on June 1, 1880, to the Central Trust Company and Cheney, as trustees, contained an "after-acquired property" clause, by force of which it covered the interest of the Wabash Company in the Indianapolis, Peru & Chicago lines, acquired under the contracts of June 1, 1881; and according to *Dow v. Railroad Co.*, 124 U. S. 652, 8 Sup. Ct. Rep. 673, and other cases, if the Wabash system, as a whole, had been earning more than the expenses of operation, when the trustees of that mortgage filed their cross-bill and asked the appointment of receivers in the interest of their trust, they would have become entitled thereafter to that surplus, even though derived, in whole or in part, from these leased lines, unless, before it had accrued, the intervenor, by a re-entry or by demanding possession for condition broken, had established his right thereto for the use of his *cestuis que trust*; but, there having been a deficit instead of the supposed surplus, the trustees of the general mortgage, by filing their cross-bill, acquired no interest in the earnings either of the entire system or

of any subdivision; and the excess of the earnings of the Indianapolis division, so long as it remained a rightful part of the system, belonged necessarily to the receivers, to be applied to current operating expenses of the system, and, under the orders of the court, to the payment of preferential liabilities which had accrued before the receivers were appointed. Until August 30, 1884, that was under the contracts unconditionally so. After that time, by demanding possession, the intervenor might have terminated the right of the receivers in this respect, and have established his own; but without such demand, or some equivalent fact, it would seem clear that he had no claim upon the earnings, though embraced by express terms in his mortgages. *Sage v. Railroad Co.*, 125 U. S. 361, 8 Sup. Ct. Rep. 887, and cases cited.

It is insisted, however, that by certain orders of the court, and especially by that of April 16, 1885, the court gave assurance that, "when any subdivision earned a surplus over expenses, the rental or subdivisational interest would be paid to the extent of the surplus;" and that by reason of this the intervenor was under no necessity of making a demand for possession in order to establish the right which he now asserts. But, if this were conceded, it would still be apparent that he acquired no interest in the earnings which accrued before that order was made, and that on this account alone there would have to be a large reduction in the master's computation of the amount due. The order of the court, however, will not bear the construction insisted upon. It contains, besides the quotation given, the further clause: "There will be no modification of the order heretofore entered concerning receivers' certificates, but all equities respecting them, as between various subdivisions, will be adjusted in the final decree," etc.; and upon the entire record it is evident that the court did not intend an unconditional promise or assurance that the surplus earnings of a subdivision or leased line should, in any and all events, be paid as rental or interest to the owners or mortgagees thereof. On this point it is enough to refer to the decision of Justice BREWER while upon the circuit bench, as reported in *Central Trust Co. v. Wabash, etc., Ry. Co.*, 38 Fed. Rep. 63, where the question was substantially the same as here. The intervenor never obtained a specific order of the court for the payment to him, or upon the mortgage debts which he represented, the net earnings of the Indianapolis, Peru & Chicago lines, though the quarterly reports of the receivers all the while showed receipts from that source sufficient for the purpose, which in his relations to the case he must have known were being expended in the operation of the system, or in the payment of preferential debts antedating the receivership, and that, if ever refunded, it would have to be done out of the *corpus* of the Wabash property at the expense of its mortgagees. It may be remarked in this connection that, when the intervenor came to present his claim to this court for adjudication, neither in his original nor supplemental petition did he assert or suggest that his demand rested upon the orders of the court, in the sense now urged, or had any better equity on that account.

If, upon the filing of their cross-bill, the court had granted the motion of the trustees of the general mortgage for the appointment of

receivers in their interest, or had sustained any of the like motions which they afterwards made, they would have become responsible, I suppose, for the conduct of the receivership from that time, as if the appointment had been made upon their motion in the first instance, and so, perhaps, the interests represented by them might have been subordinated to the intervenor's claim thereafter accruing; but, the court having denied all their efforts to obtain charge of the receivership, it cannot be said that any order of the court rests upon their implied consent; and if the bonds secured by the general mortgage, or by the mortgages of 1867 and 1879, can be postponed in favor of the intervenor's demand, it must be because that demand is somehow to be deemed one of the "obligations" which in *Kneeland v. Trust Co.*, *supra*, are said to be "burdens necessarily upon the property taken possession of," "irrespective of the question who may be the ultimate owner," "or who may have the preferred lien, or who may invoke the receivership."

Reference has been made to *Miltenberger v. Railway Co.*, 106 U. S. 286, 1 Sup. Ct. Rep. 140; and it appears that in that case the rental for the use of a leased line of road by the receivers therein appointed was ordered paid out of the proceeds of sale in preference to mortgage debts. But the original lease in that case was for a short term, with rights of extension or abandonment upon short notice, and it is fairly inferable that the successive receivers were deemed to have continued in possession of the leased line with the consent of the mortgagees whose rights were postponed. When, however, as in this case, the lease is for a long term, the practical result is an incorporation of the leased line into the body and ownership of the principal line, and in no just sense is the value of the use of one, more than of the other, an operating expense of the combination. If so, a mortgage upon a railroad, instead of having stable value according to the fixed principles of law and equity applicable to mortgages upon real estate, is subject to displacement at the will of the mortgagor, as well for his own interest as for the benefit of other parties to contracts of subsequent date, which, upon principles hitherto supposed to be established, should be subject to existing and recorded mortgage liens. The Wabash Company, by making the contracts of June 1, 1881, certainly neither conferred nor acquired any rights which, in respect to the mortgaged properties, were not subject to the mortgages theretofore made; and the court, by appointing receivers at the instance of that company, did not, as I conceive, acquire power to change the order of priority in that respect. In fact, while those contracts are in the form, and, when considered by themselves, may be entitled to the name, of leases, the Cutting contract shows that the real purpose of the transaction was a sale of the Indianapolis, Peru & Chicago roads to the Wabash Company for the price evidenced by the bonds which that company delivered to the so-called lessors. The interest on those bonds may have been regarded by the parties as equivalent to a fair annual rental of the leased roads and equipment until at the end of the term the intended sale should be consummated, but, even if so treated, it was not, under the circumstances, I think, an operating expense of such character as to

be entitled to equitable preference over the mortgage liens of prior date.

Counsel for the intervenor, referring to the decision upon the intervening petition of Gilman and others, in *Central Trust Co. v. Wabash, etc., Ry. Co.*, 34 Fed. Rep. 259, say:

"It is difficult to understand how the court could bring itself to believe that either law or equity would sanction the taking by the court of the net earnings of leased lines, held by the court for the benefit of the Wabash Company and its bondholders and creditors, and apply them to the payment of either past or current operating expenses of the lines of railway owned by the Wabash Company, leaving the rent of the leased lines making such net earnings unpaid."

The strength of this statement is largely in the erroneous assumption, already pointed out, that the receivership was for the special benefit of bondholders and creditors of the Wabash Company, as distinguished from the mortgagees and creditors of the lessor companies. There is in the statement the further implication, necessary to the force of the argument, that there has been an improper diversion of earnings "to the payment of either past or current operating expenses of the lines of railway owned by the Wabash Company," which ought to be made good at the expense of the mortgagees of that company,—a proposition which, I believe, embraces error both of law and of fact; of fact, because the master's report does not show, nor has the evidence been pointed out which shows, that the excess of expenses of operation over earnings of the entire system arose "upon lines of railway owned by the Wabash Company," and not, in whole or in part, upon leased lines, nor that the net earnings of the Indianapolis, Peru & Chicago lines were expended for any particular purpose, or in such way as to be traceable. The argument at the hearing, as it was understood, proceeded on the assumption or concession that those earnings were mingled with the general income of the system, and were expended in the payment of current expenses or in the discharge of preferred liabilities, which had accrued to a large amount before the receivers were appointed; the report showing that upon that class of liabilities the receivers had paid as much as \$4,416,-797.13, and that under the orders of the court, at St. Louis, they had "disbursed all the funds which came to their hands as such receivers;" and, other than in this general way, it was not claimed nor shown that the earnings in question were applied to the benefit of the mortgagees of the Wabash Company; and, this being so, there has been no diversion which, according to *St. Louis, etc., R. Co. v. Cleveland, etc., Ry. Co.*, *supra*, the mortgagees can be required to make good. But for the authoritative statement in that case to the contrary, I should have been of opinion that payments upon a first mortgage are a benefit to the holders of subsequent mortgages or liens so direct and certain as to constitute a diversion, if made out of earnings, which a court of chancery would charge upon the property, or upon the proceeds of a sale upon foreclosure of the second or later mortgage,—the fund produced being presumably larger by the amount of the payments upon the prior lien; but, since that is not so, much clearer is it that there has been no diversion of the earnings in

question here which can be charged upon the Wabash roads in preference to the rights of the mortgagees; and if the intervenor, or those on whose behalf he sues, would recover the money, they must seek it of those who received it. If those earnings had been stolen or otherwise lost, or if, through mismanagement of the receivers, they had not accrued, the mortgagees would not be chargeable; and so it must be in respect to any misapplication thereof not made at their instance, or for their benefit, within the meaning of the rule declared by the supreme court.

In this connection it is proper to refer to the proposition of counsel "that the Wabash Company did not owe any debts for operating expenses incurred by the company within six months next prior to the date of the appointment of Humphreys and Tutt as receivers, simply because the Wabash, St. Louis & Pacific Railway Company did not operate any railway during that six months, or any part of it; the St. Louis, Iron Mountain & Southern Railway Company—a perfectly solvent corporation—having possessed and operated the entire Wabash Railway and its leased lines during that six months under the lease made to it by the Wabash Company on April 10, 1883." If the fact were as stated, and the inference justified that the court committed a great wrong or error in recognizing the debts of that period as debts of the Wabash Company, entitled to payment out of the earnings of the system under the receivers, it is clear that the wrong cannot be righted at the expense of the mortgage creditors. To do so would be only to add to the original injustice done them, upon this theory, by the issue of receivers' certificates for a large part of those debts, and making the certificates a prior charge upon the mortgaged property. The fact, however, is that by the lease referred to the Iron Mountain Company took possession of the Wabash system, under an agreement to operate it, to receive its income and earnings, and apply them, after paying operating expenses, upon the obligations of the Wabash Company, but became itself in no way personally bound to pay or contribute to those expenses. On the contrary, the Wabash Company bound itself, and afterwards executed a mortgage to secure the obligation, to repay to the Iron Mountain Company any sums which it should expend for the benefit of the Wabash Company under the lease. The debts, therefore, which accrued, during that arrangement, on account of operating expenses, were the debts of the Wabash Company, and were properly treated as entitled to payment out of earnings or income in the hands of the receivers. Whether the receivers' certificates, if issued without the consent of the mortgagees, were a proper charge upon the *corpus* of the property payable before the mortgages thereon is quite a different question, but, in view of the opinion and rulings in *Kneeland v. Trust Co.*, *supra*, as well as upon principle, it is a question which it would seem should be resolved in the negative. The rental of cars is not less distinctly an operating expense than the rental of leased lines of road, certainly, and yet in that case the claim for the use of rolling stock, during the four months next preceding the appointment of receivers upon motion of the mort-

gagees, was rejected; and like claims which accrued after that appointment were allowed, only because the mortgagees in their bill had asked the court "to take possession, through its receivers, of both the real and personal property." If, however, such rentals, accruing during a receivership, were "burdens necessarily upon the property taken possession of, * * * irrespective of the question who invoked the receivership," the claims ought, on that ground, to have been paid for the whole time, including the receivership obtained by the judgment creditor, as well as that of the mortgagees; the consent, express or implied, of the mortgagees being on that theory immaterial. The claims which accrued under the first receivership were, of course, not less meritorious because the road was in the custody of the court than if the railroad company had been in charge; and, under what in this circuit is called the "six-months rule," they would certainly have been entitled to payment if there had been in the hands of the receivers a fund derived from earnings of the road; and the court's refusal to sanction the payment thereof out of the proceeds of sale of the property on decree of foreclosure would seem to mean necessarily that, without the consent of mortgagees, the rental of rolling stock, though used by receivers under the sanction of the court, cannot be paid in preference to prior mortgage debts. It will not do to say, as was suggested in argument, that this decision rests in any degree on the ground that the owners of rolling stock had retained a lien upon the property, and that, having that security, they were not entitled to ask relief on other equitable grounds. If there were force in the suggestion, it would be of equal potency in the present case, where the lessors took a like security upon the leased property, whereby, upon any default of the lessee, their trustees were authorized to resume possession. In neither case, however, can it be said that the claim presented was a secured claim. The contracts under which the railroad company obtained possession of the rolling stock were not treated as binding upon the parties; the rentals were estimated upon the basis of fair value, as if no contracts had been made; and in no proper sense can be said to have been secured by the reserved right of the vendors to resume possession. That right could not have been exercised against the receivers, without leave of court. The same is true in respect to the intervenor's rights as trustee. His power to take possession might have been employed, under the sanction of the court, to stop further use by the receivers of the roads in which he was interested, but it constituted no sort of security for the payment of rentals already accrued. The conclusion reached that the claim presented ought not to be made a charge upon the interests of the mortgagees or of the purchasers at the foreclosure sales, the consideration of other questions is not necessary. It follows that the master's report should be set aside, and the intervenor's petition dismissed.

SACKETT v. SMITH.

(Circuit Court, S. D. New York. April 20, 1891.)

TAXATION OF COSTS—PRINTING BRIEFS.

Disbursements for printing a necessary and proper brief in an equity cause should be taxed in the costs, though it may not have been printed before commencement of the argument.

In Equity.

James A. Whitney, for complainant.

W. S. Logan, for defendant.

COXE, J. It seems to me that the item objected to was a proper disbursement and should be taxed. It frequently happens that equity causes go to argument before the briefs are printed, and, where the argument proceeds in this manner without objection, there can be no reason for holding that the right to tax such disbursements is lost because the printing took place after the commencement of the argument. In the present case it is not denied that the brief in question was a necessary and proper one. The only objection to the allowance of the item is that the brief was printed after the commencement of the argument. The objection is insufficient.

ADEE v. J. L. MOTT IRON-WORKS.

(Circuit Court, S. D. New York. April 21, 1891.)

EQUITY—PRACTICE—EVIDENCE—RECORD—APPEAL.

In an equity suit testimony that is ruled out on objection will not be excluded from the record on appeal.

In Equity.

Arthur v. Briesen, for complainant.

Francis Forbes, for defendant.

SHIPMAN, J. The motion to exclude the testimony of Mr. Briesen from the printed record, the object of the motion being to exclude the testimony from the record upon appeal in case an appeal is taken, is denied. Testimony in an equity suit, which has been objected to and ruled out, should properly be sent with the record to the supreme court. *Blease v. Garlington*, 92 U. S. 1. The motion to rule out the testimony of John Uprichard, which was given in *Adee v. Peck*, 42 Fed. Rep. 497, is granted, except as to question 4 and the answer thereto. This portion of the record of testimony in the Connecticut case was not offered by the plaintiff to contradict Uprichard, but simply to show that he also fully testified to the same exhibits in the Peck suit, and that the effect of the

evidence of those exhibits upon the validity of the Foley patent must have been considered by Judge WALLACE. The motion to strike from the record cross-question 20 in the testimony of John Uprichard in this case, and the statements which follow down to cross-question 21, and to strike out from the same testimony all that intervenes between cross-question 47 and the entry, "New York, December 3, 1890," and all that intervenes between cross-question 61 and cross-question 64, and all in the record of the same testimony after the words, "cross-examination closed," and before the signature of the witness, is denied. The motion to strike from the record of Mr. Serrell's testimony, under date of March 23, 1891, all after the words, "Present, Francis Forbes," etc., down to the tenth question, is granted. This colloquy between counsel became entirely immaterial in view of the stipulation made by counsel for complainant at the close of the discussion.

CAHN v. WESTERN UNION TEL. Co.

(Circuit Court, E. D. Mississippi. April 21, 1891.)

1. FAILURE TO DELIVER TELEGRAM—MEASURE OF DAMAGES.

Remote, contingent, or speculative damages will not be allowed, but only such as naturally flow from the breach of the contract.

2. SAME.

Where a telegraph message directed the sale of 200 shares of Tennessee Coal & Iron Company stock, and the defendant company failed to deliver the same to the sendees for several days after it should have been delivered, and the plaintiff did not in fact own any stock in said company, and no transaction was made, he is not entitled to recover the difference between the market value of said stock on the day when the telegram should have been delivered and the day when it was actually delivered.

3. SAME.

There being no evidence in the record tending to show that it was the intention of the plaintiff to repurchase a similar amount of stock on the 28th of February, or at any subsequent date, the defendant company cannot be held liable for a breach of contract which was neither made nor within the reasonable contemplation of the parties upon the day of sending the telegram.

At Law.

The plaintiff by his office boy sent to the defendant's agent at Columbus the following telegraphic message, written upon one of the blanks of the company used in sending night messages, to-wit:

"COLUMBUS, MISS., Feb. 20, 1890.

"To Messrs. Latham, Alexander & Co., New York City: Sell two hundred Tenn. Coal & Iron.

[Signed]

"E. CAHN."

The message was promptly sent from the defendant's office at Columbus, but, owing to some irregularity at Memphis, Tenn., (a relay station,) it was negligently sent to Conway, Ark., and failed to reach the sendees until the 28th February, 1890, whereupon the sendees declined to receive the same, and immediately notified the plaintiff of the fact.

The plaintiff declares in tort, and seeks to recover as his damage the sum of \$3,775.75, and interest, upon the theory that he was entitled to the difference between the market value of the stock upon the day when the telegram should have been delivered and the day upon which it was actually delivered. The defendant interposed the general issue, accompanied with two special pleas, viz., that the plaintiff failed to present his claim within 30 days in writing, and that it was a wager contract. It was developed by the testimony that plaintiff did not have in the possession of Latham, Alexander & Co. 200 shares of the Tennessee Coal & Iron Company's stock at the time he sent the telegram, or between the time of sending it and the time of its delivery, on the 28th of February, 1890; also, that he had securities in the hands of his said brokers, to indemnify them in case of loss in stock transactions. Plaintiff did not offer to prove that it was his intention to purchase 200 shares of Tennessee Coal & Iron stock on the 28th, or at any subsequent period after sending his message. The defendant on the above facts moved the instruction to the jury that they could only find a verdict for the amount of the telegram, and interest from February 21, 1890, at 6 per cent.

Humphries & Sykes, for plaintiff.

Sykes & Richardson, for defendant.

HILL, J. This action is brought by the plaintiff against the defendant company for damages by reason of an alleged breach of contract in failing to transmit in due time the following message:

"COLUMBUS, MISS., Feb. 20, 1890,

"*To Messrs. Latham, Alexander & Co., New York:* Sell two hundred Tenn. Coal & Iron.

[Signed]

"E. CAHN."

—to which the defendant has interposed the general issue of not guilty, which casts upon the plaintiff the burden of proving that the message was delivered to defendant's agent, and was not delivered in due time to the sendees. It is admitted that it was delivered to defendant's agent at Columbus, and the price of the message (30 cents) paid for its transmission to Latham, Alexander & Co., of New York. It is also admitted that it was not delivered to Latham, Alexander & Co. until the 28th day of February, 1890, which was not a prompt delivery, or in due time, and which failure was a breach of the contract, and entitles the plaintiff to a verdict for the actual damage sustained.

The plaintiff alleges in his declaration that if the message had been delivered on the 21st of February, 1890, the said brokers would have sold the 200 shares of stock at \$73 per share, and that on the 28th of February, 1890, when the message was received, the same number of shares could have been bought at \$55 per share. It being admitted that the face value of said stock was \$100 per share, the plaintiff thus claimed the difference between \$73 and \$55 per share upon the 200 shares as the measure of his damage. It is admitted that the plaintiff did not own or have in the possession of his said brokers on the 21st of February, 1890,

or at any time between that date and the 28th of February, 1890, or have under the control of the said brokers, any stock of the Tennessee Coal & Iron Company, but it is contended by defendant that he did have securities in their hands to indemnify them for losses in transactions had for him. The plaintiff not having the stock in the hands of his brokers, and his telegram being an order to sell something he did not own, and it being admitted that if the telegram had been delivered in time the brokers would have sold, still there could have been no actual loss to plaintiff. The brokers would necessarily have gone into the market and purchased at the market price, viz., \$73, or used their own stock, or the stock of others, which is the same thing, and of the same value; hence it would have been a purchase and a sale of the stock on the same day, and at the same price, and there could be no loss or damage predicated on this transaction. But plaintiff goes another step, and bases his claim on the idea that he might have repurchased stock on the 28th day of February, 1890, the day of the actual delivery of the telegram, and was *ipso facto* entitled to the benefit of the market on that date. The order made in the message was to sell said shares of stock, and no direction was given to make a purchase of a similar amount of the stock at any time, and the defendant, in the absence of testimony, is not presumed to know that a repurchase of said stock was contemplated by the plaintiff. Such a presumption would be equivalent to importing a new feature into the contract,—the making of a new contract,—such as did not reasonably enter into the minds of the parties, and was not contemplated by them at the time of sending the message, which is the foundation of the suit. I think the claim for damage is too remote, uncertain, and speculative, and am of the opinion that the proper measure of damage is the price paid for the telegram, to-wit, 30 cents, with interest from the 20th day of February, 1890, to date; and the court will instruct the jury to so find. See the following: *Hadley v. Baxendale*, 9 Exch. 341; *Griffin v. Colver*, 16 N. Y. 489; *Telegraph Co. v. Hall*, 124 U. S. 483, 8 Sup. Ct. Rep. 577; *Smith v. Telegraph Co.*, 83 Ky. 104; *Cannon v. Telegraph Co.*, 100 N. C. 300, 6 S. E. Rep. 731; *Telegraph Co. v. Clifton*, (Miss.) 8 South. Rep. 746.

HAMILTON v. CONNECTICUT FIRE INS. CO.

(Circuit Court, S. D. Ohio, W. D. April 15, 1891.)

INSURANCE—PROOF OF LOSS—APPRAISEMENT—DEMAND.

A policy of insurance issued by defendant to plaintiff provided that any loss should be appraised as prescribed by the policy, and that the report of the appraisers should form part of the proof required by the policy. The proof of loss furnished the company did not contain such a report of appraisement, but the letter accompanying the proof stated that, if there were any defects in the substance or form of the proof, plaintiff, upon being advised thereof, would perfect the same. No objection was made at any time to the form or substance. Several other companies, some of which were not entitled to demand such an appraisement, had policies on the same property; and in the course of a correspondence carried on by

them and defendant jointly on the one side and plaintiff on the other, in which they disputed the amount of the loss, they demanded a submission to arbitration on conditions which were refused by plaintiff. They then, by joint letter, stated that, if the form of submission proposed by them contained any provisions not prescribed by the policies, each company would submit its own form. There was no further correspondence between them jointly, or between defendant and plaintiff, on the subject. *Held*, that the joint demand could not take the place of a separate demand, and defendant had therefore waived its right to have such appraisal made part of its proof of loss.

At Law.

Kittredge & Wilby, for plaintiff.

Thos. A. Logan, for defendant.

SAGE, J., (*orally charging jury*.) This action is upon a policy of insurance issued to Robert Hamilton, the plaintiff, by the Connecticut Fire Insurance Company of Hartford, the defendant.

The execution of the policy of insurance is admitted, and its delivery to the plaintiff. It is also admitted that the plaintiff paid the premium thereon; that the policy was in force at the time of the fire, and that the loss and damage were within its terms; that the plaintiff was the owner of the property described in the petition, consisting largely of tobacco situated in the factory of the plaintiff on Madison street, Covington, Ky.; and that the fire occurred on the 16th of April, 1886.

From the evidence for the plaintiff, it appears that on the 26th of April, 1886, he furnished to the defendant proofs of loss under the policy in suit, with a letter of that date, stating that, if there was any defect in the substance or the form of the proofs, he would, upon being advised thereof, perfect the same to the satisfaction of the company, requesting in that event the return of the proofs to him for that purpose.

On the 27th of April, 1886, the receipt of the proofs was acknowledged by defendant's agent. No objection was made at any time to their form or substance.

The policy provides that the loss or damage to the property insured shall be appraised by disinterested and competent persons selected in the manner prescribed in the policy, and that the report of such appraisers in writing, under oath, shall form part of the proof required by the policy.

The proof of loss furnished the company, and put in evidence by the plaintiff, did not contain such a report, nor any report of appraisal whatever. Indeed, no such appraisal had then been made. But, as I have said, the defendant made no objection to the proofs as rendered, either at the time, or in any part of the correspondence which ensued, nor did the defendant intimate to the plaintiff, at any time or in any way, that it objected to the proofs that they did not contain or have attached thereto such an appraisal.

The damage to Mr. Hamilton's stock, consisting largely of tobacco, was chiefly by smoke.

There began on April 28, 1886, a joint correspondence relative to the loss in question, in which some 12 insurance companies were interested as having policies of insurance covering the property claimed to have

been damaged. The first letter of this correspondence, in and throughout which the several insurance companies acted jointly, jointly addressed, and were addressed by, Mr. Hamilton, was addressed to Robert Hamilton, under date April 28, 1886; and the last letter was addressed to E. W. Kittredge, by J. M. De Camp, general agent, under date of May 7, 1886. Mr. Kittredge, as appears by stipulation in evidence, was the representative of Mr. Hamilton.

It also appears that there was a dispute between the insurance companies and Mr. Hamilton, who claimed a loss of \$30,000 upon the entire property, the value of which, before the fire, he estimated at \$40,000, his claim being that it was damaged largely by smoke. The companies, on the other hand, insisted that the damage was much less than as claimed by Mr. Hamilton. It was out of that difference that the correspondence and the subsequent litigation grew, as well as upon the questions which have arisen upon these policies.

The dispute as to the amount of the loss or damage having arisen, the clause of the policy to which I have referred came into active consideration. Now, there is a rule of law that while it is the duty of the assured to furnish proofs of loss,—which is another form of expression for a formal statement in detail and in writing of the loss, and of the circumstances and particulars thereof, in accordance with the terms and requirements of the policy,—if there be any defect in the form or particulars of the proofs it must be objected to seasonably by the insurance companies, or it will be held to have been waived.

As I have stated, the plaintiff did not make an appraisalment of the value of the goods, and present it as part of his proof, but there was no objection to the proofs upon that ground in the defendant's letter acknowledging their receipt. It was merely an acknowledgment, with the statement that it would be sent forward to the proper authorities; that is, as I understand it, to the home office. Then commenced the joint correspondence, beginning with the letter of the 28th of April, 1886, signed by the agents or representatives of each of the 12 companies which held policies of insurance upon Mr. Hamilton's stock.

That was, in its terms, a joint letter. The companies jointly excepted to the amount of the claim made, and demanded that the question of the amount of the loss should be submitted to competent and disinterested persons, chosen as provided for in the several policies of insurance, and they announced their readiness to proceed at once with this appraisalment. The demand was unmistakably for a single appraisalment, not for separate appraisalments under the several policies, but one appraisalment which was to estimate the entire loss, and to be used in settlement of each and all of the policies. There is an express reservation of all the rights of the several companies, under the terms of their respective policies, in this letter of April 28th, and a request that the reply shall be addressed in the care of the London, Liverpool & Globe Insurance Company, corner of Third and Main streets, which is one of the companies. In answer to that letter came a letter from Mr. Kittredge, as the counsel for Mr. Hamilton, and that was followed by several letters, in each of which there is refer-

ence to a single appraisalment; the whole constituting a negotiation with reference to such an appraisalment and arbitration.

The final result was a disagreement between the parties, Mr. Hamilton insisting upon certain conditions which the companies refused to accede to; the companies, on their part, upon certain conditions which Mr. Hamilton refused to accede to. On the 5th of May the companies, in a letter signed on their behalf by the Liverpool, London & Globe Insurance Company, stated that they felt bound to accept Mr. Hamilton's communication of the day before as a refusal to comply with their request, and with the conditions of the policies of insurance. The final letter, addressed to Mr. Kittredge under date of May 7, 1886, and signed by J. M. De Camp, general agent, states that, if the form of submission to appraisers (which the companies had submitted to Mr. Hamilton on May 3d) contained any provisions or conditions limiting or defining the duties of the appraisers, and not prescribed by the policies, each company would submit its own form, "as we desire and demand a submission free from any conditions imposed by either party." There was no answer to this letter. Mr. Hamilton had, in his letter of May 3d, definitely and clearly declined the arbitration proposed, so that there could be no mistake as to his position with regard to it.

In the case on trial, for the first time in the progress of this litigation, the plea is made by Mr. Hamilton that there was no separate demand for an appraisal or arbitration, but only a joint demand by all the companies.

In the *Liverpool, London & Globe Ins. Co. Case*, 136 U. S. 242, 10 Sup. Ct. Rep. 945, there was a demand by the company for an arbitration, which Mr. Hamilton refused. It was made the day after the close of the joint correspondence. In *Home Ins. Co. Case*, 137 U. S. 370, 11 Sup. Ct. Rep. 133, there was a denial that there had been any demand for appraisalment or arbitration, but the correspondence between the companies and Mr. Hamilton seems to have gone unchallenged. Certainly there is nothing in the argument of Mr. Richards, which is abstracted in the report of the case, nor in the opinion of the court, referring to any controversy on that subject. It is not referred to as a matter in dispute. It seems to have been tacitly conceded that the joint correspondence would sustain the averment that the defendant requested that the amount of loss or damage be submitted to appraisers. Now, for the first time in the history of this litigation, as I have said, the plaintiff makes the point that there was not a demand for an appraisalment according to the terms of the policy in suit, nor any other demand than the joint demand for an appraisalment and arbitration, which would apply to all of the policies.

My opinion is that such a demand cannot be made to serve the purpose of a demand under each of the policies. It was a demand that Mr. Hamilton submit to an appraisalment and an arbitration, which should be conducted on behalf of the twelve companies collectively. One or two of them—the Fireman's especially—were certainly not entitled to make such a demand. The Home Insurance Company was not entitled

to make separately any such demand, and to insist upon a refusal to comply therewith as a bar to an action on its policy. That is what the supreme court decided in the case reported in 137 U. S. and 11 Sup. Ct. Rep., above referred to. It is clear to my mind that the joint correspondence is not sufficient to overcome the denial made in the amended reply. It does not sustain the allegation of the answer that the defendant, the Connecticut Insurance Company, demanded an appraisal or arbitration in accordance with the terms of its policy; and it is not claimed that that company made any separate demand, or had any separate correspondence, with Mr. Hamilton, excepting the receipt of the proofs of loss, and the letter acknowledging the same. It is also clear to my mind that there is nothing in the joint correspondence which amounts to a waiver by Mr. Hamilton of separate demands by the several companies. It may be observed right here that the defendant (and it has been stated by counsel that each of the various companies) granted to Hamilton permission to effect other insurance, and, as he held 12 policies, the companies may have thought that a joint appraisal and arbitration was the only one practicable; and Mr. Hamilton may have so thought, but negotiations for such an appraisal and arbitration were not within the stipulations of any of the several policies, nor did they operate as a waiver of any rights of either party; and, when those negotiations failed, the parties were left as they were when the negotiations began. It is to be remembered, also, that the companies, in the course of the joint correspondence, explicitly declared that they waived none of their rights, and that they proposed to stand upon the conditions of their policies. There is not a syllable in Mr. Hamilton's part of the correspondence indicating any waiver on his part, excepting on the conditions proposed by him, and rejected by the company, and the rejection was the end of the matter.

Now, gentlemen of the jury, the law being that, if there is a formal defect in the proofs of loss to which no exception is taken by the insurance company, that defect is waived, and upon this testimony it being clear to me that there was no such demand on behalf of this company, and that the joint demand cannot be regarded as evidence of a separate demand, or as a substitute therefor, the only course left to me is to instruct you, as I do, to return a verdict for the plaintiff for the amount claimed, with interest to the first day of this term of court, there being no question as to the amount, if it be found that the defendant is liable.

JAMES v. ST. LOUIS & S. F. RY. CO.

(Circuit Court, W. D. Arkansas. February Term, 1891.)

1. FOREIGN CORPORATION—CITIZEN OF ANOTHER STATE.

A corporation becomes a domestic corporation of a state either by a creation of or adoption by such state. A corporation of one state may be made, by appropriate legislation, a citizen of another state. Whenever the effect of state legislation is to adopt a foreign corporation as one of its own, it becomes a citizen as well of the state adopting it as of that to which it owes its original character.

2. SAME—DOMESTIC CORPORATIONS.

As to whether a state has adopted, and thus domesticated, a foreign corporation, is purely a question of legislative intent. When the legislature of Arkansas provided that every railroad corporation of any other state which has heretofore leased or purchased any railroad in this state shall, within 60 days from the passage of this act, file a duly-certified copy of its articles of incorporation or charter with the secretary of state of this state, and shall thereupon become a corporation of this state, it evinces by the language used a clear purpose to make such corporation a domestic one, and, when such articles of incorporation or charter are filed with the secretary of state, such foreign corporation becomes a corporation of the state.

(Syllabus by the Court.)

At Law.

Hinds & Jackson and Clendenning, Mechem & Youmans, for plaintiff.

Clayton, Brizzolara & Forrester, for defendant.

PARKER, J. This is a suit brought by the plaintiff, as the widow of Mathew James. She alleges in her complaint that her husband, Mathew James, was killed in the town of Monett, Mo., by the negligence of the servants of defendant, while said James was in the employ of the defendant as a fireman on one of its engines; that said injury occurred by reason of the defendant's negligent construction of a switch target; that it was so constructed that it struck deceased on the head while he was at work on his engine, and so injured him as to cause his death. Plaintiff alleges that she is a citizen of Missouri; that defendant is a corporation, and as such, in the year 1876, it was organized under the laws of the state of Missouri, and under its powers as such was, before March 13, 1889, operating a line of railway from the town of Monett, in Missouri, to the north line of the state of Arkansas; that before March 13, 1889, defendant, as a Missouri corporation, was operating a line of railway southward from the point at which its Missouri line struck the northern boundary of Arkansas to the city of Ft. Smith, in Arkansas; that said two lines of railway formed together one connected line of railroad between Monett, Mo., and Ft. Smith, Ark., and were then, and ever since have been, operated as one line of railroad; that on May 6, 1889, said Missouri corporation complied with the statutes of the state of Arkansas approved March 13, 1889, and entitled "An act relating to the consolidation of railroad companies, and the purchasing, leasing, and operation of railroads, and to repeal sections one, two, three, four, and five of an act entitled 'An act to prohibit foreign corporations from operating railroads in this state,'" approved March 22, 1887, by filing with the secretary for the state of Arkansas a duly-certified copy of its

articles of incorporation in the state of Missouri; that by so doing, under the act of March 13, 1889, it became a domestic corporation of this state. By these allegations the plaintiff undertakes to show such a state of facts as will make her a citizen of Missouri, and the defendant a citizen of the state of Arkansas, and a resident of this judicial district. To this complaint the defendant filed a demurrer, setting up the want of jurisdiction in this court to try the case, because both plaintiff and defendant are citizens of the same state, to-wit, Missouri, and that therefore there is not such a state of case existing as shows a citizenship of different states which must exist to give a federal court jurisdiction when difference of citizenship is relied on as a ground of jurisdiction.

The question arising on the issue presented by the pleadings is one which requires a consideration of the act of the legislature of the state of Arkansas of March 13, 1889. It is a question of legislative intention, to be deduced from a reasonable construction of the statute. This statute must be read by itself. It is an axiom of construction that an act of incorporation is to be construed strictly. So is this true as to whether an act does incorporate or not. When it is claimed that an act of the legislature has the effect of incorporating a railroad company, before it can be said to have this effect there must be the use of language clearly evincing a purpose to create a new corporation, or to adopt one of another state, so as to make it a domestic corporation of the adopting state. *Goodlett v. Railroad Co.*, 122 U. S. 409, 7 Sup. Ct. Rep. 1254. The supreme court in the same case said:

"Whether a corporation created by the laws of one state is also a corporation of another state, within whose limits it is permitted under legislative sanction to exert its corporate powers, is often difficult to determine."

Prior to the passage of the act of the legislature of the state of March 13, 1889, there can be no question that the defendant was in the state of Arkansas by its permission, and that such act of permission was nothing more than a mere license to do business in the state. So much of the act of the legislature of March 13, 1889, as bears on this question is as follows:

"Provided, further, that every railroad corporation of any other state, which has heretofore leased or purchased any railroad in this state, shall, within 60 days from the passage of this act, file a duly-certified copy of its articles of incorporation or charter with the secretary of state of this state, and shall thereupon become a corporation of this state, anything in its articles of incorporation or charter to the contrary notwithstanding; and in all suits or proceedings instituted against any such corporation process may be served upon the agent or agents of any such corporation or corporations in this state in the same manner that process is authorized by law to be served upon the agents of railroad corporations in this state, organized and existing under the laws of this state."

The first part of the section gives railroad companies in this state the right to sell or lease their connecting lines of road to any company outside of the state, and it also authorizes any such railroad company to buy or lease any connecting line in the state. The proviso set out above shows upon what terms this may be done. The proviso has reference to

railroad companies of other states which have heretofore leased or purchased connecting lines in this state. The defendant comes under this designation, for it came into the state by reason of a purchase by it of the property and franchises of another corporation before the passage of the act of March 13, 1889. As will be observed, it declares, when a duly-certified copy of the articles of incorporation or charter is filed with the secretary of state, it shall thereupon become a corporation of this state. Can a foreign corporation be in this way made a domestic one? The principle is now settled by the courts that a corporation of one state may, by appropriate legislation, be made a citizen of another state. Whenever the effect of state legislation is to adopt a foreign corporation as one of its own, it becomes a citizen as well of the state adopting it as of that from which it obtained its original charter. *Railroad Co. v. Wheeler*, 1 Black, 286; *Railway Co. v. Whitton*, 13 Wall. 270; *Railway Co. v. Vance*, 96 U. S. 450; *Railway Co. v. Alabama*, 107 U. S. 581, 2 Sup. Ct. Rep. 432; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 6 Sup. Ct. Rep. 1094; *Goodlett v. Railroad Co.*, 122 U. S. 391, 7 Sup. Ct. Rep. 1254; *Graham v. Railroad Co.*, 118 U. S. 161, 6 Sup. Ct. Rep. 1009; *Clark v. Barnard*, 108 U. S. 437, 2 Sup. Ct. Rep. 878; *Uphoff v. Railway Co.* 5 Fed. Rep. 545; *Stout v. Railroad Co.*, 3 McCrary, 1, 8 Fed. Rep. 794.

This array of able decisions settles the question of the power of the state to make a foreign corporation a domestic one. As to whether a state has done so in a given case, or merely licenses a foreign corporation to do business in the state, is a simple question of legislative intent. *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 6 Sup. Ct. Rep. 1094. The court in that case said:

"It may not be easy in all such cases to distinguish between the purpose to create a new corporation which shall owe its existence to the law or statute under consideration, and the intent to enable the corporation already in existence under the laws of another state to exercise its functions in the state where it is so received."

And further in the same case the court declared:

"To make such a company a corporation of another state, the language used must imply creation or adoption in such form as to confer the power usually exercised over corporations by the state or by the legislature, and such as a state corporation owes to its creator. The mere grant of privileges or powers to it as an existing corporation, without more, does not do this, and does not make it a citizen of the state conferring such powers."

If this defendant is a corporation of the state, it is not so by creation, but by adoption. Is the language of this statute sufficiently clear and explicit to give the defendant the *status* of a domestic corporation? I think the language is express. It says when a certain thing is done by a railroad company which has heretofore purchased or leased a connecting line of road in this state, to-wit, the articles of its incorporation or charter is filed in the office of the secretary of state, that it becomes a corporation of the state. This is the expression of a purpose so clearly, so expressly, as to leave nothing for construction. All that is to be done

with this language is to give it a strict and reasonable interpretation, that its meaning may be ascertained. When such interpretation is so given it, we must be convinced that it is sufficiently clear and explicit to evince the purpose of the legislature of the state to domesticate the defendant corporation by adoption; that its action, as affecting defendant company from its *status* when its act was passed, is something more than a mere license to defendant to do business in the state. The legislature having the power to do this, it being conceded that defendant has filed its charter with the secretary of state, and the legislature by apt and appropriate words having shown an intent to make defendant a domestic corporation, we must conclude that to be its *status*. This being so, the effect is to make it a citizen of Arkansas, and a resident of this judicial district, and, the plaintiff being a citizen of Missouri, the requisite citizenship to enable the plaintiff to maintain this suit in this jurisdiction exists. The position that the act of the legislature was in conflict with article 12, § 11, of the state constitution, is not, in my judgment, well taken. The demurrer to the jurisdiction will therefore be overruled.

SWITZER *et al* v. HOME INS. Co. *et al*.

(Circuit Court, S. D. Mississippi, W. D. January Term, 1891.)

COSTS—TAXATION—ATTORNEY'S FEES.

Where several suits by the same firm against different insurance companies, to recover for a fire loss, are by agreement submitted to referees to fix the value of the property destroyed, and to render a final award, and the referees give judgment against the insurance companies for a certain amount and costs, it is proper to allow as costs an attorney's fee of \$20 in each of the original cases, under the statute allowing such fees to be taxed in each case tried by a jury or submitted to referees.

At Law.

Miller, Smith & Hirsh, for plaintiffs.

M. Marshall and *Harry H. Hall*, for insurance companies.

HILL, J. The questions presented for decision arise upon defendants' motion to retax the attorney's fees as part of the costs in these causes. The facts out of which this controversy arises are as follows: The plaintiffs are merchants doing business in the city of Vicksburg, and were carrying a large and valuable stock of dry goods in the year 1889. To provide against accident by fire, they applied for and obtained policies from said companies, 11 in number. On the 24th day of December, 1889, all of the stock of merchandise so insured was accidentally destroyed or damaged by fire without any fault on their part. Plaintiffs made out and delivered proof of loss as required by the policies. Plaintiffs and defendants severally disagreed as to the amount of loss, and defendants severally refused to pay the sums demanded. Whereupon

plaintiffs brought suit against defendant companies severally, in this court, triable at the present term. On the first day of the term the parties entered into a written agreement, by which the question as to the value of the property destroyed and injured by fire was submitted to three referees, including the presiding judge of the court, to whom all questions of law and of the admissibility of testimony was alone referred, and whose decision was to be final. The referees heard a large number of witnesses and other testimony, with extended arguments of counsel on both sides, and made, in writing, an award, fixing the loss so sustained at \$83,000; which it was agreed should be final, and should be distributed between the said defendant companies according to the amount of the respective policies, and judgment should be rendered against them, with costs, respectively, which was done. The clerk, in taxing the costs, taxed \$20 in each case as attorney's fees. The defendants contend—*First*, that as the cases were all heard together, but one tax should be allowed against all the defendants, to be taxed against them *pro rata*; *second*, that, if this is not so, yet only \$10 should be taxed against each defendant, and then \$20 should be prorated between them.

There has been some want of uniformity in the rulings of the different courts on the allowance of attorney's fees, but, as there is no case to which I have been referred in which the facts are similar to those in this case, they need not be considered, under the view I take of this question, as presented in relation to the facts in this case. These suits were altogether separate and distinct until the agreement of reference was made, and which was necessary, in order to ascertain the amount of the judgment to be entered against each defendant company. The Revised Statutes of the United States allows an attorney tax fee of \$20 in each action at law tried by a jury or submitted to referees, and \$10 on each judgment had without a trial by a jury, or found by the award of referees. In this case the judgments, respectively, were had upon the award of the referees, the submission to the referees, and their award, or a verdict by a jury, being necessary to ascertain the amount of the judgment to be entered in each case. The contention of defendants is that there was but one hearing and one award, and that consequently but one counsel fee should be taxed.

I am of the opinion that the agreement was for the purpose of saving time and labor on the part of the parties, counsel, and court; also to save costs of witnesses and other costs, and not attorney's fees; and also to make the award final and conclusive. All the cases were before the referees, and the parties received the same benefit from the award that they would have done had the question as to the amount of the loss been considered separately. This is a different case from one in which there is no finding by the jury or referees, and then an after-agreement that other cases should be regulated by it. Without further comment, I am satisfied that an attorney's fee of \$20 should be taxed in each case, as it is no more than would have been properly taxed had each case been separately submitted. The motion of defendants is overruled.

In re MONROE.*In re* MARQUANDT

(Circuit Court, W. D. Arkansas. February Term, 1891.)

1. HABEAS CORPUS—JURISDICTION.

When it is alleged in a petition for a writ of *habeas corpus* that by the action of a judge of a police court of a city a person has been deprived of his liberty without due process of law, and consequently against the constitution and laws of the United States, the federal court, or judge thereof, has jurisdiction to issue a writ of *habeas corpus*.

2. SAME—DUE PROCESS OF LAW.

A person is deprived of his liberty without due process of law when he is restrained of it by virtue of an order or judgment or commitment made or issued by a police judge of a city or town without legal authority, or beyond his jurisdiction to make or issue the same.

3. CONTEMPT—POWER TO PUNISH.

A court of a justice of the peace, or a court of a police judge of a city or town, has, as a necessary incident to its existence, the power to punish for such contempts committed in its presence as have a tendency to produce disorder that may prevent and interrupt the orderly proceedings of such court. Such courts also have the incidental powers to punish executive officers of their courts for disobedience of, or refusal or failure to obey or execute, lawful process issued by them. Such powers belong to them because necessary to their very existence, and to enable them to perform their duties as such courts.

4. SAME—POWER OF POLICE JUDGE.

The police judge of the city of Ft. Smith has the power, by virtue of the statutes of the state, to punish for contempt in the cases above named; but to authorize it, either under its statutory or incidental power, to punish an officer for failing or refusing to execute a process of commitment issued by it, such process must be legal.

5. PARDON—VIOLATION OF CITY ORDINANCE.

The mayor of the city of Ft. Smith has the right, under the ordinance of the city, to pardon a person for a violation of a city ordinance when certain conditions exist. One of these is that the physical condition of a person is such that a confinement would endanger the life of such person. Under this authority to pardon, the mayor is the sole judge of the existence of the condition which gives him the right to pardon. Unless he acts corruptly, his action is final. In the absence of any showing to the contrary, the court will presume the mayor acted in good faith.

6. SAME—EFFECT.

The pardon of the mayor destroys the offense of which a party is convicted, and the police judge cannot in such case order a person committed, and a police officer may legally disobey a commitment issued in such case by the police judge without being in contempt of the police court.

Application for *Habeas Corpus*.

Clayton, Brizzolara & Forrester, for petitioners.

R. E. Jackson, for respondent.

PARKER, J. The facts as set up in this complaint, and not denied, are that on the 11th day of November, 1890, Amanda Marquandt was brought before Judge MURPHY, as police judge of the city of Ft. Smith, Ark., and fined in the sum of \$5 for misdemeanor, and costs amounting to \$1.50 were assessed against her; that at the time of her conviction no commitment or process of law was issued for her, and that no formal sentence against her was entered of record at that time; that on the evening of November 11, 1890, before, as alleged in this complaint, process of commitment had been issued, Mr. Baker, mayor of the city, ordered

Amanda Marquandt released from custody on the payment of costs, and that after the \$1.50 costs was paid the mayor ordered her discharged from custody upon the representation made to him by the said Amanda Marquandt that she was, and had been, in ill health, and that confinement in the city jail for the non-payment of the fine and costs would endanger the life of the aforesaid Amanda Marquandt; that on the 12th of November, 1890, Judge MURPHY of the police court handed to Mr. John Kennedy, chief of the police of Ft. Smith, a commitment for the said Amanda Marquandt; and that this commitment was returned unexecuted by the chief of police, for the reason that the said Amanda Marquandt had been discharged from custody by order of the mayor. Thereupon Judge MURPHY of the police court issued another warrant of commitment, which was directed to Mr. Robert Monroe, a police officer of the city, but Mr. Monroe refused to execute the process, and that on the 15th day of November, 1890, Judge MURPHY of the police court assessed a fine of \$25 against the said Monroe for contempt of court in refusing to execute the process of said court, and issued a warrant of commitment upon the 15th day of November, 1890, committing said Robert Monroe to the city jail or prison for a period of 25 days. In the petition it is substantially alleged that the judge of the police court had no authority to commit said Monroe to jail, for the reason that he had a lawful right to refuse to execute the process put in his hands for the commitment of this woman, Mrs. Amanda Marquandt, for the reason that the mayor had pardoned the woman at that time, and that there was no longer any offense existing against her for which she could be committed, and that the process of commitment was therefore illegal, and the officer could not be punished for contempt in refusing to execute it. In the complaint it is alleged that the petitioner, Robert Monroe, is held in custody by the jailer of the city without authority of the laws of the state, and without due process of law, and that he is therefore restrained of his liberty contrary to the constitution and laws of the United States.

The very first question that meets us upon the threshold of a case where a writ is issued which may affect proceedings of the state court is, does the federal court have jurisdiction to issue a writ in behalf of the liberty of a citizen who is alleged to be illegally restrained? How far may the federal court go in its investigation of the legality of the process, which, as is alleged, is in restraint of the liberty of a citizen of the state, or of the United States? There seems to be a misconception in the public mind as to the power of the federal court in this regard, and it is a mystery in my mind how that misconception can exist in the face of the constitution and laws of the United States. There is no invasion of any prerogative or power of the state by the exercise of jurisdiction of this kind, because there is no prerogative that belongs to any state, nor is there any power or jurisdiction in a state to deprive any citizen of liberty without due process of law. The constitution of the United States, by the first section of the fourteenth amendment, provides that: "Nor shall any state deprive any citizen of life, liberty, or property without due process of law." When a citizen is deprived of any of these rights, the

power of the United States can be invoked in behalf of the citizen. The constitution of the United States, by its own terms, erects an insurmountable barrier against any state or federal authority that can be exercised to restrain the liberty of a citizen without legal warrant. It matters not whether it is done under color of state authority or national authority; it is a restraint of liberty that is unwarranted, and the authorities upon that subject are abundant, and some of them are cases very similar to this. That which is a part of a state has of course no higher power than a state. A municipal government is carved out of a state, and is a part of the state machinery. Wherever there is an inhibition against a state doing a thing, the supreme court of the United States in many cases has held that the inhibition goes against any part of the legal machinery of the state, as well as against the whole of it. In California in the case that is recognized as the *Stockton Laundry Case*, 26 Fed. Rep. 611, it was decided that a party who was held in custody for a violation of a city ordinance which is in conflict with the fourteenth amendment to the constitution is entitled to be discharged on *habeas corpus*; and in the *Laundry License Case*, 22 Fed. Rep. 701, it was held that, under the Revised Statutes of the United States, §§ 751-755, federal courts have jurisdiction of *habeas corpus* proceedings in the case of one imprisoned without due process of law under an invalid city ordinance. In a comparatively recent case decided by Judge GRESHAM (*Ex parte Perkins*, 29 Fed. Rep. 908) it is declared:

"An order or judgment of a court, acting within its jurisdiction, punishing a party or other person for contempt of its authority, cannot be reviewed or annulled by another court; but if a court having no jurisdiction over the parties or the subject-matter before it sentences a party, a witness, or any other person to imprisonment for contempt of its authority, the person thus illegally deprived of his liberty may be released by any court authorized to issue writs of *habeas corpus*."

The court in that case refers to a great many other cases, but the doctrine is so well enunciated that it is hardly necessary for me to refer to them.

The next question is as to the power of the police court. This is a question of some little difficulty, because of the confusion of the statutes upon his power. The question is, does he have the right, in the first instance, to commit for contempt of court? This kind of contempt is called and recognized by the law of contempt as a civil contempt,—a disobedience of the process of a court, as is claimed, by an officer of that court, whom that court had a right to command to perform a certain duty. There is a great diversity among the authorities upon the powers of courts of this character. Justice of the peace courts and municipal courts have the power, as a necessary incident to their existence, to punish for certain kinds of contempt. I believe that, without any statutory authority upon the subject, magistrates' courts and municipal courts, while they are inferior courts, and not courts of record, unless made so by a declaration of the statute, (and we will come to that presently,) have an incidental power upon this subject of contempt that goes with

their very existence, and is necessary to it. That incidental power goes to the extent of giving them the right to punish for contempts committed in the face of the court, if necessary to preserve order; and especially does it go to the power to punish for disobedience upon the part of an officer of that court to the lawful order of that court. Suppose, for example, a magistrate issues an execution, and delivers it to a constable who is an officer of that court, and such constable says, right in the face of the court, "I will not serve it." If the court does not have the power to punish for contempt, it is in a pitiable condition, sitting there without any authority whatever to enforce its lawful judgment. There is a distinction between the general power to punish for contempt, and the power to punish because the punishment is necessary to the very existence of the court. It may, however, be remarked, according to my judgment, that the allusion to this incidental power of the court is not necessary in this case, as we will see presently. In a note to *Clark v. People*, 12 Amer. Dec. 178, the author, speaking with reference to the class of contempts I have named, says:

"But the sounder opinion is that this power of punishing contempts is possessed equally by all courts, whether of superior or inferior grade, and whether of record or not. The foundation of the power is the obvious necessity that a court should have some summary means of self-protection from insult, disorder, and disobedience of its process. And this necessity is just as strong in inferior courts as in those of higher jurisdiction. Indeed, there would seem to be even greater reason why a justice's court should be able to vindicate its dignity and the orderly progress of its business by some prompt and efficient punitive power than for a superior court to possess this authority. Courts of higher grade usually find ample protection from offensive or disrespectful conduct in the fact that those who preside there have secure shelter in the public esteem in which they are held for their integrity, learning, and ability. Their worth and character enforce respect without resorting to the coercive sanctions of the law. But it is not so with justice's courts. Their weakness and obscurity, and the ignorance and inexperience which are too often displayed there, invite insult."

Further on in the same note the author says that in an opinion in a noted case the court remarked:

"The power to punish for contempt is inherent in the nature and constitution of a court. It is a power not derived from any statute, but arising from necessity; implied because it is necessary to the exercise of all other powers. It is indispensable to the proper transaction of business. It represses disorder, violence, and excitement, and preserves the gravity, tranquility, decorum, and courtesy that are necessary to the impartial investigation of controversies. It secures respect for the law by requiring respect and obedience to those who represent its authority. Its exercise is not merely personal to the court and its dignity; it is due to the authority of law and the administration of justice."

Further on in the same note it is remarked:

"The power to punish for contempts is indispensable to the proper discharge of their duties by magistrates. Without it the magistrate would be in a pitiable condition, compelled to hold court, investigate controversies, examine witnesses, and listen to arguments, and yet powerless to secure order in his proceedings, to enforce obedience to his decisions, to repress turbu-

lence, or even to protect himself from insult. The mere power to remove disorderly persons from the court-room would be wholly inadequate to secure either the proper transaction and dispatch of business, or the respect and obedience due to the court, and necessary for the administration of justice."

Further on in the same note we find the following:

"Mr. Bishop remarks [2 Bish. Crim. Law, § 263] that the opinion 'may perhaps be well founded' that a justice's power to punish contempts is limited, as mentioned in some of the cases already referred to, to cases where the offense is committed in the magistrate's presence, while holding court. The learned author, however, does not seem entirely satisfied with the correctness of that limitation. Nor is it easy to discover any solid reason for such a limitation. Why, for instance, should not a witness be punished for contempt for disobeying a magistrate's subpoena, as in *Robb v. McDonald*, 29 Iowa, 330? Or why should not an attachment issue for a juror, who, after retiring from the magistrate's presence to consider the case with his fellows, separates from the rest of the jury, and departs without leave, as in *Murphy v. Wilson*, 46 Ind. 537? Are not acts such as these as obstructive of the business of a justice's court as any conduct of which a party could be guilty in the presence of the magistrate?"

A juror in such a case as that would be constructively in the presence of the court. It seems to me that, outside of the statute of the state upon that subject, there is an inherent power to compel obedience to the process of the court upon the part of a legal officer of that court; and, while there was something said in the discussion as to whether Mr. Kennedy, as chief of police, and the policemen as his subordinates, were officers of that court, construing the whole statute together, I think they must be held to be officers of that court. Here is one section which provides that the chief of police shall obey the orders of the mayor, and shall attend his court, etc., while it is necessary. While it is recognized that there is no mayor's court provided for by this statute, yet if you take that in connection with the other sections you must consider the chief of police and the policemen officers of the police court. This much as to his incidental power to punish for contempt.

The statute of the state makes his court a court of record. It is declared expressly by the statute to be a court of record. "Every police court shall have a seal, and shall be deemed a court of record. Said seal shall be provided by the city council, with the name of the state in the center, and the words 'Police Court' around the margin." That is the declaration of the statute as to the *status* of that court, and I am disposed to treat the court as a court having the *status* provided for by that statute. What power has a court of record in regard to punishing for contempt? The statute gives that power:

"The general assembly shall have power to regulate by law the punishments of contempts not committed in the presence or hearing of the courts, or in disobedience to process. Every court of record shall have power to punish, as for criminal contempt, persons guilty of the following acts: *First*. Disorderly, contemptuous, or insolent behavior committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority. *Second*. Any breach of the peace, noise, or disturbance directly tending to interrupt its proceed-

ings. *Third*. Willful disobedience of any process or order lawfully issued or made by it."

There is the power to punish for contempts, given by the statute, and my judgment is, as far as the condition of this police court is concerned in regard to the punishment of contempts, it is precisely the same as any other court of record. It is made a court of record. Now, the question is, if at the time that the police judge issued this process for the commitment of Robert Monroe, he could issue a lawful process for his commitment. Under this statute, if the process was illegal—if it was unlawfully issued—he could not commit him for contempt. It seems at the time that he issued this process that the mayor had intervened, and had done what he asserts amounted to a pardon of this woman for the offense of which she was declared guilty by the police court, and the mayor claims that authority under the act of the council passed the 30th of August, 1888, which is as follows:

"Section 1. That the mayor shall hereafter have the authority to discharge any person from the city prison confined for the non-payment of a fine for the violation of an ordinance, when the physical condition of such person is such that a confinement would endanger the life of such person, or the life or health of any other person confined in such prison; or when it shall appear by affidavit that new and material evidence has been discovered since the trial, tending to show the innocence of defendant, which could not have been obtained by the defendant at the trial, or was unknown to him at the time, and when such discharge shall be recommended by the police judge.

"Sec. 2. He shall have the authority to reduce any fine imposed for a violation of an ordinance, when the police judge shall recommend such reduction.

"Sec. 3. He shall also have the power to reduce the sentence of the defendant for good conduct without the written recommendation of the police judge."

As far as the case of this woman, Amanda Marquandt, is concerned, it becomes necessary to only allude to the first section, which gives the mayor, among other things, the power to pardon when the life or health of any person confined in such prison would be endangered by such confinement, or if the confinement would endanger the life of such person confined. It is alleged in this petition that that was the ground upon which the mayor acted, and that is not denied. Of course, if the mayor has the power to pardon, the court must presume, in the absence of anything to the contrary, that he exercised that power in good faith. If that power had the effect to destroy the offense, and eliminate it from existence there was no longer any power to hold her in custody. The case of *U. S. v. Kein*, 13 Wall. 128, decides that a pardon blots out the offense, and removes all its penal consequences. That is the effect of a pardon. It seems to me that under this ordinance the mayor had the power to pardon upon the existence of a certain condition, and that was that the health of the party was of such a nature that the imprisonment would endanger the life of such party. That is one of the conditions. The other condition is that it would endanger the lives of other persons. That is, of course, intended to apply where the party imprisoned has a contagious or infectious disease. Who is the judge of that? Who is to exercise a discretion upon that? The power which can par-

don, as a matter of course; and, as long as that power exercises a sound discretion, although it may be a mistaken exercise of it, this or any other court cannot interfere. That is my judgment of the power of the mayor. He had the power to exercise that discretion. Although he may have exercised it unwisely, unless he did it corruptly, or for a corrupt purpose, the courts could not well go behind his act. But there is no allegation that he exercised it corruptly. It is not claimed. It is claimed, perhaps, in argument, that he exercised it in a mistaken manner; but that he exercised it honestly is conceded. Although mistakenly exercised, it is a power that he had a right to exercise, as far as this court is concerned. The exercise of the power in issuing the warrant for the commitment of Robert Monroe for contempt was obtained from the statute that gives this power to punish for contempt. This statute declares that for willful disobedience of any process or order lawfully issued or made by it every court of record shall have the power to punish, as for criminal contempt, persons guilty of such acts. If the mayor had the power to pardon, and if he had exercised that power at the time of the issuance of this process, then there was no power in the police court to lawfully issue process for the commitment of the woman, because the offense had been blotted out. All the penal consequences of that offense had been removed by the act of the mayor, and it is the conclusion of this court upon that branch of the case—*First*, that the mayor had the power to exercise the authority that he did exercise in this case; *second*, that if he did exercise it, as far as any issue in this case is concerned, the court presumes that he exercised it in good faith, and the penal consequences of that offense entirely disappeared, and there was no longer any power in the police court to hold this woman in custody for the non-payment of that fine; nor was there any longer power to compel the officer of that court to execute any process of that kind, because the process must be lawful,—he must have a lawful right to issue it.

Another point: The warrant committing Robert Monroe to jail committed him for a period of 25 days. This statute provides that courts shall have power to punish for contempt, and that punishments for contempt may be by fine or imprisonment in the jail of the county where the court may be sitting, or both, in the discretion of the court; but the fines shall in no case exceed the sum of \$50, nor the imprisonment 10 days. If there was no limitation of the power of the police court, it would have the power to commit for an unlimited time, until the fine assessed was paid; but this limitation of 10 days must be considered to be a limitation upon the power of that court, as well as any other court, as far as their commitment to the jail is concerned. They can commit for that time, and no longer; and, under this limitation clause, the court holds that, if he had the power to commit at all, he could not have committed for longer than 10 days. That would be a condition that would give, in this instance, this court jurisdiction to apply the writ of *habeas corpus*, because that is the exercise of authority beyond the jurisdiction of the court, outside of the laws of the state, and consequently amounts to a restraint of liberty without due process of law, because there is an

inhibition against the exercise of the law of the state to that extent in that kind of a case. And for these reasons, while the court holds that the police court had the authority to punish for contempt, by imprisonment or fine, when committed in the presence of that court, or by disobedience to a lawful order of that court, yet it must be held that in this case it had no right to exercise this power, because the offense that the party had been found guilty of had disappeared,—had no longer an existence. The mayor had wiped it out by his action, and the court holds that under this ordinance he had a right to exercise that authority, and the order will have to go discharging Mr. Monroe from custody; and the same principle that has been enunciated will apply to the case of Mrs. Marquandt, as she has been pardoned, and the court had no longer any authority to hold her in custody, and she also is entitled to a release.

In re LEE.

(District Court, D. Mississippi. March 14, 1891.)

CONCEALED WEAPONS—DEPUTY-MARSHAL IN DISCHARGE OF HIS DUTY.

Petitioner, a United States deputy-marshal in Tennessee, while in the town of Corinth, just across the line in Mississippi, learned that one B., for whose arrest he had a warrant, was at another point on the railroad. Being without arms, and knowing the reputation of the accused as a dangerous character, he borrowed a pistol, and belted it on under his overcoat. While waiting for the train, he learned that the accused had returned to that neighborhood, and determined to immediately go in search of him. During the evening, after he had abandoned the idea of going on the train, he was arrested in Corinth, on the charge of carrying concealed weapons, but action was deferred upon the presentation of his commission as a deputy-marshal and the warrant which he had to execute, and he was released. He immediately went in search of the accused, but stopped over night at his own house, and started again at daylight, and continued his search that day, making the arrest upon the day after. Subsequently he was again arrested for the same offense, brought before the mayor, who fined him, and that judgment was sustained by the state circuit court on appeal. *Held*, on a petition for *habeas corpus*, that he was an officer of the United States in the regular discharge of his duty, notwithstanding his stop for a night's rest at his own home, and was entitled as such to be armed, and that he must be discharged.

On Writ of *Habeas Corpus*.

M. A. Montgomery, for relator.

Sullivan & Whitfield, for the State.

HILL, J. This cause is submitted upon petition of relator; return to the writ by J. P. Walker, sheriff of Alcorn county, to whom the writ was directed; answer or suggestions to the return by the relator; proof and argument of counsel for the relator; and for the state of Mississippi. The petition of the relator upon which the writ was issued, in substance, charges that, at the time he was charged with a violation of the laws of the state of Mississippi, by carrying about his person concealed a pistol, and upon which he has been arrested and convicted by a jury in the circuit court of Alcorn county, and upon which he has, by

the judgment of the court, been held to pay a fine of \$50 and costs, and to remain in the custody of the sheriff of Alcorn county until the same is paid, and was, at the time of presenting his petition, confined in the jail of said county, and is a deputy-marshal of the United States for the western district of Tennessee; that at the time of his arrest he had in his hands to be executed a warrant issued by the commissioner of the United States court for West Tennessee, commanding him to arrest one Frank Bowers for a violation of the postal laws of the United States, committed in the western district of Tennessee; that he was on his way to execute said warrant, and had the pistol on his person to protect himself, and enable him to make said arrest, and for no other purpose; and that he had the right, under the constitution and laws of the United States, to carry about his person a pistol for the purposes stated; and that his conviction and imprisonment is a deprivation of his personal liberty, contrary to the constitution and laws of the United States. The return of Walker, the sheriff of Alcorn county, is that he held the relator in custody by virtue of a *mittimus* or execution *pro fine*, issued by the clerk of said circuit court upon said judgment, which writ is made part of the return. The relator does not deny the facts stated in the return, but, by way of answer or replication to the return, in substance states the following facts: That on the 20th day of December, 1890, before that time and since, he was, had been, and is a deputy-marshal of the United States, duly commissioned and qualified, and had, at the time, in his hands for execution, a number of warrants for the arrest of persons charged with violations of the laws of the United States, and especially for the arrest of said Frank Bowers, charged with violating the postal laws of the United States; that the said Frank Bowers had fled from his home, so that relator did not know his whereabouts, until he went to the city of Corinth, on the morning of the 20th of December, 1890, Corinth being his post-office where he receives the most of his mail, when he received a letter informing him that Frank Bowers, for whom he had been searching, was in Kenton, on the Mobile & Ohio Railroad, some 100 miles north of Corinth; that he determined to take the train for Kenton on its arrival, and knowing Bowers to be a dangerous man, and having no pistol or other weapon to defend himself, or to aid him in making the arrest, he borrowed a pistol from one of the deputy-sheriffs of Alcorn county, which pistol was in a scabbard, which he belted around his body under his overcoat; but whilst waiting for the train he was informed that Bowers had returned to McNairy county. Upon receiving this information, relator determined to go immediately in search of and to arrest him; that in doing so he would pass from Corinth within a half mile of his own home, to the place where he expected to find him; that on that evening he did go directly to make the arrest, arriving late at night at home, it being only about a half a mile out of the direct route, and that he left the next morning by daylight, went immediately in search of Bowers, continued his search during the day, and, after having tracked him 12 or 13 miles, found and arrested him, the following day, it being Monday, and delivered him to the commissioner, who is-

sued the warrant. This is the substance of all that need be stated in the pleadings, if such they may be called.

The proof sustains the statements made in the answer or replication. The proof, among other things which need not be stated, shows that during the evening, after the relator had abandoned going on the railroad, and before leaving Corinth, the mayor of the city discovered the pistol on the person of the relator, and ordered the marshal of the city to arrest and bring him before him to answer the charge of violating the law of the state of Mississippi prohibiting carrying concealed weapons, which was immediately done, when relator gave as his defense that he was a regular deputy United States marshal, and produced his commission as such, and also process which he had to serve. The mayor, not being satisfied whether this was a sufficient defense, deferred action for the time. But on the 3d day of January thereafter, the relator having in his possession to be executed a warrant for the arrest of certain persons charged with robbing a post-office, in McNairy county, Tenn., pursued them to Corinth, where one of them was arrested by a deputy-sheriff, and conveyed to the commissioner, who committed him to jail; and, while relator was in Corinth, on this business, he was again arrested, and taken before the mayor, who fined him \$25 and cost upon the said charge. From this judgment the relator appealed to the next term of the circuit court of Alcorn county. On the trial in said court the relator offered to introduce proof of his defense, which was denied by the court, and the jury was instructed, in substance, that if the relator (the defendant in that case) carried a pistol concealed about his person, in the county of Alcorn, he was guilty of a violation of the law, and they would find him guilty, which the jury did; and thereupon he was adjudged to pay a fine of \$50, and all costs, and stand committed until the same was paid; that in default of payment he was imprisoned in the jail of said county, from which imprisonment he seeks by this proceeding to be released.

I have no power, and I do not assume, in this proceeding, to review or pass upon the proceedings had before the mayor, or in the circuit court. If errors were committed in those proceedings, they can be inquired into no further than is necessary to ascertain the merits of this *habeas corpus* proceeding, and if it appears from those proceedings that the relator was, by them, deprived of some right he then had under the constitution and laws of the United States, as one of their officers, and was thereby deprived of his personal liberty, if he was so deprived, the proceedings before the mayor and in the circuit court will be held absolutely void; but, if he was not so deprived of his personal liberty, then neither I, as United States judge, sitting in chambers, nor any court of the United States, can in any way interfere with the judgment of the circuit court of Alcorn county, or any proceeding under it.

It is well settled in the case of *In re Neagle*, 10 Sup. Ct. Rep. 658, recently decided by the supreme court of the United States, and by the numerous decisions of that court, referred to in the opinion of the court, that it is the duty of the several judges and courts of the United States

to relieve, by writ of *habeas corpus*, any of the officers of such courts, or of the United States, when imprisoned under proceedings in the state courts, or by state officers, when such officers of the United States are obeying any order or process of such judge, commissioner, or court of the United States, and when the officer of the United States is in the performance of any duty in obeying or executing any such order, decree, or process; and any judgment or proceedings had in a court of the state against such officer, for anything properly done by him in the discharge of such duty, is absolutely null and void; and, if he is deprived of his personal liberty for such discharge of official duty, by any proceedings had in the courts, or by the officers of the state, the judges of the United States courts, in chambers, or the district or circuit courts in session in the district or circuit in which such officer is so wrongfully deprived of his personal liberty, will relieve him upon *habeas corpus* proceedings.

The only questions to be decided in this cause are, was the relator in the discharge of his official duty as deputy-marshal for the western district of Tennessee when he was informed of the probable whereabouts of Bowers by the letter he received in Corinth, and determined to pursue and arrest him wherever he could be found? And did he have a right, as a means to defend himself and to aid in making the arrest, to, then and there, arm himself with the pistol, if he was in the discharge of such duty; and, having, then and there so armed himself, had he the right to carry the pistol with him for the purpose mentioned? If so, then, under the constitution and laws of the United States, he must be held by the judges and courts of the United States as entitled to these rights, as against the proceedings had against him by either the mayor of Corinth, or in the circuit court of Alcorn county, stated in the proceedings and proof, and must be released from the custody of the sheriff of said county under the proceedings before me. It is contended with great earnestness by the learned counsel on the part of the state that the relator had no power, under any circumstances, to make any arrest in this state for a violation of the laws of the United States in the western district of Tennessee, and especially the person for whose arrest he then had process in his hands. This, I think, is a mistake. Section 788 of the Revised Statutes of the United States provides "that the marshals and their deputies shall have in each state the same powers in executing the laws of the United States as the sheriffs and their deputies in such state may have by law in executing the laws thereof." Section 3034 of the Mississippi Code of 1880 provides "that if a person who committed an offense, and is pursued by a sheriff or constable, escapes from the county of such officer, he may pursue and apprehend the party charged in any county of this state, and take him to the county in which the offense was committed;" and I presume every other state has a like provision, which is a matter of necessity to prevent the escape of persons charged with crime; and, reasoning by analogy, the marshals' districts being compared to the counties in the states, I can see no reason why the same rule shall not prevail, there being the same reason for

its exercise. If a marshal of the United States, pursuing one charged with crime for violating the laws of the United States, is compelled to stop at the line of his district when in pursuit, and let the culprit go free, then, indeed, there would often be a failure of justice, certainly never contemplated by congress. Some powers are expressly given to officers, while others are necessarily implied, as it seems to me must be the case when the offender is pursued by the marshal; and if Bowers had fled into Mississippi, while being pursued by the relator, as was the case in pursuing Cagle a short time afterwards, in my opinion he might have lawfully arrested him in Corinth under the process in his hands. But in this case that rule does not apply, which leaves the question as first stated.

That the relator was a deputy-marshal of the United States while he was in Corinth, and that he then had the warrant in his hands to be executed, is admitted. That he had the right to go to Corinth, his post-office, although in another state, cannot be denied. That he received notice first by letter that Bowers was then in the neighborhood of Kenton, 100 miles away, is proven. What was his duty as such marshal? Evidently to go there and arrest him. But he knew him to be a dangerous man, a refugee from justice, supposed to be among his friends, and strangers to the relator. What was, then, not only his right, but his duty as well? Unquestionably to arm himself to enable him to protect himself, and enable him to make the arrest. He had no arms with him. Was he compelled to wait until he crossed the state line to procure a pistol, and then to stop off somewhere on the way where he might not be able to procure one? Certainly not. I therefore conclude that he had the right to procure the pistol for the purpose and under the circumstances stated. While waiting for the train he learned that Bowers had returned to McNairy county. What was then his duty as marshal of the western district of Tennessee, having the warrant for the arrest of Bowers in his hands? It was evidently to go and arrest him in his district, wherever to be found. He had the pistol in his possession for the purpose of defending himself if attacked while in the discharge of his duty, and to enable him to make the arrest. Did the fact that the information received made it necessary to take a different route from the first contemplated make it less necessary that he should proceed and make the arrest, or less necessary that he should go armed to enable him to execute the process in his hands? Certainly not. But it is contended that the presumption is that he had a pistol at home, and should have returned the one he borrowed, and waited until he got home to get one. The proof is silent as to whether he had one at home or not; but, in the absence of the proof, it will be presumed he had not. Besides, the state line is but three and a half or four miles from Corinth, where he would be in his own district, and might before reaching home meet with Bowers. But it is insisted, also, that he should have left Corinth immediately, but that, on the contrary, he ordered his horse shod, and waited for it to be done; and that in the mean time he bought an overcoat, and that he gave a neighbor some assistance in the sale of a

bale of cotton; that he settled a dispute between his son and a man about the number of some chickens sold by the former to the latter; that he waited for his sons until the balloon was raised, which they had gone to witness; that he stopped at his home, (which was on the direct way from Corinth to where he expected to find Bowers,) and remained until daylight next morning. Were these delays unwarrantable? I think not. The proof shows that he arrived late at night, and set out at daylight next morning, and spent the day in search for Bowers, and, after following him 12 or 13 miles, made the arrest, and had Bowers before the commissioner in another county on the next day. He was not under obligations to go without food until he made the arrest, or without sleep; and where better to get it than at home? The proof shows that the relator is a sober, peaceable, upright man, and that he properly conducted himself while in Corinth, and that he wore the pistol in the same way that peace-officers usually wear them.

Without further comment, I am satisfied that relator was in the discharge of his official duty from the time he determined to go from Corinth in the pursuit of Bowers; that in going from Corinth to Tennessee line he was as much in discharge of his official duty as after he crossed the state line, or when he made the arrest of Bowers; and that he was as much under the protection of the constitution and laws of the United States, during that time, as after he crossed the state line, as one of the officers of the United States; and that he is entitled to be discharged under these proceedings from the imprisonment imposed upon him. I exceedingly regret to do anything which interferes with the proceedings in the state tribunals; and I will further say that I am satisfied that, had the real facts been understood, this conflict would not have arisen. The facts in this case are different from those in any reported case, and it may, indeed, be considered as a case of first impression, and one about which there may well be a difference of opinion among those most desirous to do justice and maintain the laws, state and national. It has been my misfortune, during my 25 years on the federal bench in this state, to have before me a number of cases of first impressions, in which I have had little or no aid from prior adjudications, and in these I have had to rely upon what appeared to me to be common justice and right. Being satisfied of the correctness of the conclusion reached, I have but one duty to perform, and that is to order the release of the relator from the imprisonment imposed upon him.

UNITED STATES *v.* SIMMONS.*(Circuit Court, S. D. New York. January 17, 1891.)*

1. INDICTMENT—FINDING—MOTION TO QUASH.

The fact that the grand jury, after voting not to find an indictment, but, before reporting to the court, reconsidered their decision, and voted to find one without hearing any new evidence, is no ground for quashing the indictment.

2. SAME—STENOGRAPHER IN GRAND JURY ROOM.

The fact that a stenographer who was in the employ of the district attorney at the latter's request attended before the grand jury, and took notes of the testimony of a witness, is no ground for quashing an indictment, as such stenographer was an assistant to the district attorney.

Motion to quash indictment.

Edward Mitchell, U. S. Atty., and *John I. Mott*, Asst. U. S. Atty.

Chas. A. Hess, *Edward H. Murphy*, and *S. S. Joyce*, for defendant.

BENEDICT, J. In this case the indictment against the accused was filed on the 7th day of October of last year. The accused appeared in court, and entered a plea of not guilty, but leave was given to withdraw such plea on or before the 20th of October. During that period the plea of not guilty was not withdrawn, nor was any motion made to quash the indictment. On the 10th of December following, the question of fixing a day for the trial on the indictment was presented to the court, and, after hearing counsel for the defendant, it was arranged that the case be set down to be tried on the first day of the January term; no intimation having been given of an intention to move to quash the indictment. Now on the day fixed for trial the defendant presents a motion to quash the indictment. This motion, it appears, was originally noticed to be heard at a stated term of the circuit court to be held by the Honorable WILLIAM J. WALLACE on the 12th day of January, two days before the opening of the present term. The motion was not heard by Judge WALLACE, and is now presented to the court at the regular January term. Inasmuch as a motion to quash an indictment after plea can only be made on leave of the court, reason for refusing such leave in this case could be found in the delay to make this application until the day fixed for trial, and after the lapse of several months since the finding of the indictment. The proceeding savors too much of an effort for delay to receive the countenance of the court, but the grounds upon which it is sought to have the indictment quashed upon examination prove insufficient, and I am of the opinion that the motion, if it had been made in time, must have been denied. The grounds of the application are stated in the moving papers by the following language:

"Wherefore, deponent asks that the indictment may be dismissed upon the ground—*First*. That the same was improperly found. The grand jury, if it reconsidered its determination not to find a true bill, did so improperly and illegally, if no further evidence was furnished to the said grand jury between the time of its decision not to find a true bill and its reconsideration to find a true bill, and its presentment to the court. *Secondly*. The presence of a
v.46f.no.1—5

stenographer in the grand jury room, taking the testimony of witnesses for the purpose of transcribing the same, was improper, illegal, and contrary to law."

In support of the first ground, the moving papers show that the grand jury, at some time during their determination, voted not to find a bill against the accused, and, after having so voted, reconsidered their determination, and voted to find a bill. This was done, so far as appears, without any new evidence being presented to the grand jury subsequent to their vote not to find a bill. These facts, in my opinion, furnish no ground for quashing the indictment. It was the right of the grand jury to reconsider their vote without taking additional testimony, certainly before any report by the jury to the court, and while the matter was still before them. There are many authorities that sustain this proposition.

The facts in support of the second ground of objection, which are before the court by the admission of the district attorney, are these: On one occasion Edmund T. Davis, a stenographer, who is one of the employes of the district attorney, attended before the grand jury at the request of the district attorney, by virtue of his employment in the office of the district attorney, and took stenographic notes of the testimony of one witness, and then retired. He was not present at any deliberation of the grand jury, nor on the day upon which the indictment was found. In this there was nothing illegal or irregular. By the settled practice of the courts of the United States, the district attorney and his assistants are permitted to attend before the grand jury. The practice has been stated as follows: "It is a settled practice for the clerk and assistants of the district attorney to attend the grand jury, to assist in investigating the accusations presented before them." See note in Brightley's Digest, p. 209. See, also, *U. S. v. Kilpatrick*, 16 Fed. Rep. 765, (Dist. Ct. N. C. 1883,) cited here by the defense. Mr. Davis, he being one of the staff of the district attorney, employed by authority of the government for the purpose of taking notes for the use of the district attorney, in the discharge of his official duties was permitted, by the practice of the court, to attend as he did before the grand jury. He comes within the designation of an assistant to the district attorney, as understood in practice, and the mere fact that he was present, and took notes of the testimony of one witness, affords no ground on which to quash the indictment. This case differs from the case decided in the state court in Louisiana, to which reference has been made by the defense. In the case of *State v. Natali*,¹ an indictment seems to have been quashed because of the presence before the jury of the short-hand reporter of the court, who was an official having no connection with the district attorney's office, possibly not under his control. That is not this case. Here the stenographer was a duly-appointed assistant of the district attorney, acting as such by direction of the district attorney. I may add that the laws of the state of New York (Laws 1885, c. 348) expressly

¹ A decision of Judge BAKER, of the criminal district court for the parish of Orleans, La. and not reported.

provide for the appointment of a stenographer to take the testimony given before grand juries in the county of New York; and, while a statute of the state does not control the practice of the courts of the United States in criminal cases, the existence of such a provision in the laws of the state clearly indicates that the presence of a stenographer before a grand jury is not inconsistent with a due administration of justice in criminal cases. For these reasons, the motion to quash the indictment is denied.

UNITED STATES v. CLAASEN.

(Circuit Court, S. D. New York. April 23, 1891.)

BILL OF EXCEPTIONS—WAIVER—CRIMINAL LAW.

Where the defendant in a criminal case presents to the judge minutes of the trial, in which some of his exceptions are omitted, and the same is signed by the judge, and used in moving for arrest of judgment and for a new trial, no further bill of exceptions should be given after issuance of a writ of error, since the defendant has thereby waived the exceptions omitted from the minutes.

At Law.

Edward Mitchell, for the United States.

Hector M. Hitchings, for defendant.

BENEDICT, J. This is an application on the part of the defendant for a bill of exceptions. A statement of the proceedings had in the case is necessary to an understanding of the questions involved. The defendant, having been indicted for embezzling and misapplying the funds of a national bank, of which he was president, was on the 28th day of May, 1890, found guilty by the jury. During the trial many exceptions were taken by the defendant, which were duly noted. At that time there was no law providing for a writ of error in criminal cases tried in the circuit courts of the United States. By the rules of the circuit court of the southern district of New York, however, adopted March 12, 1879, provision was made for the correction of any error committed in the trial of a criminal case by means of a motion for a new trial and in arrest of judgment, to be heard before the three judges authorized by section 613 of the Revised Statutes to hold the criminal terms of that court, the same to be made upon minutes of the trial to be settled by the judge who tried the case, and filed before the first day of the term next subsequent to the term at which the trial is had. In the present case, after the verdict, and before judgment, minutes of the trial, containing some exceptions that had been noted at the trial and omitting others, were presented by the defendant for settlement, and the same were by consent settled and signed by the judge. On the 9th day of July, 1890, a printed copy of the minutes as settled and signed was filed, and thereupon became part of the record. Thereafter, and on the 24th day of October, 1890, the cause came on to be heard before Judges

WALLACE, BROWN, and BENEDICT, in accordance with the rules of 1879, already referred to, when the defendant, then represented by new counsel, applied for an opportunity to procure to be inserted in the record exceptions not appearing in the minutes of the trial as the same had been settled and filed in July previous. This application was denied by the court, and motions for a new trial and for an arrest of judgment were then argued before the three judges upon the record as it stood, and the same were thereafter by them at the December term, 1890, denied. Thereafter, on the 18th of March, 1891, at the March term, the defendant was sentenced to be imprisoned for a term of six years, and it was then ordered that the sentence be executed in the Erie county penitentiary. On the 21st day of March, and before the sentence was carried into effect, a writ of error from the supreme court of the United States was allowed by Mr. Justice BLATCHFORD, with a direction that the writ of error operate as a *supersedeas* and a stay of execution, with leave to the United States to move to vacate the stay as having been granted without authority of law. And now, on the 17th of April, 1891, application is made to the judge who tried the cause for his signature to a bill of exceptions containing many exceptions which do not appear in the minutes of the trial on file. From this statement it will be seen that this application is made after judgment, without leave previously obtained; that it is made after a writ of error, a *supersedeas*, and a stay of proceedings by a justice of the supreme court of the United States; that the objection of the application is to have inserted in the record other exceptions than those now appearing therein; that some eleven months have elapsed since the verdict, and some nine months have elapsed since the minutes of the trial, as presented by the defendant, by his consent settled and signed by the judge, and made part of the record; and after an application for opportunity to procure the insertion in the record of exceptions other than those appearing in the minutes has been denied by the three judges. To this application the district attorney objects upon several grounds. One ground is that, inasmuch as the joint resolution of March 3, 1891, declares that nothing in the statute of March 3, 1891, creating the circuit court of appeals, shall be held or construed in any wise to impair the jurisdiction of any circuit court of the United States in any case now pending before it, or in respect to any case wherein a writ of error or appeal shall have been sued out or taken before the 1st day of July, 1891, the provision made in the statute of March 3, 1891, for a writ of error in criminal cases, which in legal effect deprives the circuit courts of the power theretofore possessed to render final judgment in a criminal case without any appeal, and prevents the circuit courts from carrying into effect any sentence that may have been pronounced by such courts; impairs the jurisdiction of the circuit courts within the meaning of the joint resolution, and therefore confers no right to a bill of exceptions in this case. This objection, however, the district attorney declined to argue for the reason that a writ of error and a stay of proceedings has been issued herein by Mr. Justice BLATCHFORD. For the same reason the objection will receive no further attention on this oc-

casation. It is further objected by the district attorney that, no application for a bill of exceptions having been made prior to the sentence, nor any leave to make a bill of exceptions having been granted prior to judgment, it is now too late to present a bill of exceptions. In support of this objection reference is made to the rules of this court in criminal cases already referred to, and to rules 67 and 69 of this court, and also to the cases of *Walton v. U. S.*, 9 Wheat. 651; *Muller v. Ehlers*, 91 U. S. 249; *Ex parte Bradstreet*, 4 Pet. 102; *Genes v. Bonnemere*, 7 Wall. 564; *In re Chateaugay Iron Co.*, 128 U. S. 544, 551, 9 Sup. Ct. Rep. 150. It is still further objected on the part of the United States that after a writ of error and a *supersedeas* and a stay has been issued by a justice of the supreme court and filed in this court, this court has no power to open the judgment and allow a bill of exceptions; and reference is made to *Draper v. Davis*, 102 U. S. 370; *Keyser v. Farr*, 105 U. S. 265; *Morgan's, etc., Co. v. Texas Cent. Ry. Co.*, 32 Fed. Rep. 530. And lastly it is insisted in behalf of the United States that the defendant, having presented for the signature of the judge minutes of the trial, and the same having been signed by the judge, and incorporated in the record with the consent of the defendant, and the case having been heard and decided by the three judges upon such minutes, the record now contains a statement of the only exceptions subject to review sufficiently authenticated, and is therefore complete; and reference is made to *Railroad Co. v. Warren*, 137 U. S. 348, 11 Sup. Ct. Rep. 96; *Herbert v. Butler*, 97 U. S. 319.

Inasmuch as in my opinion the last objection above stated is fatal to the present application, the validity of the other objections will not be considered on this occasion, and the application will be denied upon the ground that the record as it stands contains all exceptions which have not been waived and abandoned in this case, and that there is no occasion for any other or different bill of exceptions than the one already incorporated in the record. This plainly appears, as it seems to me, from the above statement of the proceedings had in the cause. The defendant, after the rendition of the verdict, moved for a new trial, and also for an arrest of judgment. He founded those motions upon what had occurred at the trial as stated in the minutes of the trial prepared by him. These minutes of the trial were signed by the judge who tried the case, the defendant consenting, and, being filed by him, became part of the record. These minutes of the trial were made with all deliberation, and without suggestion of fraud or mistake or misapprehension. In these minutes certain exceptions which had been taken and noted at the trial were inserted, and certain other exceptions which had been taken and noted at the trial were omitted. By this action, in my opinion, the defendant abandoned all exceptions taken at the trial, save only those which he had caused to be set down in the minutes of the trial prepared by him, and made by him a part of the record. The minutes of the trial, as now appearing in the record, have all the requirements of a bill of exceptions. It was made for the purpose of a review of the proceedings had at the trial, and upon it the case has been heard and

decided by the three judges. That hearing was not, as the present counsel for the defendant seems to understand, upon a motion for a new trial only, but also upon a motion in arrest of judgment, made according to the notice "upon the exceptions taken at the trial and upon the pleadings and proceedings herein," which motion brought before the three judges for review all rulings made at the trial to which exceptions had been taken, as well as all exceptions to the charge to the jury, for which a writ of error would lie if such writ had been then authorized by law. Grah. Pr. p. 641. When for the purpose of such a hearing the defendant caused such minutes of the trial to be filed, which he had himself procured to be approved and verified by the judge's signature, and from which he deliberately omitted the exceptions which he now seeks to have inserted in the record, he, in my opinion, waived all the exceptions so omitted. Upon that record the case has been argued and decided by the three judges, and it is that record which is called for by the writ of error from the supreme court of the United States. There is in *Vaughn v. State*, 4 Mo. 290, a decision to the effect that a statute authorizing a bill of exceptions in criminal cases does not give the right to a bill of exceptions in cases arising before the passage of the act, and when no bill of exceptions was allowed by law; but, assuming that the statute of March 3, 1891, although enacted subsequent to the review of this case by the three judges, gives to the supreme court of the United States the right to review the record in this case upon writ of error, the statute applies to the record as it stood complete in the matter of exceptions taken at the trial when the statute was passed. It had no effect to revive exceptions that had been waived and abandoned, nor does it, in my opinion, require or permit a second bill of exceptions to be incorporated into the record as it stood at the time of the passage of the act. Upon these grounds, therefore, the application is denied; and it is permitted to add that, if these grounds be found insufficient by the supreme court, all detriment to the defendant will be avoided by their writ of *mandamus*.

WIRT v. HICKS *et al.*

(Circuit Court, S. D. New York. April 16, 1891.)

PATENTS FOR INVENTIONS—INJUNCTION—EQUITY PLEADING.

Where no preliminary injunction is asked for, a bill to enjoin the infringement of a patent need not show that the complainant is engaged in making or selling the articles described in his patent, that such patent has been a source of profit to him, or that the validity of the patent has been established by prior adjudication or by public acquiescence.

In Equity.

Walter S. Logan, for plaintiff.

James A. Whitney, for defendants.

SHIPMAN, J. This is a demurrer to the complainant's bill in equity, to restrain the infringement of two letters patent for improvements in fountain pens. The complainant owns one of the patents as assignee, and the other as patentee. The bill alleges the originality and the novelty of the inventions, the grants of letters patent therefor, the sole ownership of the said letters by the complainant, and the infringements thereof by the defendants, by which they have made large profits. It further alleges that they are threatening future infringements, which will be to the complainant's injury; that by the acts of the defendants he is being and has been deprived of profits which he otherwise would have obtained; that they have been notified of the complainant's rights in the premises, and have been requested to desist from infringing thereon, but have refused to comply with said request. The bill asks for an injunction "provisionally and perpetually" against infringement, and also prays for an accounting of profits and damages.

The principal grounds of demurrer are that it does not appear from the bill that the complainant is or has been engaged in the manufacture, sale, or use of the patented inventions, or that they have been a source of profit to him, and that the bill has no allegation which if true would show any substantial injury to the complainant from the acts of the defendants. The bill could not be relied upon as a foundation for a motion for preliminary injunction. It does not state a prior adjudication upon the validity of the patent, or acquiescence by the public in its use and enjoyment by the owners thereof, or any use by the complainant of his patented rights. *Isaacs v. Cooper*, 4 Wash. C. C. 259; *Sullivan v. Redfield*, 1 Paine, 452; *Parker v. Brant*, 1 Fish. Pat. Cas. 58; *Gutta Percha, etc., Co. v. Goodyear, etc., Co.*, 3 Sawy. 542; Walk. Pat. § 660; 3 Rob. Pat. § 1206. But the allegations are sufficient in a bill for an injunction to be issued at the conclusion of the suit, when the validity of the patent has been established by the proofs in the case. It is not necessary to aver or to show the extent of the complainant's damages, and the bill has alleged, as it properly should allege, if an accounting is prayed for, that the defendants have made profits. Walk. Pat. § 579. The mere power of the court, under the statute, to issue an injunction to prevent a

defendant from infringing upon a right secured by letters patent, does not depend upon the magnitude of the injury which the plaintiff has suffered. *Colgate v. Telegraph Co.*, 17 Blatchf. 308. In the exercise of the power, the equities of the respective parties, and the amount of the injury to be remedied or inflicted, are weighed by the court.

The demurrer is overruled, with costs, and the defendants will answer over in 30 days.

STONEMETZ PRINTERS' MACHINERY CO. v. BROWN FOLDING MACH. CO.

(Circuit Court, W. D. Pennsylvania. May 4, 1891.)

1. EQUITY PLEADING—INFRINGEMENT OF PATENTS—MULTIFARIOUSNESS.

A bill which claims relief because of an alleged interference between the patents of the complainant and the defendant, and also because of defendant's alleged infringement of complainant's patent, is not multifarious.

2. SAME—INTERFERENCE OF PATENTS.

Allegations that complainant obtained a certain patent; that defendant obtained certain patents of a later date, which interfere with complainant's rights under his patent; that defendant is making and selling machines under his patents, and has in other ways disturbed complainant in the use and enjoyment of the rights granted by his patent,—sufficiently charge interference.

3. SAME—IMMATERIAL ALLEGATION—EXCEPTION.

Objection to an immaterial allegation in a bill should be taken by exception, and not by demurrer.

In Equity. On demurrer.

John K. Hallock, for demurrer.

John C. Sturgeon, *contra*.

REED, J. The bill avers the plaintiff's assignor, John H. Stonemetz, to have been the inventor of an improvement in carrier attachments to folding machines. That he filed his application March 14, 1883, and letters patent No. 343,677 were granted to him on June 15, 1886. That while the Stonemetz application was pending, R. T. Brown, on May 28, 1883, filed an application for letters patent for an invention in carrier attachments for folding machines substantially the same in construction and operation as the said invention of Stonemetz. That an interference was declared between said applications under the rules of the patent-office, and Stonemetz finally declared to be the prior inventor. Afterwards Brown disclaimed the invention claimed by Stonemetz, and thereupon letters patent were issued to said Brown's assignee upon December 8, 1885, numbered 331,762. That on August 4, 1884, the said Brown filed a second application for letters patent for a sheet carrier or conveyor for folding machines, and a patent was issued to the Brown Folding Machine Company, as assignee of the said Brown, on July 14, 1885, numbered 322,344. That the said patents No. 322,344 and No. 331,762 interfere with the rights of the plaintiff under patent No. 343,677, and in the working of the invention described in the latter patent. That

the defendants are manufacturing and selling carrier attachments for paper-folding machines, claiming the right to do so under the patents owned by them, and have in other ways disturbed the plaintiff in the use and enjoyment of the privileges conferred by patent No. 343,677. The bill prays that defendants' patents may be decreed void, for an injunction to restrain infringement of plaintiff's patent, and for an account.

To this bill a demurrer has been filed, showing as causes of demurrer misjoinder of causes of action and misjoinder of parties defendant. The demurrer also refers to an allegation in the bill relative to certain interference proceedings between plaintiff's assignor and one Meek, in which the priority of plaintiff's invention was sustained, which, it is argued, in no way relates to the other matters set forth in the bill, and does not concern the defendants, excepting W. Downing, who is alleged to have procured Meek to file his application for a patent. If this allegation is not material and pertinent, the objection should be made by exception, and not by demurrer. *Stirrat v. Manufacturing Co.*, 53 O. G. 1094, 44 Fed. Rep. 142. The objection as to misjoinder of parties has been cured by amendment, and hence was not pressed on argument.

The remaining question is whether there is a misjoinder of causes of action. Two causes of action have been joined in the bill,—one, the alleged infringement by defendants; the other, the interference between plaintiff's and defendants' patents. The latter arises under the provisions of section 4918, Rev. St., which provides that, wherever there are interfering patents, any person interested in any one of them may have relief against the interfering patent by suit in equity against the owners of the interfering patent, and that the court, upon due proceedings had, according to the course of equity, may adjudge and declare either of the patents void in whole or in part. Jurisdiction in the matter of infringement is derived from section 4921 of the Revised Statutes, and defendants' counsel has argued that, as the proceedings were statutory, the relief authorized by the two sections was different, requiring different testimony, with the right to set up defenses in the one case which could not be set up in the other, and the decree in the one case would be entirely different from the decree in the other; that the two causes of action could not be joined in the one bill. There is great force in the defendants' position, and it may perhaps be found that the final result may be detrimental to the plaintiff, since the testimony in regard to the infringement may prevent its obtaining relief under section 4918, while the defendants will be compelled to defend against distinct issues, and the case will be complicated thereby. Were the question entirely new, I should hesitate to sustain the plaintiff's bill, but the same question has been passed upon, and decided in favor of the joinder of the two causes of action. In *Leach v. Chandler*, 18 Fed. Rep. 262, Judge Woods held that a bill which, under section 4918 of the Revised Statutes, upon proper averment, prays an adjudication concerning conflicting patents, and also alleges an infringement of the plaintiff's patent by the defendant, by reason of the manufacture and sale by the latter of articles constructed under his letters, and prays an accounting and damages, is not

demurrable for misjoinder of causes of action. In *Holliday v. Pickardt*, 29 Fed. Rep. 858, Judge WALLACE sustained a bill filed for infringement, and also praying the repeal of an interfering patent under section 4918, and a decree was entered in favor of the plaintiff on both causes of action. In the case of *Paper Co. v. Knopp*, 44 Fed. Rep. 609, Judge THAYER said: "It has been held that a count for infringement and a count under section 4918 may be joined in the same bill, and I can see no objection to that course of procedure." In the case of *Swift v. Jenks*, 29 Fed. Rep. 642, Judge COXE entertained a bill filed for both causes of action. It has been held that, where the bill is filed solely for relief under section 4918, the only questions at issue are those of interference and priority as between two patentees, and that the defendant cannot set up as a defense the invalidity of the plaintiff's patent for other reasons. The decisions are referred to in the late case of *Electrical Accumulator Co. v. Brush Electric Co.*, 44 Fed. Rep. 602, where Judge BROWN, citing the several cases on the subject, says that the statute has for its sole object the determination of the question of interference and priority; but he intimates that, had the bill been also a bill for an infringement as well as for an interference, every question which might properly be put in issue in an ordinary suit for infringement might be raised. That these are the only questions that are material and relevant when the bill is filed solely for relief under section 4918, and that the defendant cannot attack the validity of the plaintiff's patent upon other grounds, is ruled in *Lockwood v. Cleveland*, 20 Fed. Rep. 165; *American Clay-Bird Co. v. Ligowski Clay-Pigeon Co.*, 31 Fed. Rep. 466; *Pentlarge v. Pentlarge*, 19 Fed. Rep. 817; and *Sawyer v. Massey*, 25 Fed. Rep. 144; and may be regarded as settled. The distinction between the two classes of cases would seem to be, however, that in the latter the plaintiff has elected to proceed under section 4918 for the single relief afforded by that section, and the defendant cannot compel him to litigate any other issue. In the former class of cases the plaintiff elects to raise the question of infringement as well as interference, and, having raised those issues, both of which are within the jurisdiction and cognizance of a court of equity, such a court will entertain a bill, which includes the entire controversy. As such has been the ruling and practice in the other courts where the question has arisen, I think it better that their rulings and practice should be followed upon this question, and the demurrer overruled; particularly as I have been able to find no case to the contrary.

In reference to the suggestion in defendants' brief that "the matter in the bill relating to the grounds for an interference is incompetent and insufficient," the bill, in my opinion, sufficiently states the plaintiff's case in that respect. The demurrer must therefore be overruled.

THOMAS HUSTON ELECTRIC CO. v. SPERRY ELECTRIC CO.

(Circuit Court, N. D. Illinois. November 10, 1890.)

PATENTS FOR INVENTION — INFRINGEMENT — PETITION TO BE ADMITTED AS PARTY DEFENDANT.

In a suit for the infringement of letters patent, the petition of a third party to be permitted to defend, which alleges that petitioner makes and sells certain machines which he is informed and believes complainant claims to be an infringement of the patent sued on, and that if successful in that case complainant intends to sue the petitioner for infringement, and that petitioner is advised and believes that there is no infringement, but which fails to aver that petitioner's machines are identical with those made by defendant, or to show any privity with the latter, would, if granted, have the effect of rendering the proceeding multifarious by including in one action different infringements of one patent by different persons and different machines, and must be denied.

In Equity.

George P. Barton and Banning, Banning & Payson, for petitioner.

Offield, Towle & Linthicum, for complainant.

BLODGETT, J. The Western Electric Company files a petition in this case setting forth that petitioner is an Illinois corporation engaged in the business of manufacturing electric lamps and general electric apparatus in the city of Chicago, and has a large business and a large amount of money invested in the same; that, in due course of its business, petitioner makes and sells electric machines with "current regulators," which, as he is informed and believes, complainant claims are an infringement of its patent, No. 238,315, on which this suit is brought, and that petitioner is informed that, if successful in this case, complainant intends to sue petitioner on the use of machines made by petitioner, on the ground that such machines are also an infringement of said patent; that petitioner has been advised and believes that the machines which it makes and sells are not an infringement of complainant's said patent. Wherefore petitioner prays that it be made a party defendant to this cause, and let in to defend the same, to which prayer complainant objects. It will be noticed that petitioner does not state or claim that the machines which it makes are identical in structure or mode of operation with the machines made by defendant, nor is any fact stated showing that petitioner is in privity in any way with the defendant. The most that can be inferred from the matters stated in the petition is that petitioner has a common interest with defendant in defeating this suit, because if successful in this suit complainant may sue the petitioner. It may be accepted as one of the obvious rules of the law that a party who is wronged by an invasion of his rights is not bound to bring suit for redress of such wrong unless he elects to do so, and, if he brings such suit, he is not obliged to sue all the wrong-doers. Where the invasion of his rights has been perpetrated by more than one person, he may elect which of them he will sue. *Smith v. Rines*, 2 Sum. 338; 2 Hill. Torts, 242.

But to the direct point involved in this petition. Certainly a person whom the complainant has not elected to sue cannot intrude himself into

a suit brought against another, unless complainant could have sued him as one of the original tort-feasors. By the showing of this petition, if complainant had joined the petitioner as one of the defendants in this case, he would thereby have made his bill bad for multifariousness, because it would have attempted to include in one action different infringements of his patent by different persons and different machines. Story, Eq. Pl. § 271 *et seq.* If petitioner should be made a defendant in this case contrary to the expressed wish of the complainant, it would largely increase the costs of the suit for the complainant, as it would expand the scope of the case beyond the infringement alleged against the defendant, into an inquiry as to whether petitioner's machine infringes the complainant's patent; and, if both machines should be found to infringe, it would involve a separate inquiry as to the damages for which each of the defendants was particularly liable, as there would be no pretext that the infringement was the joint act of the two defendants,—thus giving a range and scope of inquiry which the complainant did not intend or seek. The result of the suit might be practically two separate decrees for damages, and two separate injunctions, and two separate executions for the collection of the damages awarded complainant. While the court may in this suit construe the complainant's patent, and such construction may be adhered to in subsequent suits against other persons, that would not determine against petitioner the fact of infringement, which would be, after all, the main question in the subsequent suit, if one should be brought against the present petitioner. To let petitioner into this case would, in effect, be to hold that the complainant must join in the same suit all persons who have infringed this patent, whether acting together or not; thus throwing defendants into relations they had never assumed towards each other, as well as compelling complainant to give to his suit a range of inquiry and judgment far beyond what he intended or wished. The case made by this petition differs widely from a case where a landlord is allowed to come in and defend a suit in ejectment against his tenant, and a case where a manufacturer of a machine is allowed to come in and defend a suit brought against his agent or customer, on the ground that such machine infringes a patent held by plaintiff or complainant. In such cases the landlord or manufacturer is in direct privity with the person sued, and has a direct interest in the event of the suit, while here the petitioner has only an interest in one of the questions involved in the suit, but has no interest in the event, as the decree cannot conclude him, and only affects him remotely or argumentatively. It was stated on argument that the judge of the district court of Minnesota allowed a party to come in as defendant in a suit in that district upon grounds similar to those stated in this petition. No one certainly has a higher regard for the learning and uniform accuracy of that learned judge than myself, but, as no opinion has ever been published in that case, I must assume that the order was made by reason of some special features shown in that case which do not appear in this. The motion to make petitioner a party is overruled, and the petition dismissed.

ADEE v. J. L. MOTT IRON-WORKS.

(Circuit Court, S. D. New York. April 21, 1891.)

PATENTS FOR INVENTIONS—INFRINGEMENT.

Letters patent No. 6,739, granted November 16, 1875, to James Foley, for an improvement in waste valves and overflows for basins and baths, which consists in bringing up the stand-pipe or outer pipe of the overflow through the casing or slab contiguous to the basin or bath-tub, and securely attaching it, preferably by a screw connection, to a removable cap resting upon the outside of the casing or slab, are not infringed by the device made under letters patent No. 170,709, to William S. Carr, and No. 358,147, to John Demarest, by which the stand-pipe is provided with a screw flange resting upon the top of the slab, but has no cap covering its upper end, as in the prior patent.

In Equity.

Arthur v. Briesen, for plaintiff.

Francis Forbes, for defendant.

SHIPMAN, J. This is a bill in equity, which is founded upon the alleged infringement of reissued letters patent No. 6,739, dated November 16, 1875, to James Foley, for an improvement in waste valves and overflows for basins and baths. The original patent was dated July 21, 1874. The validity of this reissue and the patentability of the invention were adjudicated in the suit of *Adee v. Peck*, which was tried by Judge WALLACE. His opinion describes the invention so far as was necessary in a cause in which infringement was admitted, and obviates the necessity of an extended description here. *Adee v. Peck*, 42 Fed. Rep. 497. The vital question in this case is that of infringement. The patentee said in the specification of the reissue that before his invention "valves had been made with a tubular stem, which formed an overflow for the water when the level of the same rises above the upper end of the tubular stem. In some instances this tube and valve have been introduced in the bath itself, and in other instances in a fixed tube at the side of the bath or basin. When employed in the fixed tube adjacent to the basin it is difficult to remove the valve and its tubular stem, because the slab of marble or wood usually covers the end of the stationary screw, and there is a hole through the same for a rod that operates the valve and tubular stem. In consequence of the difficulty of removing the tube and valve for cleaning, this waste valve and overflow are objectionable, and but little used. My invention relates to an improvement that is made for allowing the valve and overflow to be easily removed. For this purpose the valve and its tubular stem is continued up through the marble or wooden slab or table contiguous to the basin or bath, and provided with a removable cap, through which the stem to the handle passes." The standing tube passes through the slab, and is furnished with a removable cap, preferably screwed to the tube. A rod, with a handle at the upper end, passes through this cap, its lower end being connected by a bail with the tubular stem, which forms the overflow pipe, within the standing tube. When the rod is raised and par-

tially revolved, it suspends the tubular stem and valve. The claim is as follows:

"The stand-pipe, *f*, of the bath or basin overflow, passing through the slab or table, *b*, and receiving at its upper end the removable cap, *l*, in combination with the overflow pipe, *o*, valve, *v*, and means for suspending the valve and overflow pipe from the cap, substantially as set forth."

It thus appears from the specification, and it is also stated by Judge WALLACE, that the improvement really made by Foley consisted "in bringing up the stand-pipe or outer pipe of the overflow through the casing or slab contiguous to the basin or bath-tub, and securely attaching it, preferably by a screw connection, to a removable cap, resting upon the outside of the casing or slab." Fastening a removable cap to the upper end of the stand-pipe upon the outside of the casing for the purpose of readily exposing the pipe and conveniently removing the valve-stem and its parts for cleaning or repairs was the important part of the improvement. If the defendant's device, which is made under letters patent No. 170,709, to William S. Carr, and No. 358,147, to John Demarest, assignor to the defendant, does not have the cap of the patent, there is no infringement. In this device the tubular valve-stem, which is the overflow pipe, extends up to the handle by which it is lifted. The stand-pipe does not have a cap which covers its upper end, but its mouth above the slab is provided with a screw flange, which rests upon the top of the slab. A nut around the stand-pipe clamps the under side of the slab. The contention between the parties is whether this flange is the cap of the Foley patent. It rests upon the outside of the slab, is removable, and helps to support the stand-pipe to the slab, and is deemed by the complainant to be directly within the terms of the patent, and to be the patented improvement. The complainant insists that it is immaterial whether it does or does not entirely cover the upper end of the pipe. In the Foley patent the rod which lifts the stem and valve passes through the contracted top of the cap of the stand-pipe, and the stem of the overflow pipe is guided centrally by the cap. The valve-stem cannot be lifted out until the cap is removed. In the defendant's device the so-called cap is simply a flange around an open mouth. The upper part of the overflow pipe is enlarged, so that it loosely fills the stand-pipe, and is lifted immediately out of it for the purpose of cleaning, without disturbing any other part. The upper end of the stand-pipe is not covered or capped in any proper sense. The difference is not merely in the size of the holes in the respective caps, but is a difference in the principle of construction of the two waste-valves. In the Foley valve the valve-stem is intentionally confined within the cap, which must be removed when the valve-stem is to be lifted out, while in the defendant's device the stand-pipe is intentionally made with an open mouth, so that the valve-stem can be instantly removed. There is no infringement, and the bill should be dismissed.

BRUSH ELECTRIC CO. v. NEW AMERICAN ELECTRICAL ARC LIGHT CO.

(Circuit Court, S. D. New York. April 14, 1891.)

PATENTS FOR INVENTIONS—ELECTRIC LAMPS—INFRINGEMENT.

Letters patent No. 219,208, issued September 2, 1879, to Charles F. Brush for an improvement in electric lamps, are valid, and cover all forms of mechanism constructed to separate two or more pairs or sets of carbons dissimultaneously or successively, so that the light is established between the members of but one pair or set at a time. Following *Brush Electric Co. v. Western Electric Light, etc., Co.*, 43 Fed. Rep. 533, and *Same v. Ft. Wayne Electric Co.*, 44 Fed. Rep. 284.

In Equity.

H. A. Seymour, for plaintiff.*Homer A. Nelson*, for defendant.

SHIPMAN, J. This is a bill in equity to restrain the infringement of letters patent No. 219,208, dated September 2, 1879, to Charles F. Brush for an improvement in electric lamps. The defendant took no testimony, and did not appear at the hearing. The questions in the case seem to have been previously adjudicated, and to be fully stated in the opinion of Judge GRESHAM in *Brush Electric Co. v. Ft. Wayne Electric Light Co.*, 40 Fed. Rep. 826; of Judge BROWN, in *Same v. Western Electric Light, etc., Co.*, 43 Fed. Rep. 533; and of Judge BLODGETT upon a motion for an injunction in *Same v. Ft. Wayne Electric Co.*, 44 Fed. Rep. 284.

Let there be a decree for the complainant for an injunction and an accounting.

THE ISAAC MAY.

(District Court, N. D. New York. April 24, 1891.)

1. SALVAGE—AMOUNT.

Where a steel propeller, which is thoroughly equipped with all the modern appliances for extinguishing fires, saves in the day-time, and with little danger to herself or crew, a barge worth about \$4,000, after about five hours' labor, and then tows the barge into port, without deviating from her course, an allowance of \$1,000 for salvage is sufficient.

2. SAME—APPORTIONMENT.

In such case the salvage will be divided as follows: To the owners, \$325; to the master, \$90; to the first mate, \$50; to the chief engineer, who took an active part in the work, \$50; to the second mate, \$40; to the second engineer, \$25; and the balance, of \$420, equally among the rest of the crew, their services being nearly equal.

In Admiralty.

George J. Sicard, for Lehigh Valley Transportation Company and James W. Todd, libelants.

Josiah Cook, for Thomas Wynne, David Gibbs, and others, libelants.

Benjamin H. Williams, for claimant.

COXE, J. At about half-past 4 on the morning of July 16, 1890, the steel propeller Saranac, owned by the libellant, the Lehigh Valley Transportation Company, discovered the steam lumber barge Isaac May on fire, at a point on Lake Erie about 100 miles W. S. W. from Buffalo. The May was wrapped in flames. Her crew had abandoned her, and she would have burned to the water's edge but for the assistance of the Saranac. The latter was admirably equipped for such work, being provided with all the modern appliances, and, after about five hours' labor, her master and crew succeeded in extinguishing the flames. The Saranac was bound for Buffalo, and towed the May to that city. On the following day a libel for salvage was filed by the owners of the Saranac. Subsequently two libels and a petition were filed on behalf of several members of the crew of the Saranac. The libels have been consolidated and tried in one action.

The testimony as to value is conflicting, but the impression left upon my mind, after taking everything into consideration, is that the property saved was worth about the sum of \$4,000. In view of the fact that the salvage service, though promptly and gallantly rendered, took place in the day-time, with very little danger to the Saranac or her crew, and that in towing the wreck to Buffalo she was not required to deviate from her course, it is thought \$1,000 will be a liberal allowance for the entire service.

It seems to be expected that the court will apportion this sum among the libellants upon the testimony already taken, without further proceedings before a commissioner. In my opinion the sum awarded should be divided as follows: To the owners, \$325; to the master, \$90; to the first mate, \$50; to the chief engineer, who took an active part in extinguishing the flames, \$50; to the second mate, \$40; and to the second engineer, \$25. As all of the crew participated in the salvage, and as their services were equally meritorious; or nearly so, the remaining sum of \$420 should be evenly divided among them. The proof submitted does not warrant the court in discriminating in favor of a portion of the crew as against the rest, although it is apparent that some, at times, occupied positions of greater hazard than others.

It is thought that there is insufficient warrant for the assertion that the libellants should be deprived of costs, because the libels were prematurely or improperly filed. The libels filed by the seamen, however, should entitle them to but one bill of costs. There should be a decree for the libellants as above stated.

CAMPRELLE v. BALBACH.

(Circuit Court, S. D. New York. March 20, 1891.)

1. REMOVAL OF CAUSES—CITIZENSHIP—PETITION.

Under the removal act of 1887, (24 St. U. S. 552,) which provides that certain actions may be removed from the state to the federal courts, "by the defendant or defendants therein, being non-residents of that state," a removal cannot be had unless the petition shows on its face that the defendant was a non-resident when the action was begun.

2. SAME—MOTION TO REMAND—AFFIDAVITS.

On motion to remand, defects in the petition for removal cannot be supplied by affidavits.

At Law. On motion to remand.

H. F. Lawrence, for plaintiff.

S. Mallet-Prevost, for defendant.

LACOMBE, Circuit Judge. This is a motion to remand. The action was begun in the superior court of the city of New York by the service of a summons on June 11, 1890. By reason of various motions to make the complaint more definite, and for bills of particulars, and by extensions, the time to answer the complaint (or rather the amended complaint) did not expire until December 5th. The cause was removed into this court, December 4, 1890. The record in the state court showed that the controversy was one between citizens of different states, such difference of citizenship existing when the action was begun; and that the defendant was a non-resident of the state of New York when the petition for removal was verified, December 4, 1890; but did not show that he was such non-resident when the action was begun. The removal act of 1887 (chapter 373, 24 St. 552) provides that—

"Any suit of a civil nature [other than those involving a federal question] of which the circuit courts of the United States are given jurisdiction [including controversies between citizens of different states,] * * * brought in any state court, may be removed into the circuit courts of the United States * * * by the defendant or defendants therein, being non-residents of that state."

The act does not expressly state whether a defendant, in order to be entitled to removal, must show non-residence from the beginning of the action, or need show only non-residence at the time of filing the petition. Which construction shall be given to the language used in the act is the question presented on this motion. The precise point seems never to have been decided. In *Freeman v. Butler*, 39 Fed. Rep. 1, it was referred to, but not disposed of; the petition in that case not showing non-residence, even at the time of removal. Inasmuch as the removal act of 1887 manifestly shows that it was the purpose of congress to restrict the jurisdiction of the circuit courts, (*Smith v. Lyon*, 133 U. S. 319, 10 Sup. Ct. Rep. 303,) the interpretation apparently most in accord with the intention of congress is that which holds that the *status* of parties, so far as the right to removal is concerned, is to be

settled by their condition at the time of the beginning of the action. If, when the summons was served, the state court had jurisdiction, and there was no right of removal to the federal court because the defendant was a resident of the state in the court of which he was sued, it can hardly be held that it was the intention of congress to allow such defendant to escape from the jurisdiction of the state court by changing his residence after the commencement of the action. Such an interpretation would allow a citizen and resident of the state of New York, sued in the courts of his own state by a citizen of another state, to drag his litigation into the federal courts by merely changing his residence, abandoning the courts of the state in which he was a citizen, and which his adversary, though a citizen of another state, was willing to accept as the forum which should pass upon the justice of his claim. It certainly was not the intention of congress to incumber the calendar of the federal courts with such litigation, and, unless the removal act of 1887 is interpreted as the plaintiff contends it should be, such a result is possible. The record, therefore, which was before the state court, did not on its face show that the cause was one removable to the federal court.

The defendant, however, asks leave to file an affidavit in aid of his petition for removal, alleging that he was a non-resident of this state when the action was brought. This, however, he cannot do. The case must be determined by the record presented to the state court. Unless at the time the application for removal was made such record upon its face shows that the case was a removable one, it is not in law removed from the state courts. The jurisdiction of that court remains unaffected, and, under the act of congress, the jurisdiction of this court cannot attach until it becomes the duty of the state court to proceed no further. No such duty, of course, arises unless a case is made by the record presented to the state court entitling the party to a removal. There is no precedent, which authorizes an amendment to be made in the circuit court, by which grounds of jurisdiction may be made to appear, which were not presented to the state court on the motion for removal. The converse has been expressly held repeatedly by the supreme court. *Cameron v. Hodges*, 127 U. S. 322, 8 Sup. Ct. Rep. 1154; *Crehore v. Railway Co.*, 131 U. S. 240, 9 Sup. Ct. Rep. 692; *Jackson v. Allen*, 132 U. S. 34, 10 Sup. Ct. Rep. 9. The motion to remand is granted.

LOWRY v. CHICAGO, B. & Q. R. Co.

(Circuit Court, D. Nebraska. May 6, 1891.)

1. REMOVAL OF CAUSES—FEDERAL QUESTION—INTERSTATE COMMERCE LAW.

An action against an interstate common carrier by rail for damages caused by unjust discrimination in rates and charges against plaintiff as a shipper over its road, and in affording other shippers better facilities, and for unlawfully demanding and receiving extortionate rates from plaintiff, is an action arising under the interstate commerce act, though not in express terms based on that act, and, though an action would lie for the same cause at common law, is removable under Act Cong. March 3, 1887, when the petition for removal sets up defenses based on the interstate commerce act.

2. SAME.

The plaintiff may be content to rest his case on the common-law liability of common carriers, but he cannot thereby deprive the defendant, as a carrier of interstate commerce, of any defense it has under the interstate commerce act. A case arises under a law of the United States, whenever that law is the basis of the right or privilege, or claim or protection, or defense, of the party, in whole or in part, by whom it is set up. It is enough that there is a federal question in the case, whether it is relied on by the plaintiff or the defendant.

3. SAME—REVIEW.

On a motion to remand, the court will not anticipate the trial of the case by construing the act of congress and determining the rights of the parties thereunder. It cannot eliminate the federal question from the case by a premature decision of it, and then remand the suit upon the theory that it no longer involves a federal question.

At Law. On motion to remand.

John L. Webster, G. M. Lambertson, and John P. Maule, for plaintiff.
Marquette, Deweese & Hall, for defendant.

CALDWELL, J. This is a suit at law, brought by the plaintiff against the defendant as an interstate common carrier by rail, upon three separate causes of action. The following is a brief summary of the facts constituting the causes of action: (1) That the defendant unjustly discriminated against the plaintiff in respect to rates and charges on shipments of grain from points in Nebraska to points in other states, by giving other shippers, who made like shipments under similar circumstances and conditions, and from and to the same places and at the same time, lower rates and better advantages, in respect to the number of cars, weight, and promptness in dispatch of shipment, than were given to the plaintiff. (2) That from 1884 to 1889 the plaintiff shipped over the defendant's road from Staplehurst and other points in Nebraska, to Chicago and other cities in the United States, large quantities of wheat and other grains, for the carriage of which the defendant "unlawfully demanded, charged, received, and exacted from the plaintiff a rate that was unjust, extortionate, and unreasonable." (3) That through the fault and negligence of the defendant, and its connecting lines, agents, and employees, all the grain shipped by the plaintiff was not delivered to the consignees. The aggregate amount of damages claimed by the plaintiff is \$145,000. The suit was brought in the state court, where the defendant appeared, and in apt time filed an answer to the first cause of action, and a petition to remove the suit into this court, upon the ground that

it arises under the act of congress commonly known as the "Interstate Commerce Act." The suit is not, in express terms, based on that act. But the statement of the cause of action follows very closely the language of the act, and the complaint was undoubtedly framed to bring the case within its provisions. The first section of the act of March 3, 1887, declares—

"That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the constitution or laws of the United States."

And section 2 of the act provides—

"That any suit of a civil nature, at law or in equity, arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, * * * may be removed by the defendant to the circuit court of the United States."

It will be observed that the first section gives the circuit courts original jurisdiction of all suits arising under the constitution or laws of the United States, and by the provisions of the second section any suit of which the circuit court is given original jurisdiction by the first section may be removed by the defendant to the circuit court. If, then, this is a suit arising under a law of the United States, it is removable. That it is such a suit cannot be controverted. The interstate commerce act declares all charges for transportation of passengers or property "shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful." Unjust discrimination is "prohibited and declared to be unlawful;" and the giving of "any undue or unreasonable preference or advantage" to one shipper or locality over another is prohibited. The eighth section of the act declares—

"That in case any common carrier, subject to the provisions of this act, shall do, cause to be done, or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

The ninth section of the act provides—

"That any person or persons claiming to be damaged by any common carrier, subject to the provisions of this act, may either make complaint to the commission, as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction."

This suit is brought to recover from the defendant damages for acts which constitute a violation of the provisions of the interstate commerce act. The suit, therefore, arises under that act, and might have been originally brought in the circuit court. This makes it a removable cause.

Notwithstanding the suit arises under a law of the United States, it would not be removable if the parties were at one as to the application and construction of that act, and the only controversy was over questions of fact or of general law. But the parties in the case are not agreed on the proper construction of the act. For the purpose of the transfer of a cause, the petition for removal performs the office of pleading. The petition in this case complies with the rule, and sets out with unusual fullness and particularity the facts and the provisions of the interstate commerce act which are relied upon as constituting a defense. The petition for removal, among other things, alleges that the defendant printed and posted up, for public inspection, schedules, showing the rates and fares and charges for the transportation of passengers and property, which it had established, as required by the sixth section of the act, and that the rates so established were just and reasonable, and were the rates charged the plaintiff and all others, without any discrimination, and that in a suit or proceeding brought by the Lincoln Board of Trade, of which body the plaintiff was at the time a member, before the interstate commerce commission, against the defendant, to test the justice and reasonableness of the defendant's schedule of rates and charges, that tribunal adjudged that they were just and reasonable. Upon these facts the defendant claims the question whether its schedule rates are reasonable and just is *res judicata*; and that, if that be not so, the act makes the schedule rates lawful until directly attacked and set aside; and, finally that under the act the schedule rates are *prima facie* just and reasonable, and that whether they are so or not is a question arising under the act, and depending largely for its correct decision upon the construction of the various provisions of the statute. A suit is removable when it clearly appears from the record that its determination will necessarily involve the construction of an act of congress the meaning of which is in dispute between the parties. All this clearly appears from the record in this case.

The construction of the act contended for by the defendant is not so fallacious or absurd as to warrant the court in treating it as an idle or false pretense. The court will indulge the presumption that the petition for removal was filed in good faith, and that the defendant, knowing the proverbial uncertainty of the law, is animated by a lively hope that its construction of the act may prevail. The court will not, on the motion to remand, anticipate the trial of the case, and proceed to construe the act of congress, and determine the rights of the parties thereunder. It cannot eliminate the federal question from the case by a premature decision of it, and then remand the suit on the theory that there is no longer a federal controversy in the case. It is said in argument that the suit cannot certainly be said to arise under the act of congress because the complaint states a good cause of action at the common law. It must be conceded that the complaint would be good at common law. And it is true that the provisions of the interstate commerce act prohibiting unjust and unreasonable charges and unjust discrimination are merely declaratory of the common law. 2 Redf. R. R. 95; Hutch. Carr. 243, 302; *Brown v. Pool*, (Iowa, 1890,) 46 N. W. Rep. 1069; *Scofield v.*

Railway Co., 43 Ohio St. 571, 3 N. E. Rep. 907. And the remedies afforded by the act of congress for such practices are cumulative, and not exclusive of the remedies existing at common law. The act declares that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." The law would have been the same independently of this provision. The rule is that when a statute gives a remedy in the affirmative, (without a negative express or implied,) for a matter which was actionable at common law, this does not take away the common-law remedy, but the party may still sue at common law as well as upon the statute. *Potter*, Dwar. St. 275, note 5. It is highly probable that in the progress of the case it will be found that, as to some of the plaintiff's causes of action, the statute is in some respects more favorable to the plaintiff than the common law. And the learned counsel for the plaintiff enter no disclaimer of their intention to avail themselves of these statutory advantages on the trial of the cause. But if the plaintiff's case was based, in terms, on the common law alone, that fact would not affect the question of removal. The plaintiff may be content to rest his case on the common-law liability of common carriers, but he cannot thereby deprive the defendant, as a carrier of interstate commerce, of any defense it has under the act of congress, which covers the ground of the common law, and much more. It is enough that there is a federal question in the case, whether it is relied on by the plaintiff or the defendant. A case arises under a law of the United States whenever that law is the basis of the right or privilege, or claim or protection, or defense, of the party, in whole or in part, by whom it is set up. *Tennessee v. Davis*, 100 U. S. 257. The motion to remand is overruled.

BABBOTT *v.* TEWKSBURY.

(*Circuit Court, S. D. New York*. March 23, 1891.)

EQUITY JURISDICTION—REMEDY AT LAW.

A suit in equity for discovery and accounting will not lie upon a contract to pay complainant commissions on certain sales the amounts of which are unknown to the complainant, since he has a plain, adequate, and complete remedy at law.

In Equity.

A. Dutcher, for complainant.

S. S. Perry, for defendant.

LACOMBE, Circuit Judge. This action is brought upon an alleged oral agreement by which the defendant agreed to pay the complainant (provided complainant would introduce defendant to the person or persons who owned and controlled certain patents) a commission of 5 per cent. on the capital stock of any companies defendant might form, or cause to be formed, for the use of said patents; and, in case of the sale of said patents for any territory by defendant, 5 per cent. of the amount of such sales. The complainant further alleges that he did introduce defendant

to the persons who controlled said patents; that through them, and by means of such introduction, defendant purchased and obtained the right to use said patents, and in part sold the same, realizing therefor a large amount of money, (the precise amount of which is unknown,) and also caused to be organized a corporation for the use of said patents, with a capital stock of \$250,000. The complainant demands his 5 per cent. upon these sums, and, averring that he has asked for an account which has been refused, prays for discovery and for relief. The defendant has demurred, and the demurrer must be sustained. The complainant has a plain, adequate, and complete remedy at law, and therefore, under section 723, Rev. St. U. S., suit in equity cannot be sustained. Upon proof of his contract, and of the sale of the patent and the organization of the company, he can at law recover the full amount of his claim. Such proof can be secured without the aid of a court of equity. If the defendant is within the hundred-mile limit, he can be subpoenaed as a witness, and required by a *duces tecum* to produce his books and papers; if he is beyond that limit, his testimony may in like manner be taken under section 863, Id. All the facts within his knowledge may be thus proved as fully as they could be on an accounting. Moreover, under section 724, Id., he may be required to produce books or writings in his possession which contain evidence pertinent to the issue.

Demurrer sustained.

HAT-SWEAT MANUF'G Co. v. WARING *et al.*

(Circuit Court, S. D. New York. March 31, 1891.)

DISMISSAL OF BILL—ANSWER FILED.

A complainant is not entitled as of right to dismiss his bill after the answer is filed, setting up that the license to use a patent upon which the suit is brought is fraudulent and void, and showing that defendant is entitled to a decree for its cancellation.

In Equity.

John R. Bennett, for complainant.

Wetmore & Jenner, for defendants.

LACOMBE, Circuit Judge. Should the defense set up by the defendants be made out by the proof, they would be entitled to a decree not simply denying complainant's right to money damages, or an accounting, but also declaring the license upon which the suit is brought to be fraudulent and void, and directing its cancellation. The complainant is therefore, under the authorities, not entitled as of right to dismiss its own bill at this stage of the case. *Electrical Accumulator Co. v. Brush Electric Co.*, 44 Fed. Rep. 602; *Stevens v. Railroads*, 4 Fed. Rep. 97. Nor, under all the circumstances, should it be allowed to do so. If complainant suffers default, defendants may take a decree dismissing the complaint, declaring the license void, and directing its cancellation; but such decree will, of course, show upon its face that it was entered upon

default. Should the complainant be unwilling to suffer default, the time to file briefs named in the former order is extended to and including April 6th, and they need not be printed.

FERGUSON *et al.* v. DENT *et al.*

(Circuit Court. W. D. Tennessee. April 21, 1891.)

1. COSTS—ATTORNEY'S FEES ON DEPOSITIONS.

On taxation of costs in an equity cause in the federal court the fee of \$2.50 on each deposition taken and admitted in evidence on the hearing before the court is taxable under section 824, Rev. St., in favor of the party recovering costs; and it is immaterial before what officer such deposition was taken, whether examiner, master, or otherwise.

2. SAME—PRINTED RECORD.

Where the record is printed in the circuit court, and paid for by a receiver under order of the court from funds in his hands, and such printed record is used on appeal in the supreme court without further expense to the parties, *held*, under the circumstances of this case, that the expense of printing the record should be taxed in favor of the party recovering costs.

3. SAME—RECEIVER'S COMPENSATION.

Where a receiver is appointed at the instance of the plaintiff, and the ultimate decision of the case upon appeal, reversing the decree below, is adverse to him, the receiver's commissions, paid out of the funds in his hands, will not be taxed as costs against the plaintiff, his appointment being regular and properly made in the case. That the plaintiff does not finally succeed in the litigation is not the criterion in determining the propriety, necessity, or legality of a receiver's appointment.

In Equity. Motion to retax costs.

T. B. Edgington, for plaintiffs.

Poston & Poston and Turley & Wright, for defendants.

HAMMOND, J. In this equity cause a decree was originally rendered for the plaintiffs on their bill and for costs. An appeal was taken, and the case was reversed in the supreme court, (10 Sup. Ct. Rep. 13,) with directions to dismiss the bill and render judgment for costs against the plaintiffs and the surety on their prosecution bonds. The costs claimed for defendants are as follows:

Clerk's fees, paid by the receiver, - - - - -	\$ 391 40
Marshal's " " " " " - - - - -	208 26
Examiner's " " " " " - - - - -	8 20
Master's " " " " " on printing record, - - - - -	500 00
Expense " " " " " " " " " " - - - - -	829 62
Receiver's commission, " " - - - - -	2,731 60
Docket fee on final hearing, - - - - -	20 00
Docket " " 98 depositions, - - - - -	245 00
Costs taxed in the supreme court, - - - - -	135 15
Clerk's fees since the appeal, - - - - -	49 75
Marshal's " " " " " - - - - -	53 54
Costs paid by defendant on Walker's deposition, - - - - -	7 00
Costs of transcript in <i>Re Ferguson</i> , bankrupt, - - - - -	6 00
Making in all claimed by defendants, - - - - -	\$5,185 52
Of which the clerk has so taxed all but receiver's fee, - - - - -	\$2,731 60
Leaving as the clerk's taxation, - - - - -	\$2,453 92

To this taxation the plaintiffs make two objections and the defendants one, as follows:

1. A docket fee of \$2.50 has been taxed on each deposition "taken and admitted in evidence," amounting in all to \$245 on the 98 depositions on file. Of these depositions, 14 were taken outside this district; 71 before examiners at Memphis, where the court is held; and the remaining 13 in this city, before officers other than an examiner or master. For the plaintiffs, who are adjudged to pay costs, it is contended that these fees are not taxable upon depositions taken within the jurisdiction of the court before one of its examiners, and this objection goes to the above 71 depositions so taken, but does not apply to the other 27. The record in this case shows that as a matter of fact each of the depositions so taken before the master or an examiner were by written interrogatories and written answers, just as depositions are usually taken, and not "in narrative form," as insisted in the brief of counsel. The argument against the taxation of these fees is that the testimony so taken is simply the examination of the witness, and not his deposition, and that, therefore, such fee is not taxable, since the statute applies only to "depositions." It is as follows: "For each deposition taken and admitted as evidence in a cause, two dollars and fifty cents." Rev. St. § 824. Section 862 of the Revised Statutes provides that "the mode of taking proof in causes of equity and of admiralty and maritime jurisdiction shall be according to rules now or hereafter prescribed by the supreme court, except as herein specially provided." And the sections of the revision immediately following prescribe the mode of taking depositions *de bene esse* "in any civil cause depending in a circuit or district court," (Rev. St. §§ 863-865,) and under a *dedimus potestatem*, "according to common usage;" and *in perpetuam rei memoriam*, "according to the usages of chancery," (Id. §§ 866-870.) The original supreme court equity rule No. 67 prescribes how "commissions to take testimony may be taken out * * * upon interrogatories filed by the party taking out the same. * * * If the parties shall so agree, the testimony may be taken upon oral interrogatories by the parties or their agents without filing any written interrogatories." This rule was amended at the December term, 1854, by giving the judge of the court authority "to vest in the clerk of said court general power to name commissioners to take testimony." Later, at the December term of 1861, the rule was further amended by providing that "either party may give notice to the other that he desires the evidence to be adduced in the case to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners of the court; * * * and such examination shall take place in the presence of the parties or their agents, by their counsel or solicitors, * * * and which shall be conducted as near as may be in the mode now used in common-law courts. The depositions taken upon such oral examination shall be taken down in writing by the examiner in the form of narrative, unless he determines the examination shall be by question and answer in special instances. * * * When the examination of witnesses before the examiner is concluded, the original deposition, authenticated

by the signature of the examiner, shall be transmitted by him to the clerk of the court. * * * Testimony may be taken on commission in the usual way by interrogatories and cross-interrogatories." And, finally, by a still subsequent amendment at the December term, 1869, of the supreme court, it was provided that, "where the evidence to be adduced in a cause is to be taken orally, * * * the court may, on motion of either party, assign a time within which each party shall take his evidence." The statutes regulating the taking of the written testimony of witnesses nowhere make any distinction between examinations and depositions; nor does this equity rule 67, as originally promulgated, use either word, but speaks, as does the first amendment to it, of the proof simply as "testimony." Its principal amendment, made in 1861, provides that "testimony" may be "taken orally," how the "examination" shall be conducted, and that the "depositions taken upon such oral examination shall be taken down in writing" in the manner indicated, and that at the close of the "examination" the "original deposition" shall be filed as provided; while in the last amendment the proof is only referred to as "evidence" in a cause "taken orally." This rule nowhere calls the proof taken under its provisions an "examination," and this word, as used in it, always has reference to the taking of proof, and never to the testimony after it has been given by the witness and reduced to writing. Equity rules 68 and 69 likewise refer solely to the taking of "testimony" in a cause "by deposition" under the statute, while rule 70, governing the taking of statutory depositions *de bene esse*, provides for the appointment of commissioners "to take the examination" upon notice of the time and place of taking the "testimony," and such depositions are conceded to be taxable with the attorney's fee. The general admiralty rules of the supreme court prescribe a reference to commissioners, who are granted all the powers "usually given to or exercised by masters in chancery in reference to them," (Sup. Ct. Admiralty Rule 44,) and provides further for the taking of new proof on appeal "by deposition" before a commissioner or other officer "authorized to take depositions" under the statute "upon an oral examination and cross-examination," unless the court "upon motion allow a commission to issue to take such deposition upon written interrogatories and cross-interrogatories," prescribing particularly the mode to be pursued "when such deposition shall be taken by oral examination." Admiralty Rules 49; 50; 52. In the rules of our circuit court (Ed. 1864) the written testimony of witnesses in cases at law and in equity is spoken of only as "depositions." Rules 13, 14. Therefore, upon a careful inspection of all these rules, as well as of the statutes, there does not seem to be any such distinction between depositions and examinations as counsel here insists upon.

Nor does the word "deposition," as used in this fee statute, (Rev. St. § 824, *supra*,) appear by the decisions of the courts to be confined in its meaning or application by any such limitations, or by the weight of authority, probably, restricted by any limitations whatever. In *Stimpson v. Brooks*, 3 Blatchf. 456,—an equity case, decided by Judge BETTS in 1856, and the first decision, I think, under this clause of the statute,

—the word “deposition” was defined to be “a generic expression, embracing all written evidence verified by oath. * * * A ‘deposition’ is evidence given by a witness under interrogatories, oral or written, and usually written down by an official person.” In that case it was ruled that the docket fee of \$2.50 was not taxable upon *ex parte* affidavits used on a motion for preliminary injunction. And in *The Sallie P. Linderman*, 22 Fed. Rep. 557, 558; Judge Nixon, in defining “deposition,” as used in this statute, says:

“In its strict and appropriate sense it is limited to the written testimony of a witness given in the course of a judicial proceeding, either at law or in equity.”

The only case cited by counsel against the taxation here is *Factory v. Corning*, 7 Blatchf. 16, and the precise question before the court there was whether the fee was taxable upon oral testimony taken before the master “on the accounting” before him, and evidently after the final decree settling the rights of the parties to the cause. Judge NELSON in disallowing the taxation says the statute “relates to testimony taken out of court, under authority which will entitle it to be read as evidence in court, and has no relation to oral testimony taken in court or before a master. It applies in cases at common law where depositions are given in evidence upon the trial, and in suits in equity where depositions are read at the hearing.” The decision obviously was made not so much upon any distinction between depositions taken before one officer, rather than another, as upon the idea that the statute confines these, as it does the other docket fees mentioned in it, to depositions used “on a trial before a jury,” or “on a final hearing in equity or admiralty.” And other cases seem to have held the same doctrine, as will be seen hereafter, though the statute as to these deposition docket fees contains no such limitation as to the time when or purpose for which they are “admitted in evidence in a cause,” or “in the cause,” as originally enacted. 10 St. U. S. 161. While in *Dedekam v. Vose*, 3 Blatchf. 77, it was held that upon the trial of an admiralty appeal in the circuit court these fees were not taxable there upon depositions read from the district court transcript, (in which court they were taxable,) yet, upon depositions taken for the circuit court after the appeal, they were taxable under the statute. In *Jerman v. Stewart*, 12 Fed. Rep. 271, where depositions taken in the state court were used by agreement in a case at law here, I held the fee taxable because the statute “does not mean that the deposition shall be formally taken, and the fees allowed only for such as are formally taken, but for those that are taken in any way and admitted in evidence. The use of the deposition on the trial is what entitles the attorney to the fee.” *Archer v. Insurance Co.*, 31 Fed. Rep. 660; *Wooster v. Handy*, 23 Fed. Rep. 49, 59, 63. In the admiralty cause of *The Sallie P. Linderman*, *supra*, there had been a reference to a commissioner, upon which 21 depositions were taken and returned to the court with the commissioner’s report, and “admitted in evidence by the judge in deciding the cause.” The motion to retax costs was overruled, and the \$2.50 on each deposition was allowed to proctor for the prevailing party. In *Amer-*

ican, etc., *Co. v. Sheldon*, 28 Fed. Rep. 217, a cause in equity, Judge WHEELER, while holding that depositions taken in one case and used by agreement in others could be taxed but once, ruled that they were taxable in the case in which they were in fact taken; and in *Cahn v. Qung Wah Lung*, Id. 396, the case was dismissed "without a submission or hearing," and docket fees on the depositions were disallowed solely on the ground that they were not "admitted in evidence." To the same effect is *Cahn v. Monroe*, 29 Fed. Rep. 675, where, in a case at law, the court, after the jury was sworn, directed a verdict for defendant on the opening statement of plaintiff's attorney, before the introduction of any proof, and accordingly disallowed these fees. And in *Gorse v. Parker*, 36 Fed. Rep. 840, such was the ruling of the court on the taxation of costs, because the successful party to the suit conducted his own litigation without the aid of counsel, and could not, therefore, be entitled to attorney's docket fees under the statute.

The question whether these attorney's fees can be taxed upon depositions unless admitted in evidence "on a trial" at law or "on a final hearing" in equity and admiralty is not here presented for adjudication, as all these depositions were used in proof at the hearing, and taken for that purpose, there being no reference or collateral proceedings in the cause in which or for which any of this testimony was taken. The following cases, in which such fees were disallowed upon that ground, do not, therefore, apply here: *Strauss v. Meyer*, 22 Fed. Rep. 467, where the depositions were used in part upon motion for preliminary injunction, and in part taken and used on reference to the master to ascertain damages; *Spill v. Celluloid Manuf'g Co.*, 28 Fed. Rep. 870, where certain depositions were taken to be used upon such reference, and others in a collateral proceeding in the cause for contempt of court; *Dalzell v. The Daniel Kaine*, 31 Fed. Rep. 747, where the testimony was taken before a commissioner appointed to make distribution of a fund in admiralty; *Central Trust Co. v. Wabash, etc., R. Co.*, 32 Fed. Rep. 684, and *Missouri Pac. R. Co. v. Texas, etc., R. Co.*, 38 Fed. Rep. 775, 776, where, in suits for the foreclosure of a railroad mortgage, intervenors for damages caused by the receiver made proof by depositions taken and used before the master upon a reference to him. In *Tuck v. Olds*, 29 Fed. Rep. 883, such fees were disallowed by Judge SEVERENS in an equity case; but the report does not show whether the depositions were taken to be used on the "final hearing" or otherwise in the cause. The court, in the opinion, says:

"It is probable that the statutory provision was intended to provide for compensation in cases where depositions are taken *bene esse*, and in such other cases, not within the scope of the ordinary method of taking testimony in cases pending in the federal courts, as may arise."

But this decision was expressly overruled in *Ingham v. Pierce*, 37 Fed. Rep. 647, by an oral opinion of Judge JACKSON, concurred in by Judge SEVERENS, because the practice under a long-established interpretation of the statute throughout this circuit has been to allow such fees; the 23 depositions in that case having been taken before notaries public under

a stipulation "that they should be treated as of the same force and effect as if taken under the sixty-seventh rule, before regularly appointed special examiners." In *Jerman v. Stewart*, 12 Fed. Rep. 271, 278, cited *supra*, this court held such fees taxable on depositions used on the trial, though taken elsewhere, because "this fee is not a part of the cost of taking the deposition, but, like the docket fee, is an allowance to the attorney as taxable costs for his professional services in the case." And, now, again, upon this review of all the cases I have been able to find construing this provision of the statute, I still adhere to my opinion in *Jerman v. Stewart*, and cannot agree with any *dicta* in the other cases cited tending to establish the principle that the mode or manner of taking the deposition, or the officer before whom it is taken, is to be treated as a criterion in determining the allowance of the \$2.50 fee to the attorney, when the deposition is in fact admitted in evidence. The statute itself contains no limitation or condition. If it be urged that so broad a construction would allow the fees on depositions taken to be used on references, motions for rehearing, or other proceedings in a cause than the final hearing, it is sufficient to say that that question will be further examined when presented here for adjudication. The practice in this district, however, I may add, has always been to tax such fees upon all depositions in any way used in the case. The testimony here is all written, not in narrative, but by question and answer, counsel in every instance propounding the interrogatories to the witness through the officer in the usual way. The testimony of each witness is upon its face called a "deposition;" and the orders appointing the examiners empowered one of them "to take depositions and proofs in the cause," and the other "to take the testimony of the witnesses," under the sixty-seventh rule in equity. The motion to retax or disallow these fees is therefore denied.

2. At the hearing of this cause before the late Mr. Justice MATHEWS and Judge HAMMOND the following decree was made by the court:

"On good cause shown * * * the master in chancery is hereby ordered and directed to have the record in this cause printed, consisting of the pleadings and proof in the cause. He will observe and follow the form and method of printing the records in cases of appeals or writs of error to the supreme court of the United States, so that copies of the printed record can be used in case of appeal in the cause. It is further ordered, adjudged, and decreed that W. A. Wheatly pay the costs of said printing out of any funds in his hands as receiver, or hereafter to come into his hands as such. Said master in chancery will cause as many as forty copies of said record to be printed, to be distributed under the direction of the court. * * * It is further ordered that the master prepare and print with the record an index of it."

Under this order 40 copies of the record were printed and indexed, making a volume of 836 pages in the exact style of type, paper, size, etc., as the records on appeal are printed in the supreme court, and the expense of the printing, paper, and binding, \$829.62, with the master's fee allowed in the case, \$500, in all \$1,329.62, was paid by the receiver, and has been taxed by the clerk as costs against plaintiffs, to which they object by this motion. After this a decree was rendered in this

court for complainants, and defendants took the case by appeal to the supreme court. Of the 40 printed copies 15 were distributed among counsel and the judges of this court, and 25 copies were reserved, to be sent to the clerk of the supreme court with the appeal, the printed record itself being certified, together with a transcript of the subsequent proceedings in the cause. The master's fee here only amounted to about two-thirds of what the clerk of the supreme court would have received for his services in having the manuscript record printed at Washington, and the printing was done here at about four-fifths of what it would have cost there. By an order made in the supreme court, (*Dent v. Ferguson*, 131 U. S. 397, 401, 9 Sup. Ct. Rep. 791,) these printed copies were used there without further expense. No fees were paid the clerk here for copying this portion of the record in the transcript for the supreme court. The actual saving, therefore, in the proper costs of this appeal by the printing of this record here was about the sum of \$1,300; that is, if the record had not been so printed, and the defendants had taken the case to the supreme court by appeal in the usual way, the necessary expense would have been at least \$2,600, instead of \$1,329.62, the amount paid by the receiver, and which would have been recoverable as costs against the plaintiffs.

The statutes prescribe the fee of the clerk for making such copy of a record, (Rev. St. § 828,) and that, upon appeal, a transcript, etc., "shall be transmitted to the supreme court." Rev. St. § 698. Rule 8 of that court requires that "the clerk of the court to which any writ of error may be directed shall make return of same by transmitting a true copy of the record and of the assignment of errors, and of all the proceedings in the case, under his hand and the seal of the court;" and its rule 10 provides for the printing of records on appeal, (25 copies in each case) the fees for which are prescribed by rule 24, made under the authority of an act of congress approved March 3, 1883. Rule 24 of the supreme court also contains the provision that "in cases of reversal of any judgment or decree in this court costs shall be allowed to the plaintiff in error or appellant unless otherwise ordered by the court;" and rule 10 further provides that "in case of reversal, affirmance, or dismissal, with costs, the amount of the cost of printing the record and of the clerk's fee shall be taxed against the party against whom costs are given." Section 983 of the Revised Statutes governing costs in the federal courts is as follows:

"The bill of fees of the clerk, marshal, and attorney, and the amount paid printers and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trials, in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court, and be included in and form a portion of a judgment or decree against the losing party. Such taxed bills shall be filed with the papers in the cause."

The final decree of the supreme court in this case was "that the said defendants, Geo. G. Dent *et al.*, recover against the said Isaac A. Ferguson *et al.* \$135.15 for their costs herein expended, and have execution

therefor;" and that the cause be remanded to this court, "with direction to dismiss the bill with costs;" the decree here upon the mandate being that defendants recover from plaintiffs "the costs of the United States supreme court, together with the costs of this court." The original decree here, from which the appeal was taken, gave judgment against defendants for "all the costs of this cause, including the costs which plaintiffs have already paid or which have been or may be paid through the receiver herein, or which otherwise have accrued in the case;" and this decree further provided that "out of the funds in the hands of the receiver the officers of the court, including the examiner, for taking testimony, and the master, shall be paid their legal fees not already paid by the parties themselves; but this shall not include docket and deposition fees taxed to counsel for plaintiffs until the other officers are first paid, but the same shall afterwards be paid." These latter were not, however, paid by the receiver, though counsel for plaintiffs, while the case was pending in the supreme court, by petition filed here, asked a decree for their payment, which was not granted; but substantially all the other costs up to the date of the appeal were paid by him. While it may be doubtful if this sum for printing the record would have been taxable as costs in the event that no appeal had been taken, in the absence of any rule of this court authorizing such printing, such as exists in other districts in the circuit, (*Jordan v. Woollen Co.*, 3 Cliff. 239; *Dennis v. Eddy*, 12 Blatchf. 195; *Spaulding v. Tucker*, 2 Sawy. 50,) yet, under the circumstances of this case, it is clear it should now be so taxed. The very terms of the order under which the record was printed show that it was the intention of the court that the printed record should be used on the appeal in case one was taken. Counsel for plaintiffs insists that this order was made "by the consent and approval of all parties at the time;" but in its form it was not a consent decree, and there is no agreement whatever in the record pertaining to the matter, and nothing which can properly be considered, except the order itself. Besides, had the order been one made by consent upon its face, with nothing more, that fact simply would not affect the rights of the parties on a question of taxation of costs, probably. It is also urged that because the receiver was directed by the court to pay the expense of printing the record, without any reservation as to who should ultimately bear the burden of the expenditure, it was an adjudication by the court that the amount was to be considered simply as a part of the receiver's expenses, not subsequently taxable as costs in any event. It will be observed that the order upon the receiver only embraces "the costs of said printing," which might not include the master's fee which the receiver was directed by a subsequent order to pay; besides, it was the costs of the printing, not cost or expense which is named in the order, if stress is to be placed upon the word. But if the mere fact that the court ordered this expense to be paid by the receiver was such an adjudication as contended for, then the final decree in the cause, which directed him to pay all the unpaid fees of the court officers, (which, in the aggregate, were substantially all the costs accrued in the cause at that time,) was equally an ad-

judication that all those items were to be thus finally settled; and the result would be that the judgment for costs in this voluminous record would be in effect only for such costs as have accrued here since the appeal was taken, together with the costs of the supreme court. Of course a ruling so emasculating the costs of a case will not be made except upon the plainest reasons apparent in the record, and upon well-established rules of law. "Where a party is entitled to his costs, but it has not been decided who ought ultimately to bear them, payment is often directed to be made out of a fund in court, or by one of the parties to the proceeding, and without prejudice to the question how the same shall ultimately be borne. The absence, however, of these words or words of a like meaning from an order directing payment of costs out of a fund in court does not necessarily imply that the court has decided that the fund out of which the costs are paid is that which must ultimately bear them." 2 Daniell, Ch. Pr. 1409, 1410, 1433. I do not think any of these orders directing the payment of fees, costs, etc., by the receiver were at all intended to adjudge any question of costs whatever in the case, nor that their legal effect is such an adjudication. Questions of costs ordinarily do not properly arise before the taxation, and are not determined by a court in advance, without allowing parties an opportunity to be heard. The reasons urged by plaintiffs to the correctness of the clerk's taxation of this item are not, therefore, sufficient, in my judgment, to support their motion to retax or disallow the same, and it is accordingly overruled.

3. At the commencement of this litigation a receiver was appointed at the instance of the plaintiffs. His settlement with the court has been accepted as correct by the parties as to the compensation retained by him and otherwise. From his reports it appears that he has been paid for his services as receiver the sum of \$2,731.60, being 10 per cent. commissions on the gross collections of rent. The defendants claim that this amount should be taxed as costs against the plaintiffs, but the clerk did not so tax it, and the defendants by their motion ask the allowance of this item in their favor. The bill was originally filed to obtain possession of certain valuable real estate in Memphis, to cancel the muni-ments of title in defendants as clouds upon that of plaintiffs, and establish the title therein to themselves. The receiver, in his settlement, has paid over to defendants the balance of the funds in his hands. In support of defendants' motion counsel cite and rely upon two cases. In one—*Lockhart v. Gee*, 3 Tenn. Ch. 332—the bill was filed to enforce a vendor's lien, and a receiver was appointed to collect the rents on the land up to the date of its sale, on the apprehension by plaintiff and the court that the proceeds of such sale would not be sufficient to satisfy the lien. Under the Tennessee decisions, however, such a vendor has right to satisfaction only out of the land, and is never entitled to a receiver to collect rents. Per COOPER, J.:

"Having no right to a receiver, the complainant is, of course, liable to the defendants for all the consequences of having had one appointed. The costs of the receivership, including the compensation of the receiver, must therefore be paid by the complainant."

That is, while the plaintiff was entitled to recover in the action, he was not in law, at any stage of the proceeding, entitled to a receiver upon the face of his bill, the appointment being erroneous of itself, without reference to the ultimate rights of the parties to the suit, or their determination by the court; in other words, the court in that case had no jurisdiction to appoint a receiver. The case of *French v. Gifford*, 30 Iowa, 148, was a suit by certain stockholders of a savings bank against its officers and directors, and the receiver was appointed at the time the bill was filed, motion was promptly made to discharge him, which the court below denied, and from that decree alone this appeal was taken, leaving the case pending upon all other questions and upon its merits. It was held in the appellate court, both upon principle and under the provisions of the Iowa Code, that the receiver's appointment was erroneous; that the bill upon its face showed that plaintiffs were not and could not be entitled to a receiver; and the action of the court below was reversed. This case is stated because necessary to a proper understanding of what was really decided in *French v. Gifford*, 31 Iowa, 428, the only other authority cited for defendants here. From a taxation of the receiver's costs this second appeal was taken, and it was ruled that of his compensation one-third should be paid out of the funds in his hands, and the other two-thirds taxed as costs against the plaintiffs in the action. In the decision, and in answer to the argument, supported by authority, that receivers were invariably paid out of the fund, MILLER, J., speaking for the court, says:

"Upon an examination of the cases it will be found that in every case there was no question made as to the legality or propriety of the appointment of the receiver; that in each case the receiver closed up the business, and settled his accounts in pursuance of his appointment. * * * We think it would be an unjust and inequitable rule if in all cases the receiver should be entitled to his compensation from the fund in his hands, without reference to the legality of his appointment."

Subsequently, in a case whose facts strikingly resemble those of the one at bar, like questions again came before that court in *Radford v. Folsom*, 55 Iowa, 276, 7 N. W. Rep. 604, in which *French v. Gifford*, *supra*, was urged upon the court. It was an action to quiet title and recover possession of lands, and a receiver was appointed to collect rents, pay taxes, and discharge incumbrances. Plaintiff claimed title under a deed which the court held to be a mortgage, finding a large sum due plaintiff, and granting defendants the right to redeem the land upon paying same, title to vest in plaintiff in case of failure to so pay. The receiver, as here, made settlement with the court, paying balance in his hands over to defendants. The opinion holding the appointment of the receiver proper uses this language:

"The mere fact, that the court found, and so decreed, that the plaintiff and defendants sustained the relations of mortgagee and mortgagors, does not demand a different conclusion. * * * The receiver was duly appointed in the exercise of the lawful jurisdiction of the court," and "discharged the duties presented until the case was finally decided, and the rights of the parties settled, and an order made disposing of the balance of the funds in the receiver's hands."

er's hands. * * * It is believed that the authorities uniformly hold that when no question is made as to the legality and propriety of the appointment of the receiver, and he has closed up the business in pursuance of his appointment, his compensation should be paid from the funds in his hands."

In *Beckwith v. Carroll*, 56 Ala. 12, (cited for plaintiffs,) the receiver was appointed to gather and dispose of crops from land leased to partners, (the original parties plaintiff and defendant in the cause,) and the owner of the land by petition subsequently became a complainant. The fund was insufficient to pay the rent; but the receiver's compensation was ordered to be paid out of it, and the land-owner appealed. Held no error, MANNING, J., in the opinion of the court, saying:

"When it becomes the duty of a court of equity to take property under its own charge through a receiver, the property becomes chargeable with the necessary expense incurred in taking care of and saving it, including the allowance to the receiver for his services."

Such is unquestionably the well-settled law, and a citation of authority in support of it would seem to be needless. No case to the contrary has been cited by counsel, nor any in support of their position, except those heretofore noticed; and it is believed that not one decision can be found holding that the proper expenses of a receiver or his compensation shall be taxed as costs against the losing party where his appointment was proper and legal, and made by a court in the exercise of its undoubted jurisdiction, and where the fund in his hands is sufficient to pay same. Nor does the legality or propriety of his appointment depend at all upon the event of the suit; because it is ultimately determined that plaintiff in an action is not entitled to recover or to the relief he seeks, *non constat* that the action of the court or the conduct of the parties in the appointment of a receiver has been irregular, improper, erroneous, or unnecessary. But, under the circumstances of this case, the defendants ought not, in any event, to be held entitled to the relief they seek by this motion, and a proper and sound exercise of the discretion inherent in a court of equity over the matter of costs should not aid them. The property in dispute at the institution of this suit was overburdened with back taxes in the sum of nearly \$7,000 due the city, county, and state. Suits for the sale of much of it for such taxes were pending in the state courts. Its sanitary condition was extremely bad, and proceedings for the condemnation of portions of it were on that account threatened, and, perhaps, in some instances already commenced; and there was great danger of the property being wholly lost to whomsoever it should be eventually adjudged to belong, unless taken in charge of and protected and preserved by the court. The services of the receiver have been in the highest degree satisfactory to the court and the parties. He has kept the property intact, put it in as good sanitary condition as was possible, kept it insured and repaired, paid off or discharged all the past due and current taxes, and paid most of the costs of this expensive litigation, besides paying the defendants (including amounts to their counsel) some \$6,000 or more; and upon the argument it was stated at the bar that this receiver is now in possession of the

property, as the agent of defendants, under the same rate of compensation allowed him as receiver. The motion of defendants is therefore denied, and the taxation of the clerk is in all respects affirmed.

The reasoning upon which the foregoing conclusions have been reached render it unnecessary to consider the question discussed at the hearing, whether the provisions of section 983, Rev. St., quoted heretofore in this opinion, are an inflexible limitation upon the federal equity courts in the matter of cost taxation. *Trustees v. Greenough*, 105 U. S. 527; *Banking Co. v. Pettus*, 113 U. S. 116, 5 Sup. Ct. Rep. 387; *Lottery Co. v. Clark*, 16 Fed. Rep. 20; *Coy v. Perkins*, 13 Fed. Rep. 111, and notes; *Spaulding v. Tucker*, 2 Sawy. 50; *Gunther v. Insurance Co.*, 10 Fed. Rep. 830. Nor, for the same reason, has it been deemed material for the purposes of this case to discuss the well-recognized distinction of costs "as between party and party," and those as between "party and solicitor."

JACKSON, J., concurs.

CHAPMAN v. KEINDEL *et al.*

(Circuit Court, D. Washington, W. D. March 14, 1891.)

PUBLIC LAND—CONTESTED ENTRY—INJUNCTION.

Where the complainant claims ownership of land by mesne conveyances from one who originally entered it, and to whom the register and receiver of the land-office executed a receipt and certificate of purchase, and more than seven years afterwards the land was entered as a timber claim, and the register and receiver, having permitted this second application to be filed, propose to permit a contest, and have notified complainant to show cause why the first entry should not be canceled, an injunction will not be granted to restrain such contest, in the absence of any evidence of an intent to act unfairly or unlawfully.

In Equity.

W. S. Beebe, for complainant.

P. C. Sullivan, Asst. U. S. Atty., and D. J. Crowley, for defendants.

HANFORD, J. The object of this suit is to obtain an injunction to prevent the defendants Geoghegan and Swetland, who respectively hold the offices of register and receiver of the United States district land-office at Vancouver, from proceeding in a contest case instituted by the defendant Keindel, by which said defendant is endeavoring to secure title from the United States to a certain tract of public land, which was, on the 14th day of August, 1883, entered and paid for at said land-office, under the provisions of the act of congress of June 3, 1878, providing for the sale of timber land in certain states and in Washington Territory. The plaintiff claims to have acquired ownership of said land in good faith, by virtue of certain mesne conveyances from one Flynn, who originally entered the same at said land-office, and to whom the register and receiver executed and delivered a receipt and certificate of purchase. In October,

1890, the defendant Keindel made application at said land-office to purchase the same tract as timber land under the same act of congress. Notwithstanding the prior entry by Flynn, the register and receiver allowed this second application to be filed, and propose to permit Keindel to come in, more than seven years after allowing the first entry, and institute a contest; and have appointed March 16, 1891, as the day for hearing said contest and taking testimony to ascertain whether there are any grounds for canceling the first entry, and have notified the plaintiff to that effect, requiring him to appear at that time with his witnesses at the land-office at Vancouver to show cause why said entry should not be canceled; and the bill alleges that they threaten and intend to proceed with such contest, and to cancel said entry on the records of said land-office. The plaintiff contends that he will be harassed by said contest in the land-office, and will be compelled, in order to defend his rights in the premises, to suffer a loss of time, and incur a large expense; and that the register and receiver, after accepting the proofs and the money tendered by Flynn, and allowing his entry, and issuing to him a receipt and certificate therefor, have exhausted all power conferred on them by law; and that in said contest proceedings they are unwarrantably assuming to act in an official capacity, without authority of law or color of right; and he contends that for his protection against the injury about to be done him a court of equity should grant relief by restraining said officers from proceeding in such unlawful manner.

The appeal here made to the conscience of the court is a strong one. I consider the practice of the land department in delaying the issuance of patents for years after allowing entries of the public lands, and then permitting strangers, merely for their own gain, and individual selfish purposes, to institute contests for the setting aside of entries once allowed, as tending rather to invite and encourage the commission of frauds and perjuries than as a check to such evils. I am constrained, however, to hold that it would be an unwarrantable assumption of power for this court to control the action of the officers of the land department in the manner requested by the plaintiff. There may be sufficient reasons for an investigation as to the entry under which the plaintiff claims, and the officers of the government to whom is intrusted the administration of the laws relating to the sale and disposition of the public lands have the right to make such investigation, and should be allowed to do so without obstructions or hindrances being placed in the way by the courts, even if there should be no apparent reason for such investigation. A mere investigation is not in itself an interference with any of the plaintiff's rights. He is not obliged to attend at the time of hearing the proofs, nor to produce evidence in his own behalf, nor to incur any expense, if he does not choose to do so. If by law the register and receiver are empowered to determine any question affecting the validity of the entry made by Flynn, certainly the court should not interfere with them in the exercise of such power. The court will not assume that they have prejudged the case, or that they will act unfairly. If, in the facts of the case, there exist any substantial and valid grounds for canceling

the entry, then there is a way by which it may be canceled in accordance with law and equity. If the officers cannot themselves adjudge and finally determine the matter, they can cause proper proceedings to be instituted, in the proper forum; and, until compelled to do otherwise, the court will assume that the plaintiff will not be deprived of any interest he now has in the land, otherwise than by a proper and legal method. The fact that the officers have given notice of their intended investigation precludes the idea of any intention on their part to act in an unfair or unlawful manner, and the present application for a restraining order is at least premature. If, after an investigation, the officers should attempt to place obstacles in the plaintiff's way, to prevent him from perfecting his title to the land, by allowing another party to enter it, and so acquire a colorable right to the land, and a standing to harass and annoy plaintiff by litigation, then a question may arise which at this stage of the proceedings cannot with propriety be passed upon. The question whether officers of the land department can in any case lawfully cancel an entry, once allowed, is very serious and important, and it has been ably argued by counsel in this case. The same question is involved in other cases which have been argued before me, and are now under advisement, in which its decision is necessary to the determination of the rights of the parties. It is not necessary, however, for me to pass upon the question now, as I must, in any event, for the reasons already stated, refuse to grant the plaintiff's present application for a restraining order. Let an order be entered accordingly, but with leave to renew the application upon a supplemental bill or further showing, if there shall be cause for doing so.

AMERICAN LOAN & TRUST CO. v. EAST & WEST R. CO. OF ALABAMA *et al.*, (JERSEY CITY IRON CO., Intervenor.)

(Circuit Court, N. D. Alabama, S. D. April 30, 1891.)

RAILROAD MORTGAGE—FORECLOSURE—PRIORITIES—SUPPLY LIENS.

A debt created for materials for original construction of a portion of a railroad more than six months before the appointment of a receiver in proceedings for the foreclosure of a mortgage is not within the rule authorizing the court to provide for arrears due for operating expenses of the road out of the net income of the property, and in the absence of a showing that there had been a diversion of current funds or income which should have been applied to the payment of the claim for such materials, will not be given a priority over the rights of the mortgage creditors.

In Equity. On report of master.
Webb & Tillman, for intervenor.
R. L. Fowler, for complainants.
A. T. London, for receiver.

PARDEE, J. The Jersey City Iron Company filed an intervention in this case, alleging that the defendant railroad company was indebted to it for certain frogs and switches furnished prior to the original appointment of a receiver, and used in the construction of the railroad between Broken Arrow and Pell City. Intervenor claimed to be entitled to be paid as a preferred creditor out of any funds which might come into the hands of the receiver of the said corporation. The relief asked was for a reference to a master, and, upon the coming in of his report, for an order upon the receiver to pay said claim out of the first of any moneys which may come to his hands as such receiver. The petition of intervention was referred to the special master "to take evidence and report the facts, and, if the claim of the said petitioner shall be found under the evidence to be a valid claim against the East & West Railroad Company of Alabama, then to what extent the same is a lien upon the property in the possession of the court or upon the earnings thereof." After hearing parties and obtaining the evidence the special master filed a report, giving a full consideration of the entire case, considering it in all its aspects, to the effect "that the claim of the Jersey City Iron Company for \$396.00 is valid against the East & West Railroad Company of Alabama, with interest from September 6, 1887, at eight per cent., and should be paid to the intervenor out of any surplus that may remain after paying the preferred debts of said railroad company; but that the intervenor has no lien, either by contract, law, or order of the court, on the earnings of the said railroad company in the hands of the receiver, or on the property of said company, or upon any funds that may arise from the sale thereof." This report was filed August 5, 1890. No exceptions appear to have been filed to the said report. Thereafter, on the 27th September following, counsel for the intervenor, for the receiver, and for the complainant filed a consent to the effect that the claim and petition of the Jersey City Iron Company may be submitted upon the report of the special master for decision of the court, stipulating that each of the counsel may submit in reference thereto briefs thereon. From this statement of the case it will be seen that the cause is submitted to the court upon the report of the special master, without any exceptions of any kind being made thereto. Unless the court is called upon to pass upon a case without any pleadings, it would seem that there is nothing to be done save to enter an order homologating the master's report as one which is satisfactory to all parties in the case. I find, however, in the briefs filed a contention which, I suppose, is intended to be submitted to the court. Counsel for intervenor contends that on the admitted facts of the case, particularly upon the admission that the frogs and switches sued for were not only used in the construction of the road, but were necessary for such construction, and without them the said extension could not have been completed or made fit for use, intervenor is entitled to be paid for these frogs and switches by the receiver out of the net income and earnings of the road. By "the net income," it is expressly stated, is intended to be meant all over and

above operating expenses. There is nothing in the report of the master or in any evidence submitted to the court which shows that there is any net income arising from the operation of the property over and above operating expenses. It is a fact, however, well known to the court, that all the net income over and above operating expenses is *prima facie* subject to the lien of complainant's mortgage, and has been particularly pledged by the court, with the complainant's consent, for the payment of receiver's certificates, which have been issued in large amounts in this case. Counsel for intervenor seems to rely mainly upon the case of *Fosdick v. Schall*, 99 U. S. 235, and the line of cases thereafter following, as holding that "debts contracted by a railroad corporation as a necessary part of the operating expenses, or for labor and supplies, or for necessary equipments or improvements of the mortgaged property, are privileged debts, entitled to be paid out of the current income if a mortgage trustee takes possession, or if a receiver is appointed in a foreclosure suit." In *Hale v. Frost*, Id. 389, it is held that the net earnings of the railroad while in possession of the court and operated by its receiver are not necessarily and exclusively the property of the mortgagees, but are subject to the disposal of the chancellor in payment of claims which have superior equities, if such shall be found to exist. The court, in applying this rule in that case, only allowed for the payment of supplies to the machinery department, furnished before the appointment of a receiver, and rejected that part of the account which was for material for construction purposes, as not based on any special equity. *Miltenberger v. Railway Co.*, 106 U. S. 287, 1 Sup. Ct. Rep. 140, decides:

"A court has the power to create claims through a receiver in a suit for the foreclosure of a railroad mortgage which shall take precedence of the lien of the mortgage. It may, therefore, provide that the receiver shall pay the arrears due for operating expenses for a period in the past not exceeding ninety days, and pay indebtedness not exceeding \$10,000, to other connecting lines for materials and repairs and for ticket and freight balances, a part of which had been incurred more than ninety days before the order appointing him was made, and purchase rolling stock, and build six miles of road and a bridge, part of the main line of the road, and making such expenditures a lien prior to the lien of the mortgages."

But it must be noticed that the original construction dealt with was subsequent to the receivership. In *Trust Co. v. Souther*, 107 U. S. 591, 2 Sup. Ct. Rep. 295, the court, so far as it allowed for the payment of permanent improvements and original construction, dealt entirely with debts contracted by the receiver and during the receivership under the authority of the court. *Union Trust Co. v. Illinois, etc., Ry. Co.*, 117 U. S. 462, 6 Sup. Ct. Rep. 809, is to the same effect. The case of *Burnham v. Bowen*, 111 U. S. 776, 4 Sup. Ct. Rep. 675, was a case in which the court was dealing with diversion of income for the improvement of the property by the trustees in possession, or by a receiver, and holds in such cases that the debts for operating expenses should be paid, if necessary, out of the *corpus* of the property; and in that case the court was careful to declare that "neither in *Fosdick v. Schall*, or *Huidekoper v. Locomotive Works*, 99 U. S. 258, did they decide that the income of a rail-

road in the hands of a receiver for the benefit of mortgage creditors who had a lien under their mortgage can be taken away from them and used to pay the general creditors of the railroad." Finally, in the case of *Wood v. Deposit Co.*, 128 U. S. 421, 9 Sup. Ct. Rep. 131, the supreme court expressly declares that "the doctrine of *Fosdick v. Schall*, is applicable wholly to debts incurred for operating expenses, and does not apply where it is a question of original construction; and, further, that it only applies where there is a diversion of the income of a going concern from the parties to which that income is equitably and primarily devoted." It does not appear from the record in this case, nor otherwise, that prior to the receivership there was any diversion of current earnings or funds which should have been applied to the payment of intervenor's claim, to the payment of interest on the bonded debt, or any diversion whatever of any earnings of the property which should have been applied to the payment of intervenor's claim. The debt is conceded to be one for original construction. The intervenor can take nothing under the doctrine of *Fosdick v. Schall*. In the order appointing a receiver in the main case no reservation whatever was made for any creditors of the railroad company, except for wages and running expenses incurred by said company in operating said railroad within three months next preceding the date of the order. It is probable that, following the case of *Hale v. Frost*, *supra*, the court could now order application of net income to payment of intervenor's claim if the court could now find that in equity such claim was superior to claims of complainants and others. In the case of *Easton v. Railway Co.*, 38 Fed. Rep. 12, which was a case where it was sought to charge the income arising during a foreclosure suit, and while the property was operated by a receiver, with the payment of a liability incurred by the railway company prior to the receivership on a contract for the carriage of goods, the circuit judge now presiding, in discussing the case, said: "In all the cases that I have examined, where debts arising before the receivership have been allowed as prior in equity to the claim of the bondholder on the earnings of the receivership, the underlying principle is that the debt when incurred operated in a direct way to the advantage of the mortgage holders;" and, citing this, counsel for intervenor has laid great stress on the admitted fact that the frogs and switches furnished by intervenor were not only used in the construction of the railroad, but were necessary for such construction, claiming thus a clear case where the debt incurred operated in a direct way to the advantage of the mortgage holders. In the *dictum* quoted the judge could not have intended to declare as a rule that all debts incurred by a railroad company prior to foreclosure of mortgage bonds, which operated in a direct way to the advantage of the mortgage holders, should be allowed as prior in equity to the claim of such mortgage holders on the earnings of the railroad during the receivership. Such a rule would be too broad to be sustained by the adjudged cases. It would practically give an equitable lien for all debts incurred in the construction of railroads, for in every case it would be easy to show that the debt operated in a direct way to the benefit of the mortgaged prop-

erty, and therefore to the benefit of the mortgage holders. The generally recognized rule is that original construction creditors have no superior equity, and there is no reason why an exception should be made in favor of intervenor who sold material for general construction relying on the credit of the railroad company, and this more than six months prior to any receivership. On the case as submitted no other decree can be entered than one approving and confirming the master's report, declaring that the Jersey City Iron Company is entitled to be paid \$396, with interest from September 6, 1887, at 8 per cent., out of any surplus that may remain after paying the preferred debts of the railroad company; declaring further that the intervenor has no lien on the earnings of said railroad company in the hands of the receiver, or on the property of said company, or on any fund that may arise from the sale thereof.

ANDERSON v. MACKAY.

(Circuit Court, S. D. New York. April 27, 1891.)

DISCOVERY—PRACTICE—EXAMINATION OF PLAINTIFF.

A plaintiff may, in an action at law in a federal court, obtain an order for the examination of the defendant, to enable the plaintiff to frame his complaint, where such an order is provided for by the state Code of Procedure.

At Law.

Smith & Perkins, for complainant.

Robt. H. Griffin, for defendant.

LACOMBE, Circuit Judge. The decision in *Ex parte Fisk*, 113 U. S. 713, 5 Sup. Ct. Rep. 724, does not cover an examination of a defendant to enable plaintiff to frame a complaint, nor do any of the other cases cited hold that such an examination cannot be held in a federal court, in an action at law, when it could be had in the state court under state practice. The reason for reversing the decision of this court assigned in *Ex parte Fisk*, viz., that the federal statutes had specially provided a different mode of taking testimony to be used on the trial, does not apply in this case, where no such different mode has been specially provided. The order may stand, but the examination must be confined strictly to an inquiry whether the defendant purchased any stock of the company personally, or whether he had any interest in any stock purchased by others, or exercised any control over them or not.

HAT-SWEAT MANUF'G CO. v. WARING *et al.*

(Circuit Court, S. D. New York. April 13, 1891.)

PATENTS FOR INVENTIONS—LICENSE—ROYALTIES—FRAUD.

Where the patentee of a hat-sweat appliance induces a hat manufacturing company to accept a license to use the patent under representations that other hat manufacturers are paying the schedule rates for royalties, when in fact they are only paying one-half of those rates, the company so imposed upon is not liable for the royalties agreed to be paid, and may have the license canceled.

At Law.

John R. Bennett, for complainant.

Wetmore & Jenner, for defendants.

LACOMBE, Circuit Judge. Although the testimony is voluminous, this seems to be an exceedingly plain case. That before the execution and delivery of the written license upon which the suit is brought the complainant by its agents represented to the defendant Waring that the leading hat manufacturers (who composed the organization known as "The Associated Hat Manufacturers") had paid up their back royalties, and had agreed to take licenses, and were paying royalties thereunder at the rates specified in the license to the defendants, is indisputably proved by the complainant's printed circular, and by the written certificate, signed, when the license was delivered, by Van Gelder, as its manager. So far as there is any conflict between the witnesses Van Gelder and Waring as to any more detailed representations, these documents fully confirm the testimony of the latter, and discredit that of the former; but it is not necessary to strike any balance between the testimony of these two witnesses. The undisputed evidence of these documents proves the making of the representations above set forth. The defendant Waring, who acted for the defendant corporation in obtaining the license, testifies that these representations induced him to give up fighting the patent, and to accept the license. To the processes of his own mind he is undoubtedly the best witness, and there is no good reason shown for discrediting his statement. On the contrary, in view of the *consensus* of testimony that in the business of hat manufacture competition is sharp, and success dependent upon small savings in the cost of production, it might almost be admitted without further proof that representations as to what the use of complainant's patented articles cost rival manufacturers were material. Waring's testimony that he relied upon them is therefore reasonable, and there is no good reason why it should not be believed. Upon the proof it seems reasonably certain that the statement that rival manufacturers had paid up their back royalties was untrue, but it is not necessary to so hold in order to dispose of this case. The other representation, viz., that they had paid and were paying for current royalties the schedule rates, is shown to be false by the indisputable evidence of the agreement between the complainant and the 15 or 20 leading manufacturers who signed it, and by the acts of the parties

thereto. It is shown conclusively that at the very time the representations were made and the license taken by defendants the favored licensees were paying the schedule rates with one hand and receiving 50 per cent. thereof back again from the complainant with the other, through a tortuous and carefully disguised channel. Defendants may take a decree canceling the license and dismissing the bill.

PRICE *et al.* v. JOLIET STEEL CO.

(Circuit Court, N. D. Illinois. May, 1891.)

INFRINGEMENT OF PATENTS—LACHES.

An unexplained delay of seven and a half years in bringing suit for infringement of a patent will deprive complainants of the right to a preliminary injunction, and perhaps to an account; but, inasmuch as it would be inequitable to allow infringement to continue in the future, a court of equity will entertain jurisdiction to grant an injunction notwithstanding such laches.

In Equity.

Samuel A. Duncan and Horace S. Oakley, for complainants.

Prussing, Hutchins & Goodrich, Banning & Banning & Payson, and *E. N. Dickerson*, for defendant.

GRESHAM, J. The bill was filed October 30, 1890, and it avers that on the 2d day of May, 1876, letters patent 176,996 were duly issued to John M. Price and William Lewis for an original invention therein described; that on February 25, 1883, Lewis died intestate, and, on the 13th of April following, Louisa Lewis and Margaret Lewis qualified as his personal representatives; that on April 1, 1890, the surviving patentee and the personal representatives of Lewis, by a proper instrument, assigned the patent to the complainants, together with all rights of action for past infringements; that the complainants are still the owners of the patent; that it is valid, of great value, and has been generally respected by the public; "that the defendant, well knowing the premises and the rights secured to the inventors and patentees of the said invention aforesaid and of your orators, but conspiring with others and contriving to injure the said patentees, John M. Price and William Lewis, and your orators, and deprive them of the benefits and advantages which might and otherwise would accrue to them, the said patentees and your orators, from the said invention and improvement, since the grant of said letters patent has made or caused to be made and used, and now uses, within the city of Joliet, Ill., and elsewhere, a rolling-mill, for the rolling of steel or iron rails, embodying the principles of construction and of operation set forth in said letters patent, and covered by the several claims thereof, and that this manufacture and use on the part of the defendant has been without the license or authority of the said John M.

Price and William Lewis, or the administratrices of the said William Lewis, and without the license or authority of these, your orators, or either of them, but in disregard and defiance of the said patentees and your orators' rights in the premises, and in infringement of the said letters patent, and to the great injury of the said patentees and your orators, and damage to their rights." The bill also avers that the defendant, by its unlawful use of the invention, has derived large gains and profits, which should and would have been received by the patentees and the personal representatives of Lewis, and since the date of the assignment, by the complainants; that the defendant is prepared to continue its unlawful acts, and avows its purpose to do so. The bill prays for an injunction and an account. The defendant demurs, on the ground that the long delay in bringing the suit deprives the complainants of standing in a court of equity. It is urged in support of the demurrer that the bill shows the defendant was infringing as early as February 25, 1883, when Lewis died, and that the trespass continued until October 30, 1890, (the date of the filing of the bill,) a period of seven and a half years. The complainants' counsel concedes this to be a correct construction of the bill, and it will be treated accordingly. This unexplained delay in bringing suit is sufficient to deprive the complainants of the right to a preliminary injunction, and perhaps to an account. Is it fatal to their right to all other relief? The demurrer admits that the complainants own the patent; that it is valid and for a valuable invention; that the public has generally respected it; that the defendant has derived large gains by unlawful infringement and is prepared and expects to continue the trespass during the remainder of the life of the patent. Assuming that the complainants and their predecessors in ownership were guilty of laches in asserting their right to the invention, infringement under no claim of right is admitted, and it would be inequitable to allow it to continue during the remaining two years of the patent. An injunction would stop the trespass, and prevent a multiplicity of actions at law, which would be expensive and afford inadequate relief. In *McLean v. Fleming*, 96 U. S. 245, which was a suit for infringement of a trade-mark and an account, the court said: "Equity courts will not in general refuse an injunction on account of delay in seeking relief, when the proof of infringement is clear, even though the delay may be such as to preclude the party from any right to an account for past profits."

Demurrer overruled.

ROCKER SPRING CO. v. FLINN, (six cases.)

(Circuit Court, N. D. Ohio, E. D. 1891.)

1. PATENTS FOR INVENTIONS—ANTICIPATION.

Letters patent No. 354,043, issued to Connolly December 7, 1886, No. 247,472, issued to Beiersdorf & Bunker September 27, 1881, No. 313,429, issued to Kenna March 3, 1885, No. 334,102, issued to Bunker January 12, 1886, No. 334,345, issued to Bunker January 12, 1886, and No. 273,630, issued to Stevens March 6, 1883, the principal feature of each of which is the use of spiral or coil springs to connect the base and rocking part of a platform rocking-chair, located at opposite sides of the chair center, and in the center of the oscillation of the chair-seat, and rigidly connected to said parts, are not anticipated by springs manufactured under letters patent to John Flinn, 339,754, issued April 5, 1881, or No. 345,673, issued July 20, 1886, which were attached only at one place on the base rail and rocker of the chair, and were not rigid and firm, but were long and weak, and would not hold the upper and lower rocker to an alignment, and to the use of which guides and stops and other appliances were necessary. These objections and noises, sudden jerks, a wobbling motion, and the sense of insecurity caused thereby, combined to make the use of the springs limited, and they cannot be regarded as anticipating the Connolly invention, which was generally accepted and used.

2. SAME.

The use of such coil or spiral springs is not anticipated by the use for a similar purpose of steel springs made of flat sheet steel of various thicknesses and strength, attached to the base and rocker so as to receive a tortional spring action, and operate with a twist against itself, giving the chair a jerky twisting movement, unpleasant to the occupant.

In Equity. Bills for infringement of letters patent.

Banning, Banning & Payson, (M. D. & L. L. Leggett, of counsel), for complainant.

Henry C. Ranney and Henry McKinney, for defendant.

RICKS, J. The complainant has filed six bills in equity under six different letters patent owned by it, and of which the defendant is charged with infringement. The complainant asks for a decree for perpetual injunction, but waives any accounting as to profit and damages. The several patents sued upon, and the different claims which it is charged the defendant infringes, are as follows:

First, the Connolly patent of December 7, 1886. This patent is numbered 354,043, and was originally applied for on July 30, 1880. A provisional application was made on March 23, 1885, which entitles it on the record to date back to the date or time of the original filing. There are two claims in this patent, as follows:

"(1) The combination in a chair of a seat having rockers secured to its under side, a base having a lower support for said rockers, and two spiral springs rigidly connected to said parts, respectively, and located and secured at opposite sides of the chair center, and constituting the connection between the seat and base parts of the chair, for holding the rockers and their lower support in alignment and proper relative position, substantially as described.

"(2) The combination in a chair of a seat having rockers secured to its under side, a base having a lower support for said rockers, and two spiral springs rigidly connected to said parts, respectively, and located and described at opposite sides of the chair center, and in the center of oscillation of the chair-seat, and constituting the connection between the seat and base parts of the chair for holding the rockers and their lower support in alignment and proper relative position, substantially as described."

The defendant is charged with infringing both these claims.

The patent sued upon in the other case is the Biersdorf & Bunker patent, of September 27, 1881, numbered 247,472. Application for this patent was filed November 15, 1880, but after application of Conolly. It has only one claim, to-wit:

"In a platform rocking-chair, the combination, with the base rail, A, A, prime, and rockers, B, B, prime, resting upon such base rails, of the broad and stiff spiral spring, C, C, prime, connected rigidly with such base rails and rockers, and being both deflected and extended when the chair is rocked, such springs being oppositely coiled, and controlling wholly the movement and position of the rockers and of the base rails, substantially as described and shown."

The next patent sued on is the Kenna patent, of March 3, 1885, numbered 313,429. This patent contains five claims, but infringement is only charged of the first, second, and third. Without quoting these three claims in full, I refer to the brief synopsis thereof of complainant's counsel in their brief, in which they describe the claims to be that "the spring called for has end portions of the wire extended beyond the side of the spring, and connectors for securing the extended end portions directly to the respective parts of the chair." In the third claim the connectors are called "bracket plates," while in the first and second claims the broader term "connectors" is used. Of course, the greater includes the lesser; the bracket plates are connectors. These connectors hold the respective ends of the spring at several points, so that they are rigidly and securely attached to the rocker and base rails of the chair.

The next patent is the Bunker patent of January 12, 1886, numbered 334,102. This patent contains four claims, but infringement is only charged of the first and fourth, which are as follows:

"(1) A bracket for platform rocking-chair attachments, comprising two parts, one attached to a coil spring, and the other to the appropriate portions of the chair; the two when in operation being secured or fastened together by one interlocking with or into the other at the side of the spring, substantially as described."

"(4) A bracket for platform rocking-chair attachments comprising two parts, one to be rigidly attached to the chair, and the other rigidly to the coil spring, the two to be rigidly connected together by one interlocking with or into the other, and to be held in their proper relative positions when in use by the drawing tension of the spring, whereby, by means of the rigid attachments of their ends, the springs are flexed or bent by the rocking of the chair, substantially as described."

The next patent sued upon is the Bunker patent of January 12, 1886, numbered 334,345. Infringement of both claims is charged. These claims are as follows:

"(1) A bracket for platform rocking-chair attachments, having side and middle projections for securing one end of the spring, and at least one of said projections having a shoulder, and being adapted to be inserted between the coils of the spring, said shoulder being on the inside of the end coil when the spring is in place, whereby the spring is held in place, and prevented from being drawn away from the rockers and base rails of the chair, substantially as described."

"(2) A bracket for platform rocking-chair attachments, having side projections to partially embrace or encircle the sides of the end coil of the spring to a middle projection, the middle projection having a shoulder, and being adapted to be inserted between the end coils of the spring; said shoulder being on the inside of the end coil when the spring is in place, whereby the spring is held in place and rigidly attached to the upper and lower parts of the chair, respectively, substantially as described."

The next patent is the Stevens patent of March 6, 1883, numbered 273,630. This patent has six claims, but infringement is only charged of the sixth, which is as follows:

"(6) The combination, substantially as shown and described, with the base and rocking portions of a base rocking-chair, with flexible stops connecting the two, and arranged in the rear of a vertical line of rest or center of motion of the rocking-chair, and in front of the point where gravity would overturn the chair backward, positively limiting the backward and forward movements of the rocking portion, and preventing the overturning thereof, as specified."

The defendant has answered in each case, and denies that the letters patent sued on are valid, because the patentee named therein is not the inventor, nor the assignee of the inventor; that said invention has been in common use by the public for more than five years prior to the issuing of said letters patent, or the filing of the application therefor; that said invention is not new, novel, or useful; and denies infringement. He further says that the springs sold by him are manufactured and put on the market by virtue of letters patent duly issued to him by the United States under date of April 5, 1881, and numbered 239,754, the application therefor having been filed on the 26th day of April, 1880; and also by virtue of certain other letters patent duly issued and granted to him by the proper officers of said government under date of July 20, 1886, and numbered 345,678, all of which letters the defendant exhibits to the court. The defendant further claims that he is the sole and original inventor of the invention and articles named and described in said letters patent, respectively.

The contention as to priority of the invention between the Connollys and the defendant relate to the spiral spring covered by the claims set forth in complainant's patent numbered 354,043, and the springs exhibited by defendant, especially Exhibits 5 and 11. The complainant's spring was first made and used on a tilting office-chair, in the fall of 1876, in the offices of the Connollys in Philadelphia, Pa. A tracing drawing of this chair with the spring attached is exhibited to the deposition of Thomas Connolly, and identified by him and Joseph B. Connolly as a correct representation of the original chair and spring as made by them. They are corroborated in this testimony by the evidence of Clayton W. Nichols, who identifies the drawing as a correct representation of a chair made by the firm with which he was connected, Hutchinson, Nichols & Co., of Philadelphia, for the Connolly Bros. between July and December, 1876. He fixed the time definitely by charges made on their original account-books in the months of August and September, 1876. A copy of these charges, item by item, is given in Mr. Nichols' testimony. He saw the chair in use in Connolly's office

frequently after those dates. The Connolly Bros. continued making experiments and improvements in this spring until about July 30, 1880, when their invention was perfected, and application was made for letters patent numbered 354,043. In their application the applicants state what constitutes their real invention. I quote as follows:

"The essential idea or feature of our invention being the connecting together and holding in proper position of the seat and base parts of a chair having rockers secured to the under side of its seat part, and a base having a lower support therefor, by two spiral springs located at opposite sides of the chair center. We, of course, do not wish to be understood as limiting ourselves to special forms or details of construction, or in any way as waiving the use of proper equivalents."

The defendant contends that this invention was anticipated by various forms of spiral springs in common use before the Connolly invention. He offered in evidence exhibits of nine different forms of such springs, all claimed to have been in prior use. The evidence of such use is confined to the testimony of the defendant and a foreman in his employ in Philadelphia in 1876. The original springs then claimed to have been used are not produced. Springs of similar construction and use are produced, and which it is claimed are duplicates. Proof of use of Exhibits 5 and 11 experimentally is offered, but proof of use of No. 12 is wanting. Even conceding that the springs exhibited performed all the functions claimed for them, the proof of use and application to the purposes claimed for them is not as satisfactory as the law requires. The defendant did not show that activity and earnest purpose to put these springs in use, and to demonstrate to the public their utility, that is common and natural to inventors who feel that they have conceived something new and useful. The most that is claimed by the witnesses is that some of these springs were used and applied on rockers repaired and put in use in a few places in Philadelphia. The times and places, and the persons by whom they were so used, are very indefinite. A few of these springs were kept on hand ready for sale. The evidence shows that some sales were actually made, but there is nothing to show that the defendant had sufficient confidence in these springs to attach them to new rockers, and place them upon the market and push their sale. He did not seem to have confidence in the utility of his invention. There is no evidence that it was accepted or adopted by the public in general use. In fact, the whole testimony in the case shows that during these months the defendant was experimenting with these springs, and endeavoring to perfect an invention. But the invention does not appear to have been completed by the defendant. The springs were not applied and used and put upon the market, claiming for them that they would meet the uses for which they were invented. The objections to the defendant's springs were obvious: They were attached at only one place on the base rail and rocker of the chair, and were not rigid and firm. The springs were long and weak. The wire was not stiff enough, and the springs were not sufficiently well attached to hold the upper and lower rockers to an alignment. Guides and stops and other objectionable appliances were

necessary to make the use of these springs even possible. Noises, sudden jerks, a wobbling motion to the chair, a weakness and want of sense of security and safety on the part of the occupant all combined to make the use of this spring very limited. In truth, the springs as used were not capable of accomplishing all the useful results claimed in the patent, and cannot, therefore, be claimed as having anticipated the Connolly invention. On the other hand, the Connolly invention seems to have been generally accepted and used. Its utility was shown by such general use and adoption. Platform chairs soon became popular. The testimony of a large number of manufacturers of furniture, offered by the complainant, shows clearly the objections to the old springs, and the general acceptance by the public, and the advantages recognized in, the new springs. The *prima facie* case of invention made by the letters patent has thus been strengthened and broadened by the testimony of complainant's expert witnesses and the manufacturers, who testified as to the practical results following the use of the springs as claimed in the patent. This general acceptance by those best qualified to judge of the utility of the invention strengthens the claim that a patentable invention is covered by the letters sued on, and, where there is doubt whether the invention really exists as claimed, this fact ought to turn the scale.

The defense is based, not only on the anticipatory character of the springs used and made by defendant of the various kinds exhibited, and which defense, for the various reasons above given, was held to be established, but it is next claimed that defendant manufactured his springs by virtue of letters patent numbered 239,754, and numbered 345,678. Exhibits 6, 7, and 8 are offered as springs covered by patent numbered 239,754. These are steel springs, made of flat sheet steel of various thicknesses and strength. They are attached to the rockers and base, and given a torsional spring action. This spring operates on a twist against itself. While the spiral spring operates on a straight line, tilt, or draw, the action of the flat spring is a constant strain on the metal in use. The spiral spring has a regular yield. The two springs belong to different classes. But the flat spring has not been successful. It gave a jerky, twisting movement to the chair, not pleasant to the occupant. The strain on the metal caused by the constant motion of the chair soon made the spring brittle, and it was liable to snap and break.

I do not think these springs contain the invention shown in the Connolly patent numbered 354,043. The spring covered by patent numbered 345,678 is in many respects like the other exhibits filed by the defendant, and without the features added since the date of complainant's invention may fairly be held to come within the reasons hereinbefore given for finding that it is not rigidly attached at more than one point, and does not perform the same functions as the spring covered by the invention under No. 354,043. I am therefore of the opinion that complainant is entitled to a decree sustaining the validity of its patent in each of the six cases hereinbefore cited, and finding that there is an infringement of the first and second claims of patent numbered 354,043, of the single claim of patent numbered 247,472, of the first, sec-
v.46f.no.2—8

ond, and third claims of patent numbered 313,429, of the first and fourth claims of patent numbered 334,102, of the first and second claims of patent numbered 334,345, and of the sixth claim of patent numbered 273,630; and, complainant having waived a decree for profits and damages, a perpetual injunction may issue against the defendant, restraining him as prayed in the several bills.

NATIONAL TYPOGRAPHIC Co. *et al.* v. NEW YORK TYPOGRAPH Co. *et al.*

(Circuit Court, S. D. New York. March 11, 1891.)

1. PATENTS FOR INVENTIONS—TYPE-SETTING MACHINE—INFRINGEMENT.

Letters patent No. 317,823, for the combination, in a machine for producing printing bars, of a series of independent matrices, representing single characters, holders for such matrices, a series of finger-keys representing the respective characters, intermediate mechanism to assemble the matrices in line, and a casting mechanism to co-operate with the assembled matrices, so as to produce a line of type set in a solid bar, is infringed by a machine in which each of the mechanisms performs the same function as in the patented machine, though there are differences in the mechanisms of the infringing machine tending to simplicity and improvement.

2. SAME—INJUNCTION—PRESUMPTION OF VALIDITY.

The fact that said patent has been unquestioned for nearly six years, during which time the machines have been in the market, and over \$1,000,000 has been invested in manufacturing them, is sufficient to fortify the presumption of the validity of the patent, though there has been no previous adjudication thereon.

3. SAME—EVIDENCE.

A preliminary injunction will not be granted to restrain alleged infringements of a patent in which there is a disclaimer of what is covered by another application, where a copy of such other application is not produced, so that the court can ascertain the extent of the disclaimer.

In Equity. On motion for injunction.

Betts, Atterbury, Hyde & Betts, for complainant.

Kerr & Curtis, for defendants Hall, Starring & Van Wormer.

Lowrey, Stone & Auerbach, for Press Pub. Co.

LACOMBE, Circuit Judge. That the machines manufactured and sold by the defendants may be lighter, smaller, cheaper, more easily operated, and more efficient; that they may be a decided improvement on the Mergenthaler machine, and may, as such, commend themselves more readily to the public; that they are themselves patented, and that, if put in open competition with the earlier machines, they would prove more attractive to purchasers and users,—each of which points is pressed with great force by the defendants,—is wholly immaterial, if the complainants' main contention is a sound one, viz.: That the Mergenthaler "linotype" is covered by a foundation patent; that it embodies a combination wholly new in the printing art, which marks the first great step in advance taken for over 400 years, and which, though susceptible, as all new foundation inventions are, of subsequent improvement, has yet demonstrated its ability, practically and efficiently, to perform the work which it was designed to do. If, upon the case now presented, it ap-

pears that Mergenthaler is a pioneer inventor, he is to be secured the fruits of what he invented and covered by his patent, even as against a subsequent inventor, who, though he may have greatly improved it, still uses the original invention which lies at the foundation of the art. See cases cited in notes to section 894, Rob. Pat. Three patents are declared upon, (Nos. 313,224, 317,828, and 345,525,) but this motion for preliminary injunction is based solely upon the second and third. As to the third, (No. 345,525,) there is a disclaimer of what is covered by another application of the same inventor, which application is not in evidence, and is now in interference in the patent-office with some third person. Such application, which would limit with exactness the measure of the disclaimer, is a proper matter for consideration by the court, when interpreting the patent; and inasmuch as the complainant, who presumably could do so, does not furnish a copy of such application, the motion for preliminary injunction under that patent should be denied. The decision of this motion, therefore, hinges upon the second patent. The claim relied upon is as follows:

"(1) In a machine for producing printing bars, the combination of a series of independent matrices, each representing a single character, or two or more characters, to appear together, holders or magazines for said matrices, a series of finger-keys representing the respective characters, intermediate mechanism, substantially as described, to assemble the matrices in line, and a casting mechanism, substantially as described, to co-operate with the assembled matrices."

The product of the combination of machinery described in the patent, and thus claimed, is a line of type cast in a solid bar, presenting on its printing edge any combination of letters and printer's marks which the operator may desire, produced automatically. By its use a great change is introduced into the printer's art, whereby the type-setting of single types is dispensed with, and the matter is set up from "slugs" or "bars," each containing, not a single letter nor a single word, but any conceivable combination of words and figures. That such a change in the art is almost revolutionary seems to be practically conceded; the defendants insisting, however, that the merit of the invention, which effected it must be shared so largely with others, earlier in the field, that Mergenthaler can, at most, claim but an extremely small part of it for himself. Upon the papers, however, it appears that Mergenthaler was the first man, who united in a single machine the instrumentalities, which, by means of the operation of finger-keys, assembled, from magazines or holders, independent disconnected matrices, each bearing a single character, carried each individual character independently, one by one, to a common composing point, where they were placed in line, and were thereupon brought in contact with and closed the face of a mould, of the exact length of a predetermined line, into which mould, by the subsequent operation of the same machine, molten metal was injected and a cast taken, which cast consists of a line bar of type-metal, having on its printing edge any desired combination of characters, and which is ready as it leaves the machine for imposition on

the form. Some such combination was required to solve a problem, with which inventors in the field of the printer's art had struggled for years, and there is not found in any of the earlier patents and methods, which have been put in evidence by the defendants anything which fairly anticipates it. Some of the advantages secured by the Mergenthaler machine had existed separately before, but all of them could not and did not exist, until some one made the combination which lies at the foundation of that machine. When that was once made, the way was open for a new departure in the printer's art. The defendants themselves, in the circular which they issue recommending their own machine to the public, enumerate, as among the benefits secured by it, the getting rid of the disadvantage due to individual type, with its dangers of "squabbling," the abandonment of single type as the unit, without having to provide the too large cases required when "logotypes" are used, the avoidance of the necessity of keeping a large stock of type, the adoption of the line bar, cast automatically from assembled matrices, as the unit of composition, and the securing of a "new dress" every day. These same results, however, are all achieved by Mergenthaler's invention, which, moreover, is not a mere paper machine, but one practically operative. The patent which covers it may therefore be fairly considered a foundation patent, and its claim should be broadly construed. When thus construed, infringement seems plain. Though there are differences in the form and structure of the intermediate mechanism, tending to simplicity and perhaps improvement, and in the form of the casting mechanism, still each of these mechanisms, as it is embodied in the defendants' machine, performs the same function as the corresponding mechanism in the Mergenthaler machine, in substantially the same way, and they are combined to produce the same result. The combination which is covered by the claim is the same in both.

The question remains whether the *prima facie* presumption of the patent has been sufficiently fortified by proof of public acquiescence, there being no prior adjudication in its favor. The patent bears date May 12, 1885. Since that time over a million dollars have been invested in the purchase of factories, the erection of plants, and the development of the machinery in all its mechanical details. Machines embodying the invention have been manufactured and set to work, principally in the offices of various newspapers of large circulation. Most of these newspapers, it is contended, belong to a syndicate, which is in some way interested in the patent, and their machines were purchased at a price, which gave no financial profit to the stockholders of the corporation which owns the patent. But it does not appear that the use of those machines were merely experimental, nor that they were offered only to such papers. On the contrary, the complainant corporations have apparently endeavored to advertise and promote the sale of their machines, both here and abroad. In 1889, and again in 1890, a machine of Mergenthaler's attracted the notice of the Franklin Institute, which is claimed to be a scientific society of high standing, and which awarded two medals in recognition of its ingenuity. Certainly there is no reason

to suppose that that branch of the printing art, which has occasion to use such machines has for years been ignorant of the fact that an invention, of the character described, was claimed by Mergenthaler, was being put into practical use, and was offered to the public; but, although such invention met a public need, was manifestly of great utility, apparently solved a problem that had been waiting solution for hundreds of years, and seemed destined to work a revolution in the methods of composition for the press, no one undertook to trespass upon the rights secured by the claims of the patent, until the defendants' machine was put upon the market, within a few months past. The complainants gave due warning, by written notice to the defendants, (or to those having a common interest with them,) that any attempt to manufacture and sell machines such as that of the defendants' would be resisted in the courts, and promptly upon the exhibition of such machines for sale here this suit was begun. There is sufficient to fortify the presumption of the patent, especially as there seems so little real question about either its validity or the infringement of the claim, above quoted, by defendants' machine. The motion to vacate the service of process upon defendants Ford Starring and Frank L. Hall is granted. An injunction restraining his individual action only may issue against the defendant Van Wormer. Injunction against the use of the Rogers machine may also issue against the defendant the Press Publishing Company.

TRUAX v. DETWEILER.

(Circuit Court, S. D. New York. March 27, 1891.)

PATENTS FOR INVENTIONS—INJUNCTION—PRACTICE.

In a suit for infringement of a patent a decree granting a perpetual injunction was entered by default. Afterwards a second patent was issued for an invention similar to complainant's, and the defendant began to manufacture articles under such second patent. *Held*, that the court would not on motion declare defendant guilty of violating the injunction, complainant's remedy being to bring a new suit.

In Equity. Motion for attachment for alleged violation of injunction.

Livingston Gifford, for complainant, cited:

Thomson v. Wooster, 114 U. S. 114, 5 Sup. Ct. Rep. 788; *Goodyear v. Evans*, 6 Blatchf. 121; *Morse Fountain Pen Co. v. Esterbrook Steel Pen Manuf'g Co.*, 3 Fish. Pat. Cas. 515; *Cook v. Ernest*, 5 Fish. Pat. Cas. 396; *McComb v. Ernest*, 1 Woods, 195; *Minneapolis Harvester Works v. McCormick Harvesting-Mach. Co.*, 28 Fed. Rep. 565; *Vulcanite Co. v. Gardner*, 4 Fish. Pat. Cas. 224; *Collignon v. Hayes*, 8 Fed. Rep. 912; *Atlantic Giant Powder Co. v. Dittmar Powder Manuf'g Co.*, 9 Fed. Rep. 316; *Cantrell v. Wallick*, 117 U. S. 689, 6 Sup. Ct. Rep. 970; *Clough v. Manufacturing Co.*, 106 U. S. 178, 1 Sup. Ct. Rep. 188, 198; *Sickels v. Borden*, 4 Blatchf. 20; *Burr v. Kimbark*, 29 Fed. Rep. 432; *Matthews v. Spangenberg*, 15 Fed. Rep. 813; *Wetherill v. Zinc Co.*, 1 Ban. & A. 106; *Craig v. Fisher*, 2 Sawy. 345; *Hamilton v. Simons*, 5 Biss. 77.

R. B. McMaster, for defendant, cited:

Wirt v. Brown, 30 Fed. Rep. 187; *Onderdonk v. Fanning*, 2 Fed. Rep. 563; *Buerk v. Imhaeuser*, 2 Ban. & A. 465; *Drill Co. v. Simpson*, 39 Fed. Rep. 284; *Allis v. Stowell*, 19 O. G. 727; *Liddle v. Cory*, 7 Blatchf. 1; *Birdsall v. Manufacturing Co.*, 2 Ban. & A. 519; *Smith v. Halkyard*, 19 Fed. Rep. 602; *Fetter v. Newhall*, 20 Fed. Rep. 113; *Hammerschlag v. Garrett*, 10 Fed. Rep. 479; *Celluloid Manuf'g Co. v. Chrolithian Collar & Cuff Co.*, 24 Fed. Rep. 585; *Yale Lock Manuf'g Co. v. Scovill Manuf'g Co.*, 15 Fed. Rep. 342; *Temple Pump Co. v. Goss, etc., Manuf'g Co.*, 31 Fed. Rep. 292; *Refrigerating Co. v. Eastman*, 11 Fed. Rep. 902; *Higby v. Rubber Co.*, 18 Fed. Rep. 601.

LACOMBE, Circuit Judge. The complainant is the owner of patent No. 424,944, issued April 8, 1890, to one Allen, for an instrument (a pump) for the transfusion of blood. Heretofore action was brought against the defendant, Detweiler, and another, who were making and selling pumps identical in all respects with those described in the patent. They did not defend. Decree was entered by default, and final injunction issued. Subsequently, on January 13, 1891, a patent (No. 444,690) was issued for a surgical pump similar to complainant's, the difference between the two instruments being but slight. The defendant has since the injunction sold pumps manufactured under the latter patent, and the complainant insists that this constitutes an infringement of the patent and a violation of the injunction, and asks either for an attachment for contempt, or for an order declaring the particular pump now sold by defendant to be covered by the injunction. Upon the argument the motion for attachment was not pressed, the weight of authority being clearly against it, where the new article is covered by a later patent. The claims of the first patent are very broad, and if they are to be considered as valid in their entirety, the defendant's new pump is an infringement. He insists, however, that the first patent cannot be sustained in view of the prior state of the art, unless its claims are limited to the particular structure therein described, and that his pump does not infringe the claims, if thus limited. He submits earlier patents, and offers testimony as to the prior state of the art. The complainant, on the other hand, insists that the decree sustains the patent just as it stands, and that the defendant must accept that construction. The authorities cited by the complainant in support of his contention are all cases where the patent had been construed by the court, after argument, and that construction resulted in a decree reviewable in the manner provided by law. Here the patent has never been construed by the court at all. If it is to be now construed on this motion for an order declaring the new pump to be covered by the injunction, such construction will be arrived at without the taking of testimony in the usual way by oral examination, direct and cross, and without the opportunity for review. No doubt it might be sent to a master to take proof at the foot of the original decree, and upon his return a further decree might be made; but such practice would be more awkward, and probably no more expeditious, than a trial under a new bill. To the proposition that by a failure to waste the time of the court in a litigation practically hopeless, because

the infringing article is identical with that covered by a patent which is valid if its claims are narrowly construed, the defendant is cut off, for all time, from dealing in other articles, which would perhaps not infringe, if the patent were construed after a full presentation of the state of the art, this court cannot accede. *Buerk v. Imhaeuser*, 2 Ban. & A. 465; *Drill Co. v. Simpson*, 39 Fed. Rep. 284; *Higby v. Rubber Co.*, 18 Fed. Rep. 601. And *prima facie* the issuing of the later patent is evidence that there is some substantial difference between the articles made under the two patents. *Onderdonk v. Fanning*, 2 Fed. Rep. 568. The complainant may make out a case strong enough to entitle him to a preliminary injunction if he were bringing a new suit, but it does not follow that, under the practice, he is therefore entitled to the order now applied for. As to the pumps represented by Exhibit Le Noel Pump No. 2 the motion is therefore denied. Complainant, however, may take an order referring it to a master to examine the defendant and such other witnesses as may be produced, touching any sales of pumps like Exhibit Bogus Allen Pump, made by him since he knew of the issuing of the injunction.

THE FERN HOLME.

BOWRING v. PROVIDENCE WASHINGTON INS. CO.

(District Court, S. D. New York. May 29, 1891.)

MARINE INSURANCE—VALUED POLICY ON HULL—MANAGING OWNER—INSURANCE ON ADVANCES—INSURABLE INTEREST.

Respondents issued a 12-months policy for \$5,000 on hull and boiler of the steam-ship F., valued at \$100,000. Twenty-two other companies issued other policies of like tenor, making in all \$100,000 insurance. The managing owners being under advances for upwards of £6,000, owed to them by the ship's owners in the ship's business, took out at Lloyds, for the joint benefit of all the owners, three additional policies "on advances" for £5,750, as the probable average for the year. The ship was totally lost, and, all the policies having been paid in full except that of the respondents, making upwards of \$100,000 paid in all, the latter resisted payment, on the ground that the libelants were estopped by the valued policy from recovering more than the agreed value of the ship. It appeared that the entire insurance was not in excess of the actual value of the ship. *Held*, (1) that the managing owners in possession had an equitable, if not a maritime, lien on the ship, and an insurable interest in the ship, and in her continued life, in respect to their advances; (2) that this interest was a different subject-matter of insurance from the policies on hull and machinery; (3) that the intent of the policies "on advances," and of the payment of them, was to insure that different interest, and that the amount paid thereon by the underwriters could not be offset by the respondents as a defense.

At Law.

Convers & Kirlin, for libellant.

Wing, Shoudy & Putnam, for respondents.

BROWN, J. On the 16th of February, 1888, the defendant issued a marine policy of insurance upon the steam-ship Fern Holme, insuring her for one year from February 20, 1888, in the sum of \$5,000, on ac-

count of whom it may concern, the hull, etc., being valued at \$75,000, and the machinery, etc., at \$25,000. On the 9th of July, 1888, she was wrecked on the coast of Newfoundland, and became a total loss. Twenty-three other companies and associations had insured the hull and machinery upon the same valuation, making in all £20,000 insurance on hull and machinery, all of which, save the respondents' policy, has been paid. The respondents resist payment on the ground that the libelants effected additional insurance upon their interest in the vessel, upon which they have already recovered in all upwards of \$100,000, whereby the full agreed value of the hull and machinery, it is said, has been made good to them; that, under the name of "advances," the libelants insured their same interest as owners with other underwriters, and received thereon upwards of \$27,000, whereby they had overinsured their interest in the steamer, and had been already paid in excess of its agreed value; and that the respondents had tendered back to the libelants the premium paid on the policy in suit, which tender was refused. It is not denied that in an action on a valued policy the defendant may show in defense that the insured has already received the agreed value stated in the policy sued on from other insurers of the same identical interest. *Bruce v. Jones*, 1 Hurl. & C. 769; *Griswold v. Insurance Co.*, 3 Blatchf. 231; *Howard v. Scribner*, 5 Hill, 298; *Insurance Ass'n v. Armstrong*, L. R. 5 Q. B. 244. The policies on advances above referred to were effected at Lloyds,—one for £2,600, February 17, 1888, a second for £1,500 on the same date, and a third for £1,650 on February 20th. Each of these policies was procured by Hine Bros., as managing owners of the ship, and for the benefit of all the owners. They ran for 12 months from February 20, 1888, and were all in the following form:

"Upon any kinds of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ship or vessel called the 'Fern Holme,' (s.) whereof is master under God for this present voyage * * *, or whosoever else shall go for master in the said ship, or by whatsoever other name or names the same ship or the master thereof is or shall be named or called, beginning the adventure, upon the said goods and merchandises, from the loading thereof on board the said ship, * * * upon the said ship, * * * and shall so continue and endure, during her abode there upon the said ship. And, further, until the said ship, with all her ordnance, tackle, apparel, and goods and merchandises whatsoever, shall be arrived at * * *, upon the said ship, until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandise until the same shall be there discharged and safely landed. And it shall be lawful for the said ship, in this voyage, to proceed and sail to, and touch and stay at, any ports or places whatsoever, * * * without prejudice to this insurance. The said ship, goods and merchandises, for so much as concerns the assured by agreement between the assured and assurers in this policy, are and shall be valued at [the foregoing being in printed form, and the following in writing] £2,600 on advances, being only against the risk of total loss of the vessel, constructive or otherwise."

A memorandum attached to the policies provided that in the event of loss the policies should be deemed sufficient proof of interest. The ag-

gregate of these three valued policies on advances was £5,750. Hine Bros., as managing owners, transacted the business of the ship, and kept with her a running account, in which the amounts due them fluctuated largely from time to time. At the time the policies on advances were effected, the amount owing Hine Bros. for advances was £6,791. 11s. 10d.; at the time of the loss £3,346. 3s. 8d. Mr. Hine deposed that the "sum of £5,750 was insured on the assumption that that figure would about average the advances risked over the 12 months." He further stated that the value of the steam-ship was £25,000, and that the ship-owners always had a risk considerably greater than the insurance effected. "The advances," he says, "were not made subject to marine risks, but were to be repaid by the part owners in any event;" but, "as the vessel was not fully insured on her hull, machinery, etc., my firm, as managing owners, determined to cover a line on advances, so that these moneys would not be entirely lost to them should the vessel be lost by marine risk. On a sale of the steam-ship, the amount of said advances would be deducted from the proceeds before distribution among the owners." Besides the above insurance, there was one other policy on freight for 12 months, valued at £3,500. All these additional policies were paid before the commencement of this suit.

The evidence shows that the freight on the current voyage at the time of the loss, and the charter money for the return voyage, were greater than the valued freight insured. This is plainly a distinct subject, having nothing to do with the insurance of the hull and machinery, and need not be further considered.

The respondents contend that the policies "on advances" are, in legal effect, a further insurance on hull and machinery; that the subject insured and the interests are in reality precisely the same in the two classes of policies; and that the libelants are, therefore, estopped from making any further claim upon any of the insurers after they have received the full agreed value of the ship, viz., \$100,000, which it is admitted the libelants have received. If, however, the subject of insurance is not the same in the two classes of policies, if the parties did not intend to insure the same identical interest, or if the payment "on advances" was not intended to be a payment on account of the hull and machinery insured in the other policies, then there is no ground for any such estoppel as is claimed, and the respondent can derive no advantage from the payments. *Burnand v. Rodocanachi*, L. R. 7 App. 333; *Howard v. Scribner*, *supra*.

1. On comparing the policies themselves, it is plain that the respondents' policy, and the others like it which make up the \$100,000, are simply insurances upon the hull and machinery, which are valued in all alike at \$75,000 and \$25,000, respectively. The other three policies on advances, so called, although so incongruous in their reading as to go far to justify Mr. Justice BULLER's remark in *Brough v. Whitmore*, 4 Term R. 210, that a marine policy has "always been considered in courts of law as an absurd and incoherent instrument," do yet, by these very incongruities, and by their departure from the simple form of the other policies, strongly indicate that they did not contemplate insurance of

the same subject-matter as the former. The former insured the hull and machinery alone; the latter were upon "any kinds of goods, merchandises, and also upon the hull," etc.; but in the written portions stated to be "on advances." The valuation in the former is \$100,000 on hull and machinery; in the three latter, £2,600, £1,500, and £1,650, respectively, "on advances." It is not credible that any of the parties supposed that they were valuing the ship and merchandise at these small sums. Construed in that way, moreover, the policies would be practically worthless, in view of the other insurance already effected on the hull for \$100,000. Upon such incongruities in the forms of policies, the rule is to give greater weight to the written portions. Marsh. Ins. 248. The fair inference, I think, from these policies themselves, would therefore be that they were intended to insure valued advances to the amounts stated in connection with the business of the ship or her cargo during the year following; just as in the policy "on freight," precisely the same printed form is used, and the same mode adopted of stating the value of "ship and goods" as "3,500 pounds on freight, chartered or otherwise."

It is urged that Hine Bros. had no "advances" on the ship and goods in the legal and technical sense; that is to say, no lien upon them. This does not strictly appear on the proofs. But if the intent was to insure their actual advances, and the underwriters knew it, and paid accordingly, it is immaterial after payment whether there was any lien or not, or whether the policies were legally enforceable. If the policies were void, then surely the subject-matter was not the same as the respondents' policy, which is confessedly valid. If it was either a wager policy or a gift, the respondents cannot take any advantage from it. *Burnand v. Rodocnachi*, L. R. 7 App. 333. If the libelants had no ownership nor lien nor rights connected with the ship or goods in respect of their advances, they could not perhaps enforce a policy "on ship and goods" for lack of apt words showing an insurable interest, in the absence of some further stipulation. *Minturn v. Insurance Co.*, 2 Allen, 86; *Insurance Co. v. Baring*, 20 Wall. 159, 163; *Hancox v. Insurance Co.*, 3 Sum. 132. But no question of that kind arises here, because the policies themselves provided by a special memorandum that the issuing of the policy should be deemed sufficient proof of interest, and because Hine Bros. were in fact part owners, and because the insurers have paid the policies without raising any such question.

The inquiry, therefore, returns, what was the subject intended to be insured and paid for by the policies on advances? Upon this point I find nothing in the testimony to indicate that it was anything different from what it purports to be on the face of the policies, namely, the actual advances of Hine Bros. in the business of the ship. Whether these advances were a lien or not, they were a debt for which the owners were liable, and the loss of the ship would by so much diminish the available means of payment. In the business of the ship, moreover, Hine Bros. found their own business and their own profits, which by the loss of the ship would be *pro tanto* destroyed. The profits of the ship's bus-

iness also for the current year, which passed through their hands, would be a further security to Hine Bros. for their claims. Their advances, and their business relations with the ship, gave them, therefore, a specific interest in the life of the ship quite distinct from their part ownership in the hull and machinery. And all these interests to which the advances were attached, and on which they depended, were through apt words a proper subject of insurance, as much as freight, or profits, or commissions, or the life of a debtor in a life insurance policy in favor of a creditor; or a debt of ship-owners arising from their ship's negligent collision with another ship now usually insured against in marine policies. *Hancox v. Insurance Co.*, *supra*; *Wilson v. Jones*, L. R. 2 Exch. 139; *Hooper v. Robinson*, 98 U. S. 528. Whether the words chosen to express this intent were sufficient to withstand sharp legal criticism is now immaterial, since the policies have been paid. In my judgment, Hine Bros. being managing owners in possession, had such an equitable lien on ship, cargo, or freight, as the case might be, for their advances, even if they had no maritime lien, as to give them an insurable interest for such advances, which was covered by this policy, within the authority of the case last cited. Abb. Shipp. †107; Story, Partn. § 443. The intent both of the policy and of the payment is further made clear by Mr. Hine's testimony, where he says that, "as the vessel was not fully insured on hull and machinery, my firm, as managing owners, determined to cover a line on advances, so that those moneys would not be entirely lost to them should the vessel be lost by a marine risk." It thus appears that, though the reason they effected the insurance on advances was because the insurance on the hull was less than the ship's value, it was intended to insure the advances, as such, not the hull and machinery; so that if the ship were lost, the owners, by this additional insurance on advances, might be fully indemnified. The insurance of "advances," which the owners would in any event be obliged to pay, operated indirectly to their benefit, by extinguishing their debt *pro tanto*, as much as further insurance of hull and machinery would have done. But this circumstance does not make the two modes of insurance identical, or the subject-matter in fact the same. If the additional insurance had been upon the hull and machinery, it might have been unavailing and worthless. The intention was no doubt to cover what was not covered in the prior policies, but the intent was to cover it by means of insurance on advances only. This method of insurance seems to have long been in common use at Lloyds. Mr. Hine deposed that he had been for the past 30 years a marine insurance agent; that for 13 years he personally conducted such business at Liverpool, as well as at Maryport; and that during his whole experience, which was a large one, he never knew until the present instance of any case where the question was raised as to insurance on hull and machinery having anything whatever to do with insurance effected on advances, with the "policy-proof-of-interest" clause in the policy; and that "it is an acknowledged custom in England for such advances to be made by managing owners of steamships, and to have such advances covered by insurance, as was done in

the present case, and such policies are never considered in any way to affect policies on hull and machinery." It was competent for Hine Bros., as managing owners in possession, to insure this debt. On payment by the underwriters, the money went primarily to pay Hine Bros. Incidentally, it inured equally to the benefit of the other part owners. So long as such policies are not taken out in excess of the actual value of the ship, there is no interest liable to be injuriously affected by them, nor do they violate any general public policy. Had Hine Bros. effected these policies for their own interest only, as creditors, it would hardly be contended that the respondents could have any benefit from them, though the underwriters, who paid the advances, might be subrogated *pro tanto* as creditors of the other part owners for the payment of their share of the debt. How is the case altered by the fact, which appears in the testimony of Mr. Hine, that the insurance was designed indirectly for the benefit of all the part owners, through an extinguishment of their debt *pro tanto*, so as to prevent any equitable subrogation? That in no way concerns the respondents. Had the policies not been valued, possibly the amount recoverable on them by Hine Bros. might have been reduced to the proportion actually owed them by the other part owners; but after payment this again is immaterial.

The case differs essentially from that of money raised upon bottomry of the ship after the insurance is effected, for in that case there is, in legal effect, a transfer of a part interest in the vessel to the bottomry creditor; and the owners, through the receipt of advances on bottomry, which is a species of insurance, receive a part of the value of the vessel, which in case of loss they are not liable to repay. In such a case, therefore, the bottomry operates as an actual diminution by so much of the owners' interest in the vessel. For that reason, such subsequent advances on bottomry are deducted from previous valued insurance on the ship, though prior bottomry is not deducted. *Watson v. Insurance Co.*, 3 Wash. C. C. 1. In the present case the facts are otherwise. There was no diminution of the owners' interest at any time. The advances that were insured the owners were bound to pay, whether the vessel was lost or not. The subsequent policy on advances made no change in the relation of the owners to the respondents, or as respects the libelants' interest in the hull and machinery which the respondents insured. The advances were a debt really owed to Hine Bros. This debt belonged to the business of the ship, and was so intimately connected with the ship and her future life and earnings as to be a proper subject of insurance. It was this that the policy on advances was designed to insure, and for which the payment was made by the underwriters; and, as this violated no policy of the law through any excess in amount, worked no injury to the defendants, and was designed to operate primarily as an extinguishment of a debt to Hine Bros., it was, in my judgment, wholly independent of the subject-matter of the respondents' policy, and constitutes no defense to this libel. Decree for libellant, with costs.

SHOE *et al.* v. LOW MOOR IRON CO. OF VIRGINIA *et al.*

(District Court, S. D. New York. May 4, 1891.)

GENERAL AVERAGE—VOLUNTARY STRANDING—NO BENEFIT—YORK-ANTWERP RULES.

The schooner T., drawing 9 feet of water, and loaded with iron, in the gale of September, 1889, after parting her kedge and starboard anchor inside the Delaware breakwater, drifted in the trough of the sea, her port anchor not holding, till within 250 yards of the outer bar, near Lewes, when the master, to save life, cut the cable, and let the vessel run head on to the shore. She grounded on the outer bar, broached to, and became a total loss; but the cargo was partly saved. Upon a libel filed to recover upon a general average bond against the owners of the cargo, it appearing that when the cable was slipped the vessel would have drifted on the bar substantially in the same place within five minutes; that there was no reasonable probability that she would have sunk before reaching the bar, if the cable had not been cut; and that its only effect was to drive her upon the bar one or two minutes earlier; and that the object in cutting the cable was not to save the vessel or cargo, and that in fact it was of no benefit to either,—*held*, that no claim of general average arose, without reference to York-Antwerp rule 5.

In Admiralty. Libel to recover upon a general average bond.

Wing, Shoudy & Putnam, for libelants.

Sydney Chubb, for respondents.

BROWN, J. In the great gale of September 8, 9, and 10, 1889, some 30 vessels, which had taken refuge from the storm inside of the Delaware breakwater, went ashore between the breakwater and Lewes; among them, the libelants' schooner Major W. H. Tantum. The libelants claim that the case is one of voluntary stranding. The vessel proved a total loss, but the cargo was partially saved. A bond having been given by the cargo-owner to pay any amount found due on general average, this libel was filed to recover \$2,939.03, the amount charged against the cargo by the average adjusters. So much of the cargo as was recovered by the salvors was forwarded to its destination. After the libel was filed a deposit was made by the respondents with the libelants' proctors of \$1,350 and costs, which was received under a stipulation that the deposit should be deemed equivalent to the payment of so much money into court, not as general average, but as the whole expense for which the cargo was chargeable for salvage and for forwarding to the consignees. The respondents contend that the case is not one for any general average charge, and, after much consideration, I am of opinion that this contention should be upheld, on the ground that the facts, as I must find them upon the evidence, do not show (1) any voluntary act designed for the benefit of ship and cargo; nor (2) any such substantial sacrifice of the ship or benefit to the cargo as is necessary to sustain a general average charge. The main facts are as follows: The schooner hauled inside the breakwater, and came to anchor on September 8th, about three-quarters of a mile from the place of stranding. The wind was north-east, and increased in violence until the 10th. The schooner meantime had drifted somewhat to leeward, although the starboard and port anchors and the kedge had been successively put out with all available cable. At 6 A. M. on the 10th the kedge parted, and the vessel drifted further to lee-

ward until about 8 or 8:30 A. M., when she brought up again on the port and starboard anchors. At 4 P. M. the starboard chain parted, upon which the vessel's stem swung to the westward, and she lay in the trough of the sea drifting towards the beach, the port anchor not holding sufficiently to keep her head to the wind. In this situation the seas at times broke over her, and filled her decks with water, so that the cabin doors had to be kept closed, but the men were able to pass forward and aft. If while in that condition the hatches should have been broken in by the seas, as she was loaded with iron, she would have soon filled and sunk if she had not drifted ashore. Capt. Rudolph says that "if the hatches got off she would not live five minutes." But her hatches were not started, and she was already within five minutes of the bar. Nothing on deck was broken, but she was very near the outer bar; and if she grounded there, broadside to the seas, as she was then going, there was great danger that all on board would be lost. The master, therefore, for the purpose of saving life, and with no other motive, determined to slip the cable of the remaining anchor. This was speedily done in three fathoms of water, and the helm being put hard a-starboard, the vessel without canvas paid off to the southward, and in a few moments was blown upon the outer bar head on, where she grounded fast, after broaching to with head to the eastward, and became a total loss. Some 20 other light-draught vessels, in going ashore, passed over the outer bar, and ran high up on the beach some 200 yards further in, most of which were afterwards got off. A few others grounded outside of the *Tantum*. The master got aboard of a lighter draught vessel the same night, as she passed close to the stern of the *Tantum* in running over the bar. The rest of the crew were rescued from the *Tantum* the next morning. The master testified that he slipped his cable about half way from the light to the place of grounding, which would be a half mile from the latter. But he buoyed the cable at the time it was slipped, and the testimony of the persons who afterwards recovered it leaves no doubt that it was not over 200 or 250 yards from the place where the *Tantum* grounded. This serious error, if not intentional misrepresentation, on a most important point detracts greatly from the weight to be given to the master's testimony in other respects. In running ashore it was no doubt the object of the master to get as far as possible up the beach, and for this purpose he would naturally have set all possible canvas. None was set because, as he says, there was not time to set any, which shows that the interval between slipping the cable and grounding was very short. It is further evident that at the time when the cable was slipped the anchor was of little or no use, and that the schooner was drifting ashore fast. If the anchor had held, the vessel's head, as the master himself testifies, would have been kept more to the wind, and not have fallen off to the westward in the trough of the sea. Mr. Hammond, one of the libelants' witnesses, in answering an inquiry as to the justification of the master in slipping the cable under such circumstances, testified: "But the vessel that would be thwart-hawsed swinging to anchor and chain, she would have to be dragging very fast that she can't make the wind." As the

Tantum at the time when the cable was slipped was not over 250 yards from the place of grounding, and was drifting ashore very fast, the necessary inference of fact is (unless there was danger of instant sinking, which cannot be admitted for the reasons stated below) that, had the cable not been slipped, she would have grounded in four or five minutes substantially in the same place, under the same conditions, and with the same result to the cargo; and that the only effect of slipping the cable, no canvas being set, was to let her drift upon the bar perhaps a couple of minutes earlier than she would otherwise have done, and with head to the eastward instead of to the westward; an act, therefore, wholly without benefit to the cargo. This view accords entirely with the master's testimony as to his purpose in slipping the anchor; for he nowhere states in the direct examination or cross-examination that his object was to save either the vessel or the cargo, or that he supposed his act could make any difference as regards the safety of either. The only object he states was to save their lives. When the small chain parted he said to the mate:

"We have got to do something. We will drown here. *Question.* You mean the starboard anchor? *Answer.* Yes; by our getting into the trough of the sea, I was afraid of her foundering there, and drowning all hands. I buoyed the anchor, and slipped the chain myself. *Q.* Why did you at that time slip the chain? *A.* Why, to save our lives. * * * *Q.* Supposing you had remained, and the chain had held, what do you think would have been the effect? *A.* Well, we would have foundered right there. * * * *Q.* In your judgment, was it best, then, to slip the chain? *A.* Yes, sir. * * * *Q.* You were dragging so fast it [the remaining anchor] would not hold you up,—you were dragging broadside on? *A.* Yes, sir."

The master's protest contains the following:

"At 4 P. M. the chain of the small anchor parted. The mountainous seas that were running were breaking on board; the vessel, being unmanageable, got into the trough of the sea, and commenced to founder."

By the latter expression he says he meant that "her decks were full of water, and would have washed the houses off if we had stopped there;" which is a totally different thing. To these surmises of the master as to what might have happened, as he now states them, I cannot give much weight, because of his evident exaggerations, and because his testimony is not consistent or intelligible as it stands. How could the vessel "stop" in 18 feet of water unless the anchor should hold? And in that case, as he himself says, she would have come head to the wind; and then she would have ridden safely, as before. The only danger, as he himself states it, was from drifting in the trough of the sea, and her approach to the shore. There is no suggestion of any danger from the seas while her anchor held. If her anchor should have held, and she should have "stopped there," *i. e.*, in three fathoms of water,—she would not have been in any immediate danger, and would doubtless have ridden out the storm. The evidence quoted, therefore, proves nothing to the purpose. The vessel did not "begin to founder" before the cable was slipped, as the protest intimates. None of the hatches were in fact broken, washed off, or started, before grounding; and she did not "stop" till she reached the outer bar,

though that was then very near. I cannot find any consistent interpretation for this part of the captain's testimony, as it stands. What he meant probably was that if the vessel stopped by grounding in that vicinity—i. e., on the outer bar, broadside to the seas—all would probably lose their lives; and he therefore cut the cable in order to run the vessel ashore head on, and, if possible, over the outer bar to the beach beyond. He did not succeed in either. The vessel grounded where he feared she would ground, and broached to precisely as she would have done two or three minutes later if the cable had not been cut. His testimony on this subject is so conditioned and qualified that I cannot find that when he slipped the cable there was the smallest probability that the vessel would founder just where she then was, or before she would have reached the bar, or that the master thought so. Up to that moment not a thing on deck had been carried away or broken; nor was the danger any other than that she might stop and founder, broadside to the sea, on the outer bar, which was then very near, and would be very soon reached. That danger was imminent and pressing. To save life the master rightly did all he could to avert it by trying, though unsuccessfully, to run over the bar. His act proved of no use to ship or cargo.

Such facts do not give rise to any claim of general average. The three necessary elements of motive, sacrifice, and benefit to cargo are alike wanting. The adjudications in the federal courts of this country, which are most favorable to a general average, fall far short of sustaining it in a case like this. In the cases most nearly analogous, viz., those of *The Julia*, (*Caze v. Reilly*,) 3 Wash. C. C. 298; *The W. Sims*, (*Sims v. Gurney*,) 4 Bin. 513; *The Brutus*, (*Barnard v. Adams*,) 10 How. 270; *The Star of Hope*, 9 Wall. 203; and *The Vernon*, (*Sturgess v. Cary*,) 2 Curt. 59,—the vessels were deliberately run ashore under sail for the purpose of saving the cargo, and the ship also, if possible. The *Brutus* and the *Sims* were thus run several miles after their cables had parted. And in the case of *The Hope*, (*Insurance Co. v. Asby*,) 13 Pet. 332, the special verdict found that the vessel was run ashore "for the safety of the crew and the preservation of the vessel and cargo." The *Brutus* and the *Vernon* were sailed away from rocks to strand upon an even beach. In the case of *The Oneiza*, (*Rathbone v. Fowler*,) 6 Blatchf. 294, 12 Wall. 102, the ship was run upon an uneven shore, and exposed to greater peril by straining, for the sake of saving the cargo. In all these cases there was great benefit to the cargo through the sacrifice of the ship, and such was the purpose of the stranding. In *The Star of Hope*, 9 Wall. 232, Mr. Justice CLIFFORD says:

"Undoubtedly the sacrifice must be voluntary, and must have been intended as a means of saving the remaining property of the adventure and the lives of those on board; and unless such was the purpose of the act, it gives no claim to contribution."

And the whole ground and equity of general average rest upon substantial benefit to what is saved. Here the voluntary act was of no benefit to the ship or cargo. The law of this country, as laid down in the case of *Barnard v. Adams*, *supra*, is doubtless more liberal than that of

most countries in favor of general average in cases of voluntary stranding. The weight of opinion among men interested in maritime affairs as to the best practical rule on this subject has doubtless been embodied in the York-Antwerp rules, which for a quarter of a century have disallowed a general average upon a voluntary stranding where at the time when the stranding was determined on the vessel must in any event have been lost. This rule, (5,) as revised in the conference of 1890, is as follows:

"When a ship is intentionally run on shore, and the circumstances are such that, if that course were not adopted she would inevitably sink, or drive on shore or on rocks, no loss or damage caused to the ship, cargo, and freight, or any of them, by such intentional running on shore shall be made good as general average. But in all other cases where a ship is intentionally run on shore for the common safety the consequent loss or damage shall be allowed as general average."

This rule accords largely with the continental law. See Valroger, *Droit Mar.* §§ 2220, 2223; 4 Desjardins, *Droit Mar.* §§ 978-1004; 6 Rev. Inter. *Droit Mar.* pp. 340, 352. Though our own law is different, nothing in it sustains a general average except upon a voluntary sacrifice designed for and resulting in substantial benefit. For the lack of these elements the libelants are entitled to recover no more than provided by the stipulation, and the respondents are entitled to the subsequent costs.

SNOW *et al.* v. 350 TONS OF MAHOGANY AND CEDAR.¹

(District Court, S. D. New York. April 24, 1891.)

CHARTER-PARTY—"DEFAULT" OF CHARTERER—CONSTRUCTION—VIOLATION OF CUSTOM LAWS—CLEARANCE REVOKED—DEMURRAGE—DETENTION.

The charter of a brig provided that "for each and every day's detention by default of the charterers, \$30 per day should be paid" as demurrage. The brig loaded mahogany and cedar at Laguna, Mexico, and when completely loaded, was delayed 67 days by the action of the customs authorities of the port, who compelled the unloading and remeasurement of the cargo on the charge of smuggling, and attempted under-statement of cargo, and non-payment of full export duties by the charterers. Though the difficulty mainly grew out of what proved to be an erroneous construction of the Mexican law by the customs officers, yet the evidence showed that the charterers had not paid the proper amount of duties, though the error was small, and had not stated to the officers the known measurement of the cargo. *Held*, that the charterers were bound to do all that belonged to them to get a proper clearance, and the detention was by their default, within the terms of the charter contract. In a suit by the ship-owners against the cargo to recover freight and demurrage under the charter-party, it was therefore *held*, that the libelants were entitled to recover.

In Admiralty. Suit to recover freight and demurrage.

Carter & Ledyard, (Mr. Balkam, of counsel,) for claimants.

Wing, Shoudy & Putnam, for libelants.

BROWN, J. The above libel was filed to recover \$2,271.01 freight, and \$2,010 demurrage, for 67 days' detention of the brig *Caroline*

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

Gray at Laguna, Mexico. The cargo in question, consisting of mahogany and cedar, was loaded on the brig at Laguna, under a charter to Messrs. Bulnes Bros., by the terms of which the brig was to have for loading, in Mexico, 25 days, Sundays excepted. The charter provided that, "for each and every day's detention by default of the charterers, \$30 per day should be paid" as demurrage. The brig was loaded within the specified lay-days by the charterers, who were owners of the cargo; a bill of lading therefor, prepared by the charterers, was signed and delivered by the master, and clearance papers for the ship were delivered to him by the charterers on Saturday, the 13th of April. On the same day the captain applied for a pilot, and was told none could go till the next morning, when, upon renewed application, he was informed that the departure of the vessel was prohibited by the customs authorities. On returning to his vessel he found two customs officers on board in charge of the ship. The cargo was subject to an export duty on both the mahogany and the cedar. The charterers had made an entry at the custom-house for the cargo, and had paid certain duties. The departure of the vessel was stopped upon the charge of smuggling, and attempted fraudulent under-statement of cargo, and non-payment of the full lawful duties by the charterers, and the cargo was ordered to be unloaded for the purpose of remeasurement, whereby the vessel was delayed until June 26th, when she sailed with her cargo on board, which was subsequently delivered to the consignees in New York. In the case of *Davis v. Pendergast*, 16 Blatchf. 565, the demurrage clause was, in effect, like the present, in providing that demurrage should be paid for any detention "by default of the charterers," 45 running days being allowed in loading and discharging. Chief Justice WAITE there held that "detention, by reason of any of the risks assumed by the respondents, places them in default, within the meaning of the charter." And in *Rumball v. Puig*, 34 Fed. Rep. 665, it was held that a clause in the charter similarly worded was designed to "bind the charterer for the neglect of any duty required of him to enable the vessel to sail." It was the duty of the charterers in this case to enter the goods properly at the custom-house, and to pay the proper amount of duties. They did not do so, although, as it turned out, the error on their part was but small. The difficulty, for the most part, grew out of what proves to have been an erroneous construction of the Mexican law by the local officers of the customs at Laguna as to the proper mode of ascertaining the duties payable on mahogany; the officers claiming that it was by measurement of the mahogany itself, while the shippers claimed it was according to the tonnage capacity of the ship. In the controversy that arose on this point, the charterers were vindicated; but this covered only the duties upon the mahogany, although that was the principal part of the cargo. As respects the cedar, the charterers were wrong, the duties being payable upon the measurement of the wood; and the amount shipped was found on remeasurement to be nearly double the quantity entered, and on which duties had been paid. Upon two trials growing out of this matter in the administrative courts of Mexico, the charterers were acquitted

in the criminal suit that charged smuggling, fraud, and conspiracy; but in the other they were held civilly liable for the payment of a certain amount of double duties as a penalty for infringing the law, which amount, without further appeal, was paid by the charterers. The decree in the latter suit declared that they had "attempted to evade in part the payment of the fiscal duties."

Upon these facts, I deem it unnecessary to consider many of the details presented in the elaborate and able brief of counsel. I must find that the entry and payment of duties were in part incorrect and insufficient. To that extent the action of the customs officials was justified by the event. The manifest, and the payment of duties, as respects the mahogany, were wrong, because less than the ship's measurement, deducting the cedar; and the duties paid on the cedar were confessedly too small. The evidence leaves no doubt that the charterers knew the measurement of all the wood shipped, since the bill of lading, made out by them, states the measurement very nearly correctly. If the difficulty as to the mahogany arose primarily from the erroneous construction of the law by the officials, it must be inferred that the charterers were willing to profit by the error, since they did not communicate to the officials their own measurement of the mahogany, when entry and payment according to measurement were demanded, but accepted and paid duties upon a subsequent very low official measurement, which the charterers must have known, I think, to be grossly incorrect. Payment or deposit of duties in the beginning, according to their own measurement, would have avoided all trouble. It was evidently the original concealment of the charterers' own measurement, and the subsequent disclosure of it by the bill of lading, that led the officials to unload and remeasure the cargo, and this caused the delay. The plain error as to the cedar, though small, was also in itself more than a technical violation of the law, and placed the charterers in default. The vessel had nothing to do with all this, and was in no way responsible for it. The charterers were bound, not merely to get a clearance for the cargo, right or wrong, but to do at least all that belonged to them to do to get a proper clearance. The clearance they obtained was justly liable to be revoked, and was revoked, and the vessel was stopped, because the charterers did not make a true and correct manifest, nor pay or tender sufficient duties. The detention that grew out of this failure was therefore a detention by their default, within the terms of the charter contract. It is said that if the master had departed instantly, when the clearance papers were given him in the forenoon of Saturday the 13th, the vessel would have escaped seizure, and the delay have been thus avoided. The master testified that he did not obtain his papers until about 4 o'clock in the afternoon, and then applied for a pilot, and was told that he could not have one that night, but could have one the next morning, and early the next morning the vessel was seized, as above stated. The interval of a few hours, from about 10 to 4 at most, even if the charterers are correct as to the time when the clearance papers were sent to the ship, is quite too small to hold the ship in fault for the subsequent detention. In no sense was it the proxi-

mate cause. The interval was in fact no more than a reasonable time for the master to produce the clearance papers before the American consul at the port of Laguna, pursuant to section 4309, Rev. St. U. S., in order to obtain the ship's papers to enable her to sail. The subsequent production by the master of his copy of the bill of lading before the consul, pursuant to his request, for the inspection of the customs officers, was no breach of any obligation to the charterers, however great may have been the discrepancy thereby disclosed between the tons loaded and the amount stated in the entry, of which the master was ignorant. Decree for the libelant for the homeward freight, as claimed, with demurrage during the delay at the charter rates, with costs.

THE BROOKLYN.¹

THE GLOUCESTER.

EMPIRE WAREHOUSE Co., Limited, v. THE BROOKLYN.

SAME v. THE GLOUCESTER.

(*District Court, S. D. New York. April 15, 1891.*)

WHARFINGERS—CONTRACT FOR DOCK PRIVILEGES—INCLUDES WHARFAGE CUSTOM.

A contract by a wharfinger to furnish "dock privileges" for "the unloading of a cargo of iron from barges and for reloading and removing the cargo by trucks" from the wharf includes the wharfage charges for giving the vessel a berth alongside the wharf, as well as the charges for space on the dock occupied by cargo, and controls any custom to the contrary.

In Admiralty. Suits for wharfage.

Frederick W. Hinrichs, for libelant.

Goodrich, Deady & Goodrich, for respondents.

BROWN, J. The libels in the above two cases were filed to recover for "wharfage" at different times during the months of January, February, and March, 1890, while the above-named lighters were discharging at libelant's dock, at the Waverly stores, Brooklyn. The cases have been submitted upon an agreed statement of facts, from which it appears, in addition to the above, that both lighters were chartered by the claimants to A. & P. Roberts & Co., of Philadelphia, for carrying structural iron to said dock, and that the wharfage claimed in the libels was for the time during which they were engaged in unloading there; that the libelant had previously, by a written contract with Roberts & Co., "rented" to the latter "dock privileges at Waverly stores for the unloading from barges of elevated railroad structural iron, and for the reload-

¹Reported by Edward G. Benedict, Esq., of the New York bar.

ing and removing the same by trucks through said property, at the daily rental or sum of \$5 for each and every day, beginning with the day on which the first of said iron was landed;" that the iron brought by these lighters was the iron referred to in said contract; and that Roberts & Co. had paid the libelants in full the stipulated price of five dollars per day for the whole period for which wharfage is now claimed against the lighters. The libelant contends that the "dock privileges" bargained for and paid for did not include any wharfage charge for the berthing of the vessel along-side the dock while unloading, but only the use of the dock in receiving the iron from the lighters and in reloading it on trucks and carting it away. The libelant reserves in the submission "the right to prove that, irrespective of the statute, it has been the general custom in the port of New York to charge for berthing the vessel, and also for rent for space occupied by the cargo on dock," if the court holds such evidence competent under objection. The lighters were both chartered by Roberts & Co., who unloaded the iron on their account. If the berthing of the vessel while unloading is included in the contract, as the contract price has been paid in full, there can be no lien on the vessel, since the vessel owes nothing that remains unpaid. *The Woodland*, 104 U. S. 181; *Woodruff v. Havemeyer*, 106 N. Y. 129, 12 N. E. Rep. 628. The charges for wharfage in this port are regulated by statute. Laws 1875, p. 482, c. 405. The exaction of any greater sum than allowed is made penal, (Laws 1879, p. 234, c. 168,) though this does not apply to keeping or storing cargo, (*Woodruff v. Havemeyer, supra.*) The terms "dockage" and "wharfage" are synonymous. They are used interchangeably, as the last cited statute shows. Wharfage or dockage is a charge for the use of a wharf or dock. It may accrue from the use of the dock in mooring for the purposes of protection and safety only. *The George E. Berry*, 25 Fed. Rep. 780. But in this port such a charge is ordinarily for the purpose of loading or unloading cargo on the dock, and that includes necessarily a berth for the vessel, and a place of deposit for the cargo. The statute recognizes this by making a difference in the rate chargeable while a vessel is lying along-side the wharf and unloading, and the rate chargeable while not unloading, but made fast outside of another vessel, the latter charge being only half the former. To prevent incumbrances upon the wharf and its use for storage purposes, the statute further authorizes a charge of five cents a ton per day for goods or materials left on the wharf more than 24 hours after the discharge is completed. These provisions, with the imposition of a penalty for exacting any greater sum than prescribed, clearly agree with immemorial practice, and show that the charge for "wharfage" when unloading includes the use of the dock for that purpose. No proof of custom could avail to reverse this evident statutory provision. The terms of this contract have the same import. What is granted is "dock privileges," both for "unloading from barges" and for "reloading and removal by trucks." There could be no unloading without a vessel to unload from, and that vessel must have her berth in order to unload. The "dock privileges for unloading," therefore, necessarily include the use of the perpendicu-

lar side of the dock as a berth for the vessel, as much as the use of the horizontal surface where her cargo is deposited. The libellant sues for the full prescribed wharfage rate, though Roberts & Co. have paid the contract price in full. If the libels were sustained, and the vessels obliged to pay these full rates, as that would include the use of the wharf as a place of deposit during discharge and up to 24 hours afterwards, all that would remain for the agreement to operate upon would be the use of the dock as a place for keeping the iron after the lapse of 24 hours. The language of the agreement is not consistent with such a construction. On the contrary, it expressly states that the five dollars per day is to begin to run from the day when the first of said iron is landed,—i. e., before the discharge is even completed. The terms of the agreement evidently import a stipulated price per day as a substitute for the statutory provisions, both for a berth while unloading and for the use of the wharf for more than 24 hours after the discharge, in case Roberts & Co. should find it desirable to use it longer. The custom alleged, if proved, would not change the meaning of the contract, nor the evident meaning of the statute. Libels dismissed, with costs.

THE JERSEY CITY.¹

DOYLE v. THE JERSEY CITY.

(District Court, S. D. New York. May 4, 1891.)

NEGLIGENCE—PERSONAL INJURY—FALL THROUGH HATCHWAY—DUTY TO CHARTERER'S MEN.

Libellant was a stevedore, employed by charterers of part of the steam-ship J. C. to put up a refrigerator in the hold. On leaving work at midnight, he fell down the hatchway, and libeled the vessel for injuries thereby received, claiming fault in that the hatch was not covered, and lights maintained about the opening. The evidence showed that it is not customary to cover the hatchways until the cargo is in. The open hatch was known to the libellant, and was the customary opening. The charterers supplied lights to the workmen. When libellant fell, one was burning within six feet of the hatch. *Held*, that the ship was not under any duty to supply lights or to cover the hatches for the charterers' men, nor was libellant's fall due to the lack of light, but to his own negligence. The libel was therefore dismissed.

In Admiralty. Suit to recover damages for personal injuries.

H. H. Shook, for libellant.

Convers & Kirlin, for claimant.

BROWN, J. The libellant was employed as a carpenter by the charterers of certain space on board the steam-ship Jersey City, as one of a gang of about 15 men, in putting up a refrigerator between decks abreast of No. 1 hatch. He began work at noon of February 10, 1890, and on quitting work at midnight, when about to ascend the ladder, he fell

¹Reported by Edward G. Benedict, Esq., of the New York bar.

through the open hatch at the foot of the ladder into the lower hold. His thigh was broken by the fall, and this libel is filed to recover damages. The alleged faults of the ship are that the hatch was not kept covered, and that lights were not maintained about the opening. The evidence shows that it is not customary on ship-board to cover the hatches between-decks while the vessel is in port until her cargo is loaded. The way to the between-decks was by a ladder that ran from the forward side of the upper hatchway perpendicularly down to the coamings of the forward side of the hatch below. The ladder was in the middle of that side, and about five feet from each corner. Stevedores were at work upon the cargo during the day, and had been going up and down by the same ladder into the hold below, so that that part of the hatch which was at the foot of the ladder was kept uncovered, in accordance with the usual practice. The only proper way of going to the ladder was from the deck immediately in front of the hatch. The libelant testifies that at midnight, on quitting work, he went to the side of the hatch near where he had been working, raised his foot to step upon covers which he supposed to be there, and at the same time reached forward for the ladder, but fell down the hatch, because no cover was there to step on. He says also that it was dark, because the lights were extinguished, as had been ordered. From other testimony, however, including some of the libelant's own witnesses, it is quite certain that there had been no covers at the foot of the ladder at any time during the day. The libelant, when he came down at noon, when he went up at 6 o'clock for supper, and when he came down again to work at 7 P. M., must have seen and known that there were no covers there. To repeated inquiries of the court, he would not say that at either of these three times he had stepped upon any covers in going down or going up the ladder; and it is plain that he had not. One of his own witnesses also testified that, instead of stepping in from the side of the hatch, he stepped upon the corner, and, as the ladder was five feet from the corner of the hatch, it is incredible that he should have stepped up from the side of the hatch where he was working, and at the same time reached out his hands for the ladder. Each of the workmen during the evening had been supplied with one or two candles. When the libelant fell, only a part of the candles had been extinguished, and one was burning within 6 feet of the hatch.

From these facts it is evident that the libelant's fall was owing to his own negligence alone. He knew perfectly the proper means of access to the ladder, and that there were no covers at the foot, and that he could properly approach the ladder in only one way, viz., the way he had gone three times. At midnight he was among the first to start to go up. It is likely that in his haste he stepped upon the corner, and rashly intended to walk upon the coamings to the ladder, instead of keeping on deck. Whether this be so or not, there was no fault in the ship towards him. In fact he was not in the employ of the ship at all, nor performing any work for her benefit. He was at work for the charterers, who were erecting a refrigerator on their own account, and at their own ex-

pense. The workmen were supplied with all necessary lights by the charterers. The ship was not under any duty to supply lights or to cover the hatches merely for the use of the charterers' men, nor was the libellant's fall in fact owing to any lack of light. The open hatch was fully known to him, it was the customary opening, and the only care necessary to avoid it was such ordinary care as all who work on ship-board are expected to exercise. *The Sir Garnet Wolseley*, 41 Fed. Rep. 896. If they do not take such care, it is at their own risk.

Libel dismissed.

THE J. C. RICH.¹

SCOTT v. THE J. C. RICH.

(District Court, S. D. Alabama. February 18, 1891.)

1. MARITIME LIEN—STATE STATUTE.

The liens declared by state statute are enforceable in admiralty only if attached to contracts maritime in their nature.

2. SAME—CONSTRUCTION OF VESSEL.

A contract for the building and equipment of a vessel is non-maritime in its nature, and a lien therefor created by state statute is not enforceable in admiralty.

In Admiralty. Libel *in rem*.

Pillans, Torrey & Hanaw and *J. I. Clemmons*, for claimants.

W. D. McKinstry and *L. H. Faith*, for libellant.

Toulmin, J. This suit is brought by libellant to recover a sum of money claimed to be due him for work and labor done as ship carpenter under a contract with the owner of said tug. The proof shows that the work was done on the vessel in completing her construction, and rendering her fit for the uses for which she was designed. It shows that the tug, when partly constructed, was launched and sunk for preservation; that she was then without shoe, rudder, engine, stern-plate, house, steering-gear, bunks, or boilers; that she remained in this condition some considerable time, was subsequently raised, and libellant contracted to do certain necessary carpenter's work to complete her. She was not enrolled and licensed and finished as a complete vessel, as originally designed, until after libellant's work on her. The proof further shows that from the laying of her keel she was destined to become a steam-tug, was suitable for nothing else, was never completed for any other use, and had not been used for the purposes of commerce and navigation until after the work done on her by the libellant. What the libellant did, therefore, must be held to have been done in the original construction of the vessel. In order to the existence of the admiralty jurisdiction in this court, the

¹Reported by Peter J. Hamilton, Esq., of the Mobile bar.

claim must be maritime in its nature, and the lien must exist either under the admiralty or the local law. The jurisdiction of the admiralty depends in contract on the maritime character of the contract. *The Pacific*, 9 Fed. Rep. 120; *The De Lesseps*, 17 Fed. Rep. 460; *The Glenmont*, 32 Fed. Rep. 703; *The Royal George*, 1 Woods, 290; *The Madrid*, 40 Fed. Rep. 677. A contract for the building and equipment of a vessel is essentially non-maritime. Authorities cited *supra*, and *Roach v. Chapman*, 22 How. 129; *Ferry Co. v. Beers*, 20 How. 393; *Edwards v. Elliott*, 21 Wall. 532. The work, being done in the original construction of the vessel, is not maritime in its nature, and does not give rise to a maritime contract. Nor can it be made so by the state statute, the only effect of which is to attach a lien to a contract originally maritime in nature, and not to make a contract maritime which is not so originally. So the cases cited have expressly adjudged.

The libel in this case must be dismissed, and it is so ordered.

THE CHARLES HEBARD, etc.

LYONS *et al.* v. THE CHARLES HEBARD, etc.

(District Court, E. D. Michigan. February 18, 1891.)

1. COLLISION—NEGLIGENT TOWAGE.

The tug A., with two schooners in tow, was ascending the St. Clair. She was just passing a raft 1,800 feet long and 250 feet wide, followed at some distance by the steamer H., with three schooners in tow. Passing signals were exchanged that the tows should go starboard to starboard. The A. hugged the American shore so closely that upon the approach of the H., or almost immediately afterwards, she and her tow were grounded. The H., having been advised further up the stream of the presence of the raft, was running very slowly, and, after rounding the corner of the raft, and running along-side near enough to touch it, received a hail from the first schooner that her tow-lines were in danger of fouling with the raft, and checked her speed further, and her tow, losing steerage-way, was swept by the current into collision with the tow of the A. Held, that the H. was at fault in permitting her tow to lose the necessary steerage-way.

2. SAME—INEVITABLE ACCIDENT.

An inscrutable cause of collision will not be assumed because the fault of navigation does not appear by the proof, if the physical conditions be such that the fairly repel the suggestion of inevitable accident and indicate some unknown bad management as the real cause of the injury.

In Admiralty.

The tug American Eagle, with two schooners in tow, was ascending the St. Clair river just below the lower end of the south-east bend. A raft 1,800 feet long and about 250 feet wide, in tow of a tug, was descending the same bend, followed some distance above by the steamer Charles Hebard, with three schooners in tow. The tows were all attached by lines about 500 feet long, each. Above the bend the Hebard was notified by a passing steamer to look out for a raft below. She was then under full headway, but soon after this notice checked her speed somewhat. The night was clear, and the wind from the eastward, but

not of disturbing force. The position of the raft in the river was a matter of dispute, and the people in charge of it not being found as witnesses, the conflict is one between the parties to the suit. The testimony of the ascending tow placed the raft some 1,500 or 2,000 feet further down the bend than that of the descending tow. The American Eagle testified that the raft lay diagonally across the river, with the after end so near to the American shore that he could not safely pass it without endangering his schooners; whereupon he pushed the bow of his tug against it, and shoved that end of the raft further out into the river, with the starboard corner just about mid-stream, but lapping towards the American shore, and by this means the raft passed clear of his tow, but very near to them. But in executing this maneuver he was so crowded that he was almost upon the American shore, which he had hugged as closely as possible all the way up the raft. Just as he was completing the maneuver of shoving the raft out of his way, the Hebard appeared, and he signaled her that there was danger, which signal the Hebard denied hearing, however. Passing signals were exchanged that the tows should go starboard to starboard, and the American Eagle, crowding closer to the American shore upon seeing the Hebard approach, and putting her wheel to starboard, ran upon the bank and grounded, as did her schooners. The Hebard and her first schooner passed quite near to the American Eagle, and still nearer to her first and second schooners, but the second schooner of the Hebard came into collision with the first schooner of the American Eagle with a glancing blow, possibly without more than touching, and, taking foul of her anchor tore it from its fastenings and carried away its chain, tore out the cat-head and part of the railings, after which she came into collision with the second schooner of the American Eagle, with which she became entangled, and was held fast until morning. The third schooner of the Hebard's tow came into more violent collision with the first schooner of the American Eagle's tow, and, fouling with her, was likewise held fast until morning. The testimony of the Hebard places the raft higher up the river and the American Eagle and her tow still lower down and passing along-side the raft, when she first came into view. The Hebard saw the raft 400 or 500 feet ahead of her, and immediately checked her speed for the second time. The raft was close to the Canadian shore, holding well up against it, with its rear end about mid-stream. The space between it and Canadian shore was so narrow that he could see the water only a ship's length ahead, and, having determined to pass to the starboard of the raft, he signaled the American Eagle and her tow that he would go starboard to starboard with him. Rounding the corner of the raft, he passed near enough to touch, and went ahead, close along-side the raft; but receiving a hail from his first schooner that her tow-lines were in danger of fouling with the raft, he checked again for the third time, and brought the revolutions of the engine to about 20 per minute, after which he went ahead stronger until the collision and the parting of himself and his first schooner from the other two, the tow-line having been cast loose by that schooner when she observed the collision. The Hebard's testimony is that the Ameri-

can Eagle and her tow were afloat, and moving up, and they thought outward, at least as to the schooners, at the time they rounded the raft; but it is a conceded fact that the proof shows quite conclusively that if the American Eagle and her tow were not aground at the moment of collision, the grounding and collision were almost simultaneous, and the fact of the grounding and its place of occurrence was fixed by the situation the next day, when the vessels were separated. The owners of the schooners in tow of the American Eagle filed this libel for damages against the Hebard.

Moore & Canfield, for libelants.

H. D. Goulder, for respondent.

HAMMOND, J., (*after stating the facts as above.*) The decree in this case must be for the libelants, with costs, and the usual reference will be made to ascertain the damages. The court cannot see any fault on the part of the tug American Eagle or the vessels in her tow contributing to this collision in the least degree. The only fault imputed is that she did not stop below until the raft had passed out of the way, or until the Hebard had cleared it. This is equivalent to a demand on the part of the Hebard for the right of way upon about half of the river, with ample room, according to the testimony, for two such tows to pass between the raft and the American shore of the St. Clair river, at the south-east bend. By the Hebard's testimony the raft was so near to the Canadian shore when she rounded it that she could see but little water between them, and it was impossible for her to take that side of the raft; also that she kept within a very few feet of the raft on that side next the American shore. If this be so, she had the most abundant room and water—more than 250 feet—for the joint navigation of herself and the American Eagle and her tow on that side the raft. The most ordinary skill would have accomplished such a passage, although all the witnesses say the presence of the raft and the nature of the bend made it necessary to be careful, and call it "close." The experts say that there should have been no difficulty in such a situation. It is therefore preposterous to demand that the up-going tow should stop and give the whole space to the Hebard and her tow coming down. Whether the American Eagle and her tow were aground, as they say, on the American shore, or were moving up, as the Hebard people say, at the time the latter appeared upon the scene, the former could not be in fault, for nobody denies that they were hugging the American shore desperately, in order to keep out of the way, whether of the raft or the Hebard is immaterial. If the Hebard's story be true, she was doing this to keep out of her way; if the American Eagle's story be true, then, out of the way of the raft; but howsoever this be, she could, in that situation, be in no fault. Having the right to be there, she was doing the best she could to give all possible room to the Hebard and the raft. The court finds her without fault.

The mere happening of the collision, in such a case, would seem to throw the blame on the Hebard, in the absence of any showing by her

of a cause for which she was not responsible in the sense that it was unavoidable by her. But it is urged that the case of *The Worthington*, 19 Fed. Rep. 836, imposes on the libellant the duty of locating the fault of the Hebard by proof that shall convince the court that the force causing the collision came of her negligence; otherwise, it is said the fault is inscrutable, the accident inevitable, and that the libel must be therefore dismissed. It does not seem to the court that that case is entirely applicable to this, though apparently so nearly alike. There the court found that neither vessel was in fault; saying that the colliding vessel had removed by proof the presumption of fault on her part arising from the fact of collision, the victim being without fault. Undoubtedly this presumption is, even at common law, not always conclusive, possibly not even always *prima facie*; or rather it may be said that the presumption of negligence does not arise inevitably from the bare happening of a collision. It depends upon the circumstances of any case, and most largely on the nature of the injury itself, as indicating the cause of it to have been the negligence of the defendant, although the precise physical causation may be obscure, or possibly inscrutable. I do not understand the case to hold that the actual cause must be made apparent, and not left in doubt, as a cause producing the physical operation of forces that inflict the injury. So we are thrown back on the inquiry of fact as to negligence upon the just measure of the probative value of the accident itself in its relation to the circumstances shown to be attending it. Given the fact that the injured vessel is seen to be without fault, or even without a suspicion of any; given the fact that there were nearly 300 feet of open water between the edge of the raft and the American shore; given the fact that there was no force in the sweep of the current or no obstacle in the trend of the bend that was not always in that bend and that current, if not in all bends and all currents; given the fact that there was no hindrance in the wind or light, nothing in any of the elements that ordinary skill in navigation should not always anticipate at that time and place, and under the conditions then present,—and it does seem to me that the negligence of the Hebard is conclusively demonstrated by the happening of the collision itself, whether we can, under the proof, point out the precise fault in navigation or not; and it further seems to me that there is nothing in the case of *The Worthington*, *supra*, which breaks the force of this conclusion.

But taking that case for all that the defendant claims, and the facts here point with reasonable certainty to the fault; taking also everything the Hebard's people say to be true as sworn, and it sufficiently appears that the current drifted the offending vessels in the Hebard's tow against the injured vessels in the tow of the American Eagle, the force of the current being somewhat supplemented, perhaps, by the force from the towlines, from which had been gathered a momentum not then entirely lost. How should these natural forces have been overcome to prevent the collision? By sufficient counteracting force applied by the Hebard; for it is plain there was no bad navigation on the part of her vessels in tow which inflicted the injury. When we see that she was running under

slow bells which had been checking her from the time when far away up the river she had been told to look out for the raft below, that she had reduced her speed to so low a point that her communicated force to the vessels in tow was not sufficient to overcome the drift of the current, and the remaining momentum, which in the situation had a tendency to aid the current, as it swung the vessels with it along the concave side of the bend. Sufficient force would have swept them the other way; less than enough left the vessels helpless, and without the headway to steer them safely. The witnesses who say they had sufficient headway for steerage purposes are either mistaken in this, or they are mistaken in their opinion that sufficient steerage-way was all that was needed; and more must have been required, because absolutely there is no other possible force acting to bring about this collision than those already indicated; and as these same witnesses are just as certain that they steered their vessels properly and did the utmost to turn them aside, if there had been sufficient steerage-way they would have accomplished their purpose. Here I attach much importance to the two competent and satisfactory experts that were examined. They agreed that there was nothing extraordinary in the situation as described by defendant; that while it required careful and skillful management, there was abundant room for passing. But they said the situation demanded that the speed should be maintained, and rather increased than diminished, so that the vessels in tow should be held up against the current and swept, as it were, through the place. I cannot agree, in our present knowledge of the forces at work in such plain situations as those we have here, that there may have been some mysterious, hidden, or inscrutable cause which no one in this case can divine. I should rather believe that the testimony was mistaken or false, and proceed to find the cause of the collision as against it; but that is unnecessary here, I think. However, we must not allow tenderness for witnesses, nor a good-natured impulse to believe what is sworn to be true, to assent too readily to the suggestion of an inscrutable cause or inevitable accident, which mistake would be the result of a too easy finding, through such tenderness, that the navigation was faultless. If we are correct in divining the force which caused this collision, we are certainly correct in "locating the fault of the navigation," and this answers the most expanded sense of that term used by counsel in urging the principle of the *Worthington Case*, with which I entirely agree, though I do not think it means all that counsel urge in that behalf.

As to the excuse that the slowing down under the last checking bell was done to prevent a fouling of the towing-line with the logs of the raft, it may be said that that situation was either the result of previous checking or of running unnecessarily close to the raft, or some other mismanagement of the lines or of the navigation. Ordinary skill or care in navigation is surely equal to the task of preventing such a fouling without the sacrifice of sufficient headway to manage the tow. The presence of a raft in a canal is not an extraordinary danger, and the turning it in even close quarters can surely be accomplished without throwing away a tow

of vessels by permitting the currents to lash them, whip-like, against the bank or against another vessel on the bank, whether aground or moving closely to it.

So far we have considered the case upon the proof of defendant's witnesses, not taking everything they say to be true, and particularly not all the opinions they express, but substantially giving credit to them, and believing that they swear as they saw the facts, and only correcting errors of evidence by the other proof pertinent thereto; and this is all the court can ever do, for it is not bound to believe everything a witness swears, although he be a credible witness. Credible witnesses are often mistaken. But turning now for a moment to the libelants' proof, and the negligence of the Hebard becomes established so firmly that the learned counsel for the defendant do not deny it. And I must say that, in my judgment, the corroborating facts more nearly confirm the libelants' story than that of the defendant, not as before said, in all that which these witnesses say, and in their expressed opinions, but substantially. And I say this without imputing falsehood to the Hebard's people, for I believe they testified according to the appearance of things to them. For example, I think her captain believed the raft was so close to the Canadian shore that it was unsafe for him to take that chute. But the fact of the collision itself, the crowding of the American Eagle and her tow upon the American bank, the closeness with which the Hebard crowded and kept to the raft, all convince me that the raft had been and was closer—very much closer—to the American shore than he thought it was, and that it would probably have been safer for him to go between the raft and the Canadian side, and was, perhaps, a fault of navigation not to do this. But whether this be so or not, if the raft was in the river at the place where the libelants locate it, then, although it was only an error of judgment not to take the Canadian side of the raft, the fault in navigation after choosing the other side is not denied, as before stated, by learned counsel. The American Eagle had crowded the tail of the raft away from its threatening position toward her tow by pushing her prow against it until it had passed, and the Hebard did not take around the raft until it was much farther down the river than she locates it by her own proof. This maneuver of the American Eagle was made before the Hebard appeared, and she had already been crowded aground on the American shore, though this grounding occurred almost simultaneously with the Hebard's appearance. There was no time to show anchor lights, but the Hebard knew of the presence of the tow, and ought to have recognized its helpless condition; at least, she ought to have known that it was as close in shore as it could get, and to have governed herself accordingly. It was a fault to lose headway or give away speed until her own tow should drift helplessly against this grounded tow on her starboard, or against a tow already crowded over as close as possible to the American shore, and just as helpless, almost, as if grounded. I might array details of proof further showing this corroboration of the libelants' story of this disaster, but it is sufficient to say that the great facts—the established facts—conform

more sensibly to that story than the other, in my judgment. The result of this consideration of the libelants' proof is the same as before, the cause of collision is precisely the same, the negligence the same, and the only difference between the two is that the situation as described by libelants is much more likely to have brought about the collision than the other. It accounts for it far more satisfactorily, and more clearly indicates the cause to have been that which it must also have been in the situation described by defendant. It is hardly necessary to say that in this view the Hebard is liable, and in some sense it is quite immaterial which may be found to have been the true relative situation of the vessels, whether that given by the defendant or by the libelants.

The decree will be as before ordered.

HUDSON RIVER CEMENT CO. v. THE EMPEROR and THE E. H. GARRISON.¹

(District Court, S. D. New York. May 5, 1891.)

COLLISION—STEAM-VESSELS MEETING—LOOKOUT—PROXIMATE CAUSE—EAST RIVER NAVIGATION.

The tug G., with a tow, was going down the East river about dusk. She had no lookout other than her pilot. A ferry-boat coming out of her slip crossed ahead of the tug's course, attracting the attention of her pilot, so that he did not see the tug E., which, with a tow, was coming up stream, about 150 feet off the piers, in plain sight of the G., and giving her repeated signals. The G. collided with the tow of the E. Held, that the failure of the G. to have a lookout was the cause of the collision, rendering the G. liable therefor; that the navigation of the E. near the shore, though contrary to the state statute, afforded such abundant time and space for avoiding collision as not to constitute a proximate cause of it, and was immaterial.

In Admiralty. Suit to recover damages caused by collision.

Goodrich, Deady & Goodrich, for libelants.

Carpenter & Mosher, for the Emperor.

Alexander & Ash, for the E. H. Garrison.

BROWN, J. The tug Garrison, in going down the East river about dusk on November 19, 1890, came in collision, a little above Catharine ferry-slip, with the libelant's barge Isabella, in tow along-side of the tug Emperor going up, about 150 feet only off the end of the piers. The account of the collision given by the pilot of the Garrison is that, as he was going down in about mid-river, a ferry-boat came out of the Roosevelt ferry-slip, which is immediately above the East River bridge abutment, and gave him a signal of one whistle, in obedience to which, he ported his wheel to go to the right; and that as the ferry-boat passed him

¹ Reported by Edward G. Benedict, Esq., of the New York bar

she opened up under her stern the Emperor and her tow, so near to the Garrison that collision was then unavoidable. On examination I find it quite impossible to accept this theory of the collision on the ebb-tide. The collision could not have occurred where it did occur had the Emperor with her tow come up from below the ferry-boat as the latter came out from her slip. The men on the Emperor must also in that case have inevitably seen the ferry-boat, and several of their witnesses testify that no ferry-boat was seen. There can be no doubt that, if the ferry-boat came out at the time stated by the Garrison's pilot, she came out astern of the Emperor, and that the Emperor and her tow were all the time in full view, both lights and hulls, it not being yet dark. The Garrison had no lookout, and it is probable that the ferry-boat engaged all the pilot's attention, so that the Emperor and her tow were not noticed until quite near. The case is one of those in which the absence of a lookout proper on the tug, as required by law, becomes material. The omission of the lookout, though often immaterial, is always at the tug's risk. The Emperor twice gave timely signals to the Garrison, which were also unnoticed. There was plenty of time and space for the Garrison to have avoided running into the tow. At the collision she had changed her course about 10 points, and was heading 2 points up river. Though the Emperor was navigating near the New York shore, and not in mid-river, as required by statute, yet, as she was in plain view, and gave repeated signals in time, and as there was abundant space for the Garrison to have avoided running into her tow had any proper attention been given her, the fault is deemed that of the Garrison only; and the Emperor's navigation in the wrong part of the river is treated as not the proximate cause of the collision, and immaterial. *The Francis*, 44 Fed. Rep. 510, 512. Decree for libelant with costs as against the Garrison, and libel dismissed with costs as respects the Emperor.

CHICAGO, R. I. & P. RY. CO. v. DENVER & R. G. R. CO.

(Circuit Court, D. Colorado. December, 1890.)

1. RAILROAD COMPANIES—CONTRACT—ASSIGNMENT OF CONTRACT FOR USE OF ROADS.

A contract between the C., R. I. & C. R. Co. and defendant company, giving the former the right to use the latter's tracks, depots, etc., stipulated that the contract should be binding on the lessees, assigns, grantees, and successors of each company during the continuance of their franchises, and provided that the former company could assign its interest in the contract only by sale, lease, or consolidation of its own property. *Held*, that an assignment or conveyance by the C., R. I. & C. Co. of its interest in the contract by virtue of leases, sales, and consolidation of its property, carried with it all the rights of said company under the contract.

2. SAME—ESTOPPEL.

Where a railroad company which has granted to another company the right to the joint use of its track, depots, etc., allows the grantee and assignee of the latter to enter upon and continue in such possession and use, it is practically a construction of the power of the company to assign its rights under the contract.

3. SAME—CONSTRUCTION OF CONTRACT.

Complainant's assignor, being engaged in building a railroad from the east, with the intention of bringing it to Colorado Springs, or, possibly, direct to Denver, entered into a contract with defendant company for the use of its tracks, depots, etc., which provided that complainant's assignor should have the full, equal, joint, and perpetual possession and use of all defendant's tracks, buildings, stations, sidings, and switchings on and along its line of railway "between and including Denver" and South Pueblo, meaning and intending to include all its railway and appurtenant property "between and at the points aforesaid." *Held*, that the contract gives complainant the right to use the depot grounds and property of defendant in Denver for the handling of its freight and passenger business, without respect to the road over which it may haul its cars. HALLETT, J., dissenting.

In Equity.

Thomas F. Withrow, M. A. Low, and A. E. Pattison, for complainant.
E. O. Wolcott, J. F. Vaile, and G. W. Easley, for defendant.

MILLER, Justice. This suit is one brought in the chancery branch of the circuit court of the United States for this district by the Chicago, Rock Island & Pacific Railway Company against the Denver & Rio Grande Railroad Company. The object of the bill is to enforce certain rights which the Chicago & Rock Island Company, as I shall call it generally, claims to the use of what is called the "terminal facilities" of the Denver end of the road of the Denver & Rio Grande Railroad Company. The rights thus asserted grow out of a contract originally made between the Denver & Rio Grande Railroad Company and the Chicago, Rock Island & Colorado Railway Company. It concerned the use of the Denver & Rio Grande Railroad, which was then in operation between Pueblo and Denver—a distance of 120 miles almost, north and south—by the other company, which was being built from the east to connect with the Denver & Rio Grande Railroad at some point on this line. The construction of that contract is the subject-matter which we have to decide, and is the foundation of the difference between the two railroads,—I say between the two railroads; I mean the Chicago & Rock Island Railway Company, which claims to have become invested with all the rights concerning the matter now in controversy which the Chicago, Rock Island & Colorado Railway Company had by the original contract.

One of the points raised in the case is that this is not a sound proposition; that the Chicago, Rock Island & Pacific Railway Company, being a totally different company from the Chicago, Rock Island & Colorado Railway Company, has not become possessed of the rights which the contract between the two latter companies conferred upon the Chicago, Rock Island & Colorado Railway Company. I do not know how much importance the defendants in this case, the Denver & Rio Grande Railroad Company, attached to that proposition. I think there are two sufficient answers to it, which show that the Chicago, Rock Island & Pacific Company has the rights which were conceded, in regard to the present matter in issue, originally to the Chicago, Rock Island & Colorado Railway Company, the party who made the original contract. One of these reasons is found in section 9, art. 3, of the original contract between the two railroad companies who are parties to it. Section 9 is as follows:

"This contract shall attach to and run with the railways of the respective parties during the corporate existence of each, and of all extensions of such existence, by renewal or otherwise, and shall be binding upon the lessees, assigns, grantees, and successors of each during the continuance of their several corporate franchises: provided, however, that the Chicago Company can assign its interest in this contract only by sale, lease, or consolidation of its own property."

The allegations of the bill, and further facts presented in the papers before us, satisfy me that the Chicago Company—that is, the original contracting company—did convey or assign its interest to the Chicago, Rock Island & Pacific Railway Company by virtue of leases, sales, and consolidation of its property. If there were any doubt upon that branch of the subject, it would, perhaps, be removed, for the purposes of this suit at all events, by the fact that the Denver & Rio Grande Railroad Company has permitted the Chicago, Rock Island & Pacific Company, the present plaintiff, to exercise all the rights granted by this contract to the Chicago & Colorado Railway Company, and does permit it to exercise them to this day, and has never controverted their right to exercise such rights as belonged to the original contracting parties. That has been in operation for several years, so that it is a practical construction of the power of the original contracting party, the Chicago, Rock Island & Colorado Company, to assign, and the Chicago, Rock Island & Pacific Company to receive the benefit of, that contract.

I pass from that subject with the simple statement that, in the existing state of things, the rights of the Chicago, Rock Island & Pacific Company are such as were conferred by this contract on the Chicago, Rock Island & Colorado Railway Company. Those rights are summed up in the first section of article 1 of the contract, a section which is short, terse, and, it seems to me, is clear. It is as follows:

"Article 1. The Denver Company covenants, promises, and agrees to and with the Chicago Company:

"Section 1. It [that is, the Denver Company] hereby lets the Chicago Company into the full, equal, joint, and perpetual possession and use of all its tracks, buildings, stations, sidings, and switches on and along its line of

railway between and including Denver and South Pueblo, excluding its shops at Burnham, meaning and intending thereby to include in the description aforesaid all and every portion of its railway and appurtenant property between and at the points aforesaid, and all improvements and betterments thereof, and additions thereto, which may be jointly used by the parties, as hereinafter provided."

It would be difficult to devise language more explicit and more comprehensive than this. It is a grant to the Chicago Company, in terms, at least, in perpetuity, of the equal and joint possession and use of something. That is the nature of the power and interest granted by the Denver Company to the Chicago Company. It is the equal. This equality must have reference to the two companies; there is nobody else contracting. That they shall be equally, jointly, and perpetually in possession and use of what? Now, having defined the nature of the power granted, —the interest granted,—we find it equally explicit when it comes to saying in what that interest has vested,—what property is to be covered by it; namely, its tracks, buildings, stations, sidings, and switches (those are very minute particulars) on and along its line of railway between and including Denver and South Pueblo. That is very minute and very particular, so far as to exclude any doubt about the point of terminus. It is not between Denver and South Pueblo, but it goes further, and says: "Including Denver and South Pueblo, and excluding its shops at Burnham,"—tells what is to be excluded; meaning and intending to include in the description aforesaid all and every portion of its railway and appurtenant property between and at the points aforesaid, and all improvements and betterments thereof, and additions thereto. As I have already said, it would be difficult to find any language more capable of conveying such an interest as they did convey in all the property appurtenant to that railroad, except the shops at Burnham. Well, what is charged by the Rock Island & Pacific Railway against the Denver & Rio Grande Railroad Company is that they have given notice to the plaintiff that they propose to exclude it from the benefits secured by that section in their buildings, its terminal facilities at Denver; and the Rock Island Railway Company asks this court, by injunction, to prevent them from doing that. They say that they are running every day into Denver, and into the depot at Denver, or into the yards, where the connection is made at Denver with other roads, trains which the Denver & Rio Grande Railroad Company propose to exclude and prevent them from running in. If the question presented to us was that there never was any want of proper compliance with its contract on the part of the plaintiff in this case, we could enter into that question, and settle it; but such is not the case that is before us. It is one of a much higher grade. It is claimed by the Denver & Rio Grande Railroad Company that this contract did not oblige them to carry for the original contracting party any freight, passengers, or other subject of railroad traffic than such as might come to the city of Colorado Springs. It is claimed that there was no real right in the "Chicago Railway," as it is called in this contract, to take up or to land the property, traffic,

freight, or passengers at the Denver end of this road at all; that it must enter, as I understand, by Colorado Springs, and that they have no right to enter upon the use of this road anywhere else; and, if they are not correct in that rigid construction of the contract, they insist that the cars which the Chicago, Rock Island & Pacific Railway Company now run into this yard of the Denver & Rio Grande Railroad Company are no part of the traffic which is included in this contract. The Chicago & Colorado Railway Company evidently suppose that, wherever it ran cars carrying passengers or freight that came to the Denver & Rio Grande Railroad Company, it had a right to use the tracks, terminals, and depots of that company from Denver to Pueblo. It is now said that because the Chicago & Rock Island Railway Company, which obtained the benefit of that contract, is bringing trains with passengers and freight over another road to Denver, part of the way, it is therefore excluded from the contract. It is not my opinion that such a construction of the contract gives to the plaintiff the equal and joint possession and use of that part of the Denver & Rio Grande Railroad which constitutes the tracks at its terminus. I think that was made a part of the road that was conveyed, and I am of the opinion that by the conveyance the Chicago & Colorado Company came into the use and control of the Chicago, Rock Island & Pacific Company by virtue of the assignments and sales and consolidations I have already alluded to. I think that that included the right to run its cars, its passenger cars and its freight cars, and its freight into the Denver & Rio Grande depot, although it came over—was hauled over—somebody's else road. I think any other construction is a narrow and destroying use of these enlarged terms. I don't see why people put such things into contracts unless they mean them. What can they mean, if they don't mean the use of the terminals at the end of the road, both at Pueblo and Denver? If the contract has any qualifications or conditions to that use, it must be explicit and clear, because the language in which the grant was made admits of nothing of the kind.

I do not propose to go into those parts of the contract which are supposed to limit and qualify, and make exceptions to the general language of the first section of the contract, further than to say, in general terms, that the whole of the contract seems to me divisible into two or three purposes and objects. The first one is to define what was conveyed, and the terms on which it was conveyed; and the second had relation to some matters of expenses in the running of the road. In regard to the interest in the road, the contract provides that the cost of what has been thus granted or let by the Denver & Rio Grande Railroad Company shall be estimated, as it stood then, at \$3,000,000, and an estimate of what the Rock Island Company should pay for the use of that road, which had been built by the Denver & Rio Grande Railroad Company, is made in the contract, and it is stated how much they shall pay. That, like the other part of the contract, is a perpetual obligation, as I understand it, and the Rock Island Company was to pay the interest on this sum forever, whether they used the road much, or whether they used it lit-

tle; and there is no provision in the contract implying that the amount of interest which they shall pay—which that road shall pay—on account of the original construction of this road from Denver to Pueblo, including both ends of it, shall be diminished or changed or modified in any way, with a solitary exception, and that is, that there is an express provision that the Denver & Rio Grande Railroad Company may permit other companies to come into the use of that piece of road upon terms which would be satisfactory to it, and, I believe, the Rock Island Company; but, at all events, whatever these new companies shall pay for the use of this piece of road is to go to diminish the sum which the Rock Island Company is to pay in the way of interest on that part already constructed. It is also provided that the Rock Island Company shall pay one-half of all the taxes that the Denver & Rio Grande Railroad Company is to be subjected to; and the whole of that contract very clearly shows that, as to the cost of this road, as to the taxes which shall accrue, as to improvements which may be necessary to be made, the Rock Island Company shall pay a certain proportion of that cost, in the way of interest, to the Denver Company. So that it has bought by contract the right to the use of that railroad from one end of the line mentioned to the other, and including both ends, and it is under contract to pay for it, and that whether it loses or makes by it. Whether the Denver & Rio Grande Railroad Company becomes a success or a failure, this company agrees to pay—the plaintiff is bound to pay—its proportion of the interest and the cost of all this road, and of the taxes which may accrue upon it.

But there was another consideration in the matter, and that was, that there are certain expenses appurtenant to running the road,—to keep it going,—and those cannot be estimated by what has been done in the past. They cannot settle at once, on the basis of 50 years, what it would cost to supply clerks and agents and firemen and trackmasters, and all that kind of thing; that is to be estimated by some other, different plan, and the contract goes on to specify how that is to be paid for. I do not enter into these matters, because I simply say that they are additional sums to be paid by the Chicago & Rock Island road for the running of the institution, or its current expenses, which were not paid for when its use was then bought. Now, as regards the first part of the contract, I do not find in any of the subsequent provisions for the payment of running expenses of officers, watchmen, trackmen, engineers, and all that kind of thing—I do not see in the provisions for these things—anything which modifies the right of the road as granted in the original section; and if these were made conditions precedent to the use of the road, as they are not, I do not think that the Denver and Rio Grande Railroad could enforce the payment which is stipulated for in regard to these matters by its own action in excluding the Chicago & Rock Island Railway. It may be the subject of reference, as is provided in one of the provisions or sections. It might be the subject of suit if the Rock Island road did not pay what it ought to pay for these secondary and current expenses. It could be made to pay by suit. No al-

legations that it is insolvent. Perhaps some kind of suit might be instituted by the Denver & Rio Grande Company for specific performance, for all I know, so as to prevent continuous suits; but I do not think that any of these arrangements, which relate to compensation for the current expenses of the conduct of this road, affect or determine, or are important in construing, the original contract by which the interest in the Denver & Rio Grande Railroad Company is conveyed to plaintiffs.

I think that is about all I have to say on the subject. I do not agree to the construction of the contract by which the Chicago, Rock Island & Colorado Railway Company, the original contractor, was bound to connect with this railroad only at Colorado Springs as at all feasible; nor do I believe in any limitation upon the right of the Chicago, Rock Island & Pacific Railway Company to use the Denver & Rio Grande Railroad at all. Nor is there a limitation upon that right, except that it shall be equal and joint with the Denver & Rio Grande Railroad, and must, of course, be so conducted as to have the regard of these rights as well as its own; and, with this view of the subject, I do not believe that the Denver Company has the right to exclude the Rock Island & Pacific Railway Company from the use of its yards and its buildings, which are appurtenant to, and a part of, the Denver & Rio Grande Railroad at Denver.

As I understand,—as this is my view of the matter,—although differing from Judge HALLETT, it is my duty to grant the injunction prayed for in this case.

HALLETT, J., (*dissenting.*) My construction of this contract is widely different from that given by Justice MILLER. I think that the judgment of the court should not be confined to section 1 of article 1 of the contract, but should cover the whole instrument; and, in order to bring out the true interpretation and meaning of the contract, it is proper to look at the situation of the parties. When this contract was made, the Chicago, Rock Island & Colorado Railway Company was engaged in building a road from the Kansas line through the state in this direction, with the intention to bring that road to this point, Colorado Springs, and also with the intention, under some circumstances, to carry the road to Denver direct. It was seen that if the road should be constructed to this point it would become necessary to connect with the two principal commercial cities in the state,—cities which, I believe, are regarded by railroad men as common points, to which freight rates are equal and also passenger rates; and, when they should arrive at this place with the road, it would become a question whether that road should be built from Colorado Springs to Pueblo, and from Colorado Springs to Denver, or whether an arrangement should be made with the Rio Grande Company for the use of its road between Denver and Pueblo; and, of course, if satisfactory arrangements could be made with the Denver & Rio Grande Company, it would be much cheaper for the new company, and would somewhat reduce the expenses of the old company, to make such an arrangement. Accordingly, this contract was made; and, as I understand

it, the road, considered in its physical character, the Chicago, Rock Island & Pacific Railway Company, acquired the use of the Denver & Rio Grande Railway between this point and Pueblo and Colorado Springs. More than in any other instance, I think, the railroad of a railroad company is the physical body of the corporation, in so far as any corporation may be said to have a physical existence, and a body which may be recognized. The body of the corporation is the railroad, and it represents the corporation, in that sense; and this was the contract of the road—the new railroad with the old railroad—for one connection at Colorado Springs, not a connection at Denver, Pueblo, or other point. If the contract which has since been made by the Rock Island Company with the Union Pacific Company, by which it has secured a line between Limon and Denver, had then been made, this contract would not have taken effect, because it is expressly provided in this instrument that, if the Chicago & Colorado Railway Company shall build a road to Denver, then the contract shall become void and ineffectual; and, of course, if the Chicago Company had acquired the right to use the Union Pacific road at that time, there would have been no occasion for the making of the contract. Moreover, if the complainant in this suit should now acquire a line going into Pueblo in the same manner that it has acquired the right to enter Denver by a distinct line, there would then be no use whatever for the Rio Grande road between Denver and Pueblo, and the use of it in the way in which it is mentioned in this contract, and all the provisions in this contract for estimating the cost of maintenance by wheelage, and all that, would become ineffectual. Now, as to this interpretation of this contract, I can find support in every clause of the agreement, but I do not care to refer to more than one of them. To go over the contract at length, and give consideration to each particular clause, would be a matter of great labor, and occupy a great deal of time, to no profit. The clause to which I refer is the third clause on page 13 of article 3 of the printed contract, which provides that “the Denver Company may admit any other company operating a connecting railway to the possession and use of said railway between Denver and South Pueblo, or any portion thereof, with itself and the Chicago Company, upon substantially the same terms as those set out in these articles.” Now the Union Pacific road, which has since been acquired proportionately from Limon to Denver by the Rock Island Company, was then in existence. It is one of the roads referred to in this clause of the agreement, and the right to admit that road to the use of this road was reserved in this agreement to the Rio Grande Company. There is not a doubt of that in my mind. Furthermore, on the next page of this contract, it is said here in section 11: “This contract is intended to permit either party hereto to exchange business with other companies in carload lots or otherwise, and in the ordinary exchange of business in the cars of such other companies.” The right here reserved to this exchange at the time of this contract was a right arising out of the use of the road from Limon to Denver, and it was provided for in this agreement. Now, if you look at this and other parts of this instrument, it seems to me

perfectly clear that the right acquired by the new company—the “Chicago Company,” as it is called in the agreement—was the use of the Denver & Rio Grande Railroad between Denver and Pueblo, in connection with the line which they proposed to build. It was through a connection at Colorado Springs, and not elsewhere. It was by one connection, and no more. The Rock Island Company has since made another connection, and my Brother MILLER announces here that they may make any number of connections. If they acquire the control and use of all the lines that enter Denver, they may put the business of all those lines upon the yards and terminals of this company; they may put it anywhere upon the line of this road. I cannot agree in that construction of the agreement, but it is unnecessary for me to comment at length upon it. I must dissent from the opinion given by Justice MILLER, and when this cause comes up for final decision, as Brother MILLER will not be present, it will be for the consideration of the circuit judge.

AMERICAN PRESERVERS' TRUST *v.* TAYLOR MANUF'G CO. *et al.*

Circuit Court, E. D. Missouri, E. D. May 18, 1891.)

1. CORPORATION—CONTRACT—AGENCY.

Where a bill for injunction avers that a certain agreement, though signed only by the stockholders of defendant company, was in fact executed for and on behalf of the company, and that the stockholders were duly authorized and empowered to act for the company, and that the company had received the proceeds of the consideration of such agreement, it cannot be held on demurrer that the company is not bound by the agreement simply because its name is not appended thereto, and such agreement purports to be only the individual undertaking of certain stockholders.

2. SAME—ULTRA VIRES—TRUST COMBINATION.

A trust agreement by which the stockholders of seven corporations, situated in different parts of the country, acting for their respective companies, authorize trustees to purchase stock, bonds, or property of any corporation or firm engaged in a certain business; to issue trust certificates therefor; to organize corporations to carry on such business; to exercise control over corporations by the purchase of their stock; to sell any property other than stocks, and receive the purchase money, and to receive the dividends on stock, interest on bonds, etc.; and, after paying the expenses of the trust, to declare dividends on the trust certificates,—is beyond the corporate powers of a Missouri corporation; and a covenant made by it, in consideration of admission to the trust and of the benefits to be derived by its stockholders from the trust agreement, that it would not engage in the business for which it was organized for a period of 25 years, is void, and the company will not be restrained by injunction from violating it.

In Equity. Bill for injunction.

A. Leo Weil, C. H. Krum, Frank Ryan, and James O. Broadhead, for complainant.

Judson & Reyburn, for defendants.

THAYER, J. This case was before the court on a former occasion on an application for a preliminary injunction. The bill has since been amended, and the questions now to be determined arise on a general demurrer to the complaint.

1. An injunction was refused because it did not appear, when such an order was applied for, that the Taylor Manufacturing Company had signed or had become bound by the "agreement of co-operation" (as it is termed) of date May 15, 1889. *Vide* 43 Fed. Rep. 711. The bill has been so amended as to overcome that objection, at least on demurrer. It is now averred that that agreement, though it was only signed by stockholders of the manufacturing company, was in fact "executed for and in behalf of said company," and that said stockholders "were duly authorized and empowered to so act for the company," and that the company "received the proceeds of the sale of the trust certificates," which formed a part of the consideration for executing the agreement of co-operation. In view of these allegations, it cannot be held, on demurrer, that the corporation is not bound by the agreement of co-operation, merely because its name is not appended to the agreement, or because the agreement on its face purports to be the individual obligation of certain of its stockholders. When a contract is one which a corporation is empowered to make, and has in fact authorized to be made for its benefit, but in the name of some other person or persons, it may be held liable thereon. So far as natural persons are concerned, it is usually immaterial by what name they see fit to evidence their assent to a contract, providing they do assent and intend to become bound; and the same doctrine has been held applicable to corporations. *Melledge v. Iron Co.*, 5 Cush. 158; *Carroll v. Society*, 125 Mass. 565.

2. It accordingly becomes necessary to consider the case upon the assumption that the Taylor Manufacturing Company executed the agreement of co-operation, and thereby covenanted "that for the period of twenty-five years * * * it would not, within the territory of the United States of America, engage * * * in the manufacture or sale of preserves, jellies, fruit butters," etc. According to the averments of the bill, the agreement of co-operation was executed "in compliance with and in pursuance of" a promise to execute such an agreement, made by the Taylor Manufacturing Company, when it became a member of the "American Preservers' Trust," and signed the articles of association. It appears that the execution of that agreement was one of the conditions upon which the manufacturing company was allowed to become a member of the trust, and to share in the benefits incident to such membership. It follows, that the consideration supporting its covenant to discontinue the manufacture and sale of preserves was not merely the sum of money received for its plant, tools, brands, and trade-marks, but the consideration consisted in part of advantages gained, or supposed to have been gained, by admission to the trust. For the purposes of this decision, therefore, the "trust agreement," executed some time in the spring of 1888, and the "agreement of co-operation," executed in May, 1889, must be treated as part and parcel of the same agreement. The terms of both agreements were assented to at the same time. It was made a condition, when the Taylor Manufacturing Company was admitted to the trust, that it should enter into a covenant (termed an "agreement of co-operation") to discontinue one branch

of its business, which covenant it subsequently executed. In its legal aspects, therefore, the case presents the same features that it would present if the covenant which complainant seeks to enforce had been incorporated into the trust agreement.

3. The next question to be considered is whether the trust agreement, as described in the bill, was one to which the Taylor Manufacturing Company, a corporation created by the laws of the state of Missouri, could lawfully become a party. It seems that the American Preservers' Trust was an organization formed originally by the stockholders of seven foreign corporations located in different parts of the United States, all of which were engaged in the fruit-preserving business. Whether the foreign corporations themselves executed the articles of association is not explicitly stated, but the fair inference is that they did. The articles of association (hereafter and heretofore also termed the "trust agreement") provided that they should take effect 60 days from the time those holding the majority of the stock of the seven foreign corporations aforesaid should have transferred their stock to a board of nine trustees, also named in the articles. Without going too much into detail, it will suffice to say that the trust agreement authorized the trustees (as soon as the articles took effect) to prepare and issue trust certificates for stock, bonds, or other property at any time transferred or assigned to them, such certificates to be based on the estimated earning capacity of the property so acquired. They were also authorized to purchase the stock, bonds, property, or business of any corporation or firm engaged in the fruit-preserving business, that was not originally concerned in the trust, or to lease the property of any such company or firm; also to organize corporations to carry on the fruit-preserving business; also to exercise control over corporations by means of the acquisition of their stock; also to sell any trust property in their possession, other than stocks, and to receive the purchase money; also to receive and collect dividends on stocks, and interest on bonds, and out of the money so received on account of sales, dividends, or interest, after paying the expenses of the trust, to declare dividends on the trust certificates, which they had themselves issued and put in circulation. It is obvious, I think, that the trustees (so termed in the trust agreement) were in reality the agents of those persons, firms, and corporations who had signed such agreement, and had attempted to confer upon the trustees the extensive powers last described. It is furthermore obvious that the Taylor Manufacturing Company, by signing the trust agreement, even after the trust had taken effect, or had become established, made itself a party thereto, (so far as it was able to do,) and became one of the principals by whom the agency in question was created. Now, it is a proposition which admits of little doubt, that the Taylor Manufacturing Company exceeded its powers in signing and becoming a party to the trust agreement. By so doing, it in effect united, with the other corporations and individuals who signed the agreement, in creating a partnership or joint-stock concern, and in furtherance of that enterprise it undertook to appoint agents to manage the concern in its behalf, and to vest such agents with authority to buy and lease prop-

erty in all parts of the United States, to obtain and exercise control over other corporations by acquiring their stock, and with power likewise to issue negotiable securities without limit, and to declare dividends thereon. In all of these respects I must conclude that the defendant corporation, by executing the trust agreement, undertook to exercise powers to which it could lay no reasonable claim by virtue of the law under which it is organized, and from which all of its powers are derived. Some stress was laid in the argument upon the allegations of the bill that the trust was formed for the purpose of securing "an economical, proper, and satisfactory conduct" of the fruit-preserving business, and "an intelligent co-operation in the business of manufacturing preserves;" also upon the further allegation that the effect of the association "has been to create a better market for the sale of green fruits, * * * and more economical methods of manufacture, and to produce a better class of goods, free from deleterious substances," etc. This may be true, but the matters so alleged are not material to the present inquiry. The question now before the court is whether a business corporation, organized under the laws of this state, has the right to become a member of such an association, or to appoint agents with such extensive powers, and that inquiry must be answered in the negative. *People v. Refining Co.*, 121 N. Y. 582, 24 N. E. Rep. 834; *Mallory v. Oil-Works*, 86 Tenn. 598, 8 S. W. Rep. 396; *State v. Distilling Co.*, (Neb.) 46 N. W. Rep. 155; *Mills v. Upton*, 10 Gray, 596.

4. The ultimate question is whether the covenant to discontinue one branch of its business, made under the circumstances and for the considerations disclosed by the bill, can be enforced in equity against the defendant corporation. An injunction as prayed for, if granted, will operate, of course, as a specific enforcement of the covenant; and the general rule is that agreements will not be specifically enforced that are inequitable, or tainted with illegality, or that are in excess of corporate powers. As the case is stated in the bill, the only fair pretense that there seems to be for seeking equitable relief is the fact that the Taylor Manufacturing Company still retains the money that it received for the transfer of its manufacturing plant. But it must be borne in mind, as heretofore shown, that the money so received for the transfer of its plant was not by any means the sole consideration upon which it covenanted to discontinue the manufacture and sale of preserves. One of the inducements held out to it for entering into that covenant was the advantage that would result to it or to its stockholders from its becoming a member of the trust, and enlarging the sphere of its operations through the agency of that organization; but, as it now appears, the defendant company had no right to become a member of the trust, and all its acts done in that behalf were *ultra vires*, if not positively illegal. In view of the unlawful character of the transaction out of which the covenant arises, I conclude that a court of equity would not be warranted in enforcing it by injunction, even though the defendant company has received, and still retains, a portion of the consideration which induced it to execute the covenant.

The demurrer to the bill is accordingly sustained.

CENTRAL TRUST CO. OF NEW YORK *et al. v. WABASH, St. L. & P. Ry. Co.*, (UNITED STATES TRUST CO. OF NEW YORK *et al.*, Intervenor.)

(Circuit Court, E. D. Missouri, E. D. February 11, 1891.)

1. FEDERAL COURTS—JURISDICTION—RECEIVERS—CITIZENSHIP.

Where the claim made by a railroad company against another is for the retention of rolling stock by receivers appointed by the United States circuit court and by a new corporation to whom it was transferred, after it should have been turned over to claimant, the circuit court, having in the order of transfer reserved the right to determine all claims growing out of the subject-matter, has jurisdiction of the controversy, though the parties are corporations of the same state.

2. PLEADING—INTERVENTION—MISJOINDER OF PARTIES.

Where such claim is preferred by intervention in a pending suit against defendant, and it appears that the claim is fully vested in the intervenor, it is improper to join with it in the petition the original plaintiff, and a demurrer to the petition will be sustained on that ground.

3. SAME—DEMURRER—LIMITATION.

The objection that the claim was barred because not presented within the time limited by an order theretofore made in the cause should be raised by plea, and not by demurrer.

4. SAME—PENDING APPEAL.

It cannot be objected by demurrer that the intervenor had prosecuted an appeal from a former order made in regard to its claim, where the fact of such appeal does not appear on the face of the petition.

On Demurrer to Intervening Petition.

Theodore Sheldon, for intervenors.

Wells H. Blodgett and *F. W. Lehman*, for Wabash Western Railway Company.

THAYER, J. This is an intervening proceeding by the Omaha & St. Louis Railway Company (hereafter called the Omaha Company) to recover the value of the use of certain cars and rolling stock alleged to have been retained and used by Receivers Humphreys and Tutt and by the Wabash Western Railway Company (hereafter called the new Wabash Company) for the period of three years and three months, after they should have been turned over to the Omaha Company, or to the receiver McKissock, under whom it claims, and to all of whose rights it claims to have succeeded. A very full statement of the facts leading up to the controversy will be found in the opinion of Judge SHIRAS, 42 Fed. Rep. 343, in the case of *U. S. Trust Co. v. Wabash, St. L. & P. Ry. Co.* The intervenor's claim for the use of the cars and rolling stock now in question having been dismissed by Judge SHIRAS for want of jurisdiction, the claim has since been interposed in this court in the form of an intervening petition, and to such petition a demurrer has been filed. The first and second grounds of demurrer are that this court is without jurisdiction to hear and determine the controversy, because it has not the custody of any property of the new Wabash Company, or of the old Wabash, St. Louis & Pacific Railway Company (hereafter called the old Wabash Company,) and because the Omaha Company and the old and new Wabash Companies are Missouri corporations. It appears to the court that these objections to the jurisdiction are clearly untenable, so

far as a portion of the claim is concerned; and, if the court has jurisdiction to allow a part of the claim, these points of the demurrer must be overruled. A part of the claim is based on the alleged retention and use by the receivers of this court (to-wit, Messrs. Humphreys and Tutt) of certain cars and rolling stock, after the same should of right have been turned over to the United States Trust Company, or to Receiver McKissock. If the claim is valid, it is a debt contracted by the receivers in the course of the operation of the railway property committed to their charge, which the court must protect. It is one of those claims which the court reserved to itself ample power to protect before it parted with the custody of the mortgaged property, both by its decree of foreclosure of January 6, 1886, and by orders made in said cause on December 31, 1886, and March 30, 1887, as well as by an order made therein on April 14, 1888. A reference to these orders is all that is deemed necessary to show that the court authorized Messrs. Humphreys and Tutt to transfer the railway property in their charge to the new Wabash Company only on condition that all debts contracted by the receivers, whether then established or thereafter ascertained, should be paid by the transferee; and that it reserved to itself full jurisdiction to determine as to the validity and amount of all claims then pending or subsequently presented against its receivers, and to make the necessary orders for the payment of all such claims as might thereafter be allowed, and, if need be, to enforce the payment of such claims out of the property transferred by its receivers to the new Wabash Company.

2. The next ground of demurrer is that there is "an improper joinder of parties plaintiff," and this objection to the petition, though not important, seems to be well founded. The intervening petition is preferred by the Omaha Company and the United States Trust Company as co-plaintiffs, but the fourth paragraph seems to indicate that the claim sued upon is fully vested in the Omaha Company. If such is the fact, the United States Trust Company is an unnecessary plaintiff.

3. The next objection is that there is an improper joinder of causes of action, because a claim against the receivers for the retention and use of rolling stock by them, is united with a claim against the new Wabash Company for the retention and use of the same property by it, subsequent to the transfer of the property to it by Receivers Humphreys and Tutt. As the intervenor shows title in itself to both claims, it may sue on both claims in the same petition, unless this court is without jurisdiction as to that part of the claim founded upon the retention and use of rolling stock by the new Wabash Company, after it acquired possession thereof from the receivers. The most important question arising on the demurrer, and the only one attended with any doubt, is the one last suggested,—that is to say, whether the claim last mentioned arises out of the foreclosure proceedings against the old Wabash Company in such manner that the court may take jurisdiction of the same as incidental to the foreclosure proceedings, without reference to the citizenship of the parties, or the present custody of the mortgaged property. It cannot be successfully denied that this court had primary jurisdiction to

make a final apportionment of rolling stock as between the receiver of the Omaha Division and Messrs. Humphreys and Tutt, receivers of the old Wabash Company, at the time it remitted the determination of that question to the United States circuit court for the southern district of Iowa. Incidental to that power, it also had the right to require its receivers to pay a reasonable compensation to the receiver of the Omaha Division, for the use of any cars belonging to the Omaha Division that were withheld during the period of the final accounting and apportionment. These were matters strictly incidental to the foreclosure proceeding against the old Wabash Company, and all the parties necessary to a complete and final division of the rolling stock were before this court. By its order of January 6, 1886, made in this cause, (*vide* 42 Fed. Rep. 343,) directing a temporary division of rolling stock, and remitting the matter of a complete final apportionment to the Iowa court, this court did not divest itself of jurisdiction over the subject-matter. The division of rolling stock then ordered was partial and temporary, and for public convenience; and the clause of the order referring the final apportionment to the Iowa court was simply permissive. It authorized the parties to the controversy to litigate elsewhere a question properly incidental to this cause, that might as well have been litigated here. If the jurisdiction of the court to which "the matter of an equitable division and apportionment" was referred, is for any reason inadequate to do full and complete justice between the parties, no reason is perceived why either of the litigants or their successors in interest may not now have recourse to this court, if its jurisdiction over the subject-matter is for any reason more extensive. It is insisted, however, that this court has no power to compel the new Wabash Company to pay for the use of the rolling stock, since the delivery of the same to it by Receivers Humphreys and Tutt, although it has had the use and possession of rolling stock that of right belonged to the Omaha Division. It is said that this is an independent wrong, in no wise connected with the foreclosure proceedings, for which it must answer elsewhere than in this jurisdiction. Whether this position is tenable depends upon the circumstances and conditions under which it received possession of the property from Messrs. Humphreys and Tutt. If the transfer of the property to it was at the time absolute and unconditional, it might be conceded that the claim would not be within the jurisdiction of the court; but such is not the fact. At the time the transfer was ordered there were many pending and undetermined claims against the receivers, including the very claim now in controversy, which had been remitted for final adjustment to the Iowa court. Such pending and undetermined claims against the receivers were in effect claims against the property in their hands. This court could not, under the circumstances, and its orders and decrees of January 6, 1886, December 31, 1886, March 30, 1887, and April 14, 1888, show that it did not make an unconditional transfer of the property in its possession to the new Wabash Company. In effect it authorized the transfer to be made subject to its right to adjudicate all claims and controversies growing out of or in any wise incidental to the foreclosure pro-

ceedings, whether then pending or that might thereafter arise; and it reserved to itself the power to retake the mortgaged property, if necessary, to enforce obedience to such further orders as it might make. The new Wabash Company was also required to enter its appearance in this cause, and submit itself to the jurisdiction of the court, which it did on May 14, 1888. The matter of the division of rolling stock between the receiver of the Omaha division and Receivers Humphreys and Tutt was a pending controversy when the transfer took place. The new Wabash Company had notice of the pendency of that controversy. It also had notice of the fact that the division of the rolling stock theretofore ordered was merely provisional, and that one of the probable incidents of the controversy would be an order requiring it to pay a reasonable compensation for the use of rolling stock during the period of the accounting, if it should appear in the course of such trial that the preliminary apportionment of January 6, 1886, was not fair and equitable, or was not in accordance with the legal rights of the Omaha Division bondholders. In view of all these circumstances it must be held that this court lost none of its jurisdiction by the transfer of the property in question to the new Wabash Company; that, in so far as the claim in controversy is concerned, the possession of the property by the latter company should be treated as a continuation of the receivers' possession; and that this court has the same power to adjudge that the new Wabash Company pay a reasonable compensation for rolling stock of the Omaha Division withheld and used during the accounting suit, and thereafter until it was restored to the true owner, that it would have if the property had remained in the custody of its receivers. The transfer of the property in question, considering the circumstances under which it was authorized, cannot be held to have deprived the court of jurisdiction over a controversy that had arisen when the transfer took place, concerning the title to a portion of the property transferred. It necessarily retained jurisdiction to dispose of every question incident to that controversy, and one of the obvious questions that would arise and demand adjustment was the question as to the compensation that ought to be allowed for the use of rolling stock pending the final apportionment, and until the decree making an apportionment was fully executed. *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609.

4. The petition is also demurred to on the ground that the entire claim is barred by the provisions of an order made in this cause on March 30, 1887, limiting the time for the presentation of claims against Receivers Humphreys and Tutt. Concerning this objection it is sufficient to say that it should be made by plea rather than by demurrer. I am of the opinion, however, that the present intervention is not within the terms of the order of March 30, 1887, because prior to that time this court had remitted the entire controversy concerning the Omaha Division rolling stock to the United States circuit court for the southern district of Iowa, and the matter was then under investigation in that court. Messrs. Humphreys and Tutt were at the time parties to the proceeding pending in the Iowa court. The claim covered by the pres-

ent intervention is a part and parcel of the controversy referred to the Iowa court for final adjustment, and it would be unreasonable to hold that the intervenor is barred of its remedy by the order of March 30, 1887, when it has in fact been prosecuting its claim in another jurisdiction pursuant to the direction given by this court in its order of January 6, 1886.

5. Another objection to the intervention is that from the order made by the United States circuit court for the southern district of Iowa (42 Fed. Rep. 343) the intervenor prosecuted an appeal to the supreme court of the United States which is still pending, and that such appeal precludes any proceedings in this jurisdiction until the appeal is determined. The intervening petition does not show, however, that such an appeal has been taken, and the point is for that reason not tenable on demurrer. In this connection, however, I think it proper to add that, whether the plea of *lis pendens* would or would not be tenable in view of the alleged appeal, the court in either event would not feel called upon to enter into a trial of this cause until the appeal is disposed of. The demurrer will be sustained on one ground, namely, the improper joinder of parties plaintiff. In all other respects it is overruled.

YOUNG v. NEW JERSEY & N. Y. RY. CO.¹

(Circuit Court, E. D. New York. March Term, 1891.)

MASTER AND SERVANT—DEFECTIVE MACHINE—NEGLIGENCE OF FELLOW-SERVANT.

An employer is liable for an injury to an employe caused by a defective machine, even though the negligence of a co-employe may have contributed to the accident.

At Law. On motion for new trial.

Irving Browne, for plaintiff.

De Forest & Weeks, for defendant.

WHEELER, J. The plaintiff was a fireman on one of defendant's engines, drawing a fast passenger train, which ran by a danger signal at a junction, where the rules required the train to be under control, onto a side track, against some cars, by which he was seriously injured. This suit was brought for that injury. His evidence tended to show that the air-brake of the engine was out of order, and unsafe, repairs to which had been requested by the engineer, and directed, but neglected, to his and the engineer's knowledge, and that the train would have been stopped safely but for that. The engineer was momentarily engaged about the injector, and the plaintiff was looking out for the signals. He testified that they were in sight of this signal for a long distance; that when he first saw it he could not tell whether it was at safety or danger that as

¹Reported by Edward G. Benedict, Esq., of the New York bar.

soon as he could tell that it was at danger, he warned the engineer, who reversed the engine, put on the air-brakes, and did all he could to stop. Upon this and the other evidence the defendant moved for a verdict because of the plaintiff's knowledge of the defect in the brake; of his contributory negligence in not warning the engineer sooner; and of the negligence of the engineer in approaching the signal so fast with such a brake. The motion was denied, with directions to the jury for a verdict for the defendant if the brake was safe for that use; or the defect did not cause the injury; or the plaintiff's negligence contributed to causing the injury; or it was caused solely by the negligence of the engineer; and for a verdict for the plaintiff if the defect in the brake, or the defect and negligence of the engineer, caused the injury, without any contributory negligence of the plaintiff. After verdict for the plaintiff the defendant moved for a new trial, because there was no question but that the plaintiff contributed to the injury, and because negligence of the engineer, a fellow-servant, alone, or with that of the plaintiff, in running so fast so near the junction with such a brake, against the rule, was the proximate cause of the injury, and the defect in the brake only a remote cause, which would create no liability.

That not leaving the work pending repairs promised or directed would not bar recovery for the defect, when to remain would not be negligence in fact, is established for this court by *Hough v. Railway Co.*, 100 U. S. 213. The want of negligence in fact is established by the verdict. The plaintiff could not give warning that the signal was at danger till he could see that it was so, and, whether he ought to have given warning before that he could not so see, or was negligent on the whole in such a way as to contribute to causing the injury, could not be assumed as matters of law, but were questions of fact, arising upon the circumstances, which had to be submitted to the jury. What injured the plaintiff was the running against the cars on the side track. The speed of the train, and the inability of the engineer to check it with that brake, caused this. The speed was not too great for a reasonably good brake. If the speed had not been too great for that brake, as it was, the injury would not have occurred. If the brake had not been too weak for that speed, it would not have occurred. The speed at that place alone, which is all that the engineer, alone or with the plaintiff, was responsible for, did not cause the injury. That and the defect in the brake, which the defendant was responsible for, together, did. Both were proximate; the defect as much so as the speed. The defendant is not exempt from liability for the negligence of the engineer because the plaintiff was responsible for it. The engineer would be liable to the plaintiff for it, and both the engineer and the defendant would be liable, together or separately, for an injury which the negligence of both caused. Upon a similar question in *Railway Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. Rep. 493, Mr. Chief Justice WAITE said:

"In the instruction which was given we find no error. It was in effect that, if the negligence of the company contributed to—that is to say, had a share in—producing the injury, the company was liable, even though the neg-

v.46f.no.3—11

ligence of a fellow-servant was contributory also. If the negligence of the company contributed to, it must necessarily have been an immediate cause of, the accident, and it is no defense that another was likewise guilty of wrong."

In *Railway Co. v. Kellogg*, 94 U. S. 469, cited for the defendant, Mr. Justice STRONG said:

"The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science, or of legal knowledge. It is to be determined as a fact, in view of the circumstances attending."

The question here, whether the defect in the brake caused the injury to the plaintiff, has been submitted to the jury, and found for the plaintiff, although contributory negligence of the engineer may also have been found. From this re-examination of the case, in the light of these controlling authorities, no just ground for disturbing the verdict appears.

Motion denied.

COMSTOCK v. TRACEY.

(Circuit Court, D. Minnesota. May 15, 1891.)

1. STATUTES—ENACTMENT—PRESUMPTIONS.

Act Minn. March 4, 1872, (Sp. Laws, c. 177, p. 553,) establishing the court of common pleas of Hennepin county, being duly enrolled and signed by the presiding officers of each house, approved by the governor, and promulgated with the other laws of the session, the court will presume that it was legally enacted, and will not, in a collateral proceeding in which the validity of a judgment rendered by that court is questioned, resort to the journals of the two houses of the legislature to ascertain whether the act was passed in accordance with Const. Minn. art. 6, § 1, requiring a two-thirds vote by the legislature for the establishment of courts in addition to those enumerated.

2. FRAUDULENT CONVEYANCES—PLEADING—JUDGMENT.

A petition by an assignee in bankruptcy to set aside a deed made by the bankrupt alleged that it was executed in May and recorded in December, and was not delivered until long after it was recorded; that there was no actual change in the possession of the property; that the consideration expressed (one dollar) was fictitious; that the grantee accepted the deed within six months before the filing of the grantor's petition in bankruptcy, with a view to cover up the property in the interests of the grantor, who retained possession and control of the property, in the false and fraudulent pretense that he was the agent of the grantee; that the real value of the property was \$6,000; and prayed that the deed be adjudged fraudulent and void as against plaintiff, and for general relief. The findings of fact were that the grantee was a sister of the grantor, who was insolvent at the time of the execution of the deed; that it was not delivered until more than a year after it was executed; that no consideration was ever paid; and that the grantee had no knowledge of the deed until after the grantor's bankruptcy. *Held*, that these averments and findings were sufficient to support a judgment setting the deed aside.

At Law.

Action for the recovery of the possession of the middle third of lots numbered 1, 2, and 3, in block No. 4, in Groveland addition to Minneapolis. The case was tried by the court without a jury, upon an agreed statement of facts, substantially as follows:

"For the purpose of the first trial of the above-entitled cause the parties thereto hereby stipulate and agree that the following statements are true;

both parties, however, being at liberty to object to the competency or materiality of any or all of said facts as evidence upon said trial.

"(1) Said plaintiff was at the beginning of this action and is a citizen and resident of the state of New York, the defendant was then and is now a citizen and resident of the state of Minnesota, and the value of the real estate in controversy exceeds six thousand (\$6,000) dollars.

"(2) One Joseph Hodges formerly owned the whole of block four (4) in Groveland avenue addition to Minneapolis, in Hennepin county, Minn., in which block said land is situated, and is the common source of title of the parties hereto.

"(3) Under date of May 25, 1873, said Hodges and his wife, then residing at said Minneapolis, executed an instrument in the form of a warranty deed of said block four, (4,) naming his sister, the plaintiff herein, as grantee, purporting to convey the same to her for a consideration of one (1) dollar. Said instrument, which is the basis of plaintiff's claim of title herein, was acknowledged by said grantors on May 30, 1873, and was filed and recorded in the registry of deeds of said Hennepin county on December 1, 1873, at 9 o'clock A. M.

"(4) On the 13th day of February, 1874, said Joseph Hodges, who still resided at Minneapolis, Minn., filed in the district court of the United States for the district of Minnesota, under the act of congress then in force, his petition in bankruptcy, upon which he was afterwards duly adjudged a bankrupt, and one William E. Hale was duly appointed as his assignee. Having qualified as such assignee, all the real and personal estate of which said Hodges was the owner, or to which he was in any way entitled, at the date of his said petition, was duly assigned to said Hale, and the deed of assignment thereof was duly recorded in the registry of deeds of said Hennepin county on July 28, 1874.

"(5) On or about August 17, 1874, said Hale, as such assignee in bankruptcy, instituted an action in the court of common pleas of said Hennepin county, which said action was therein prosecuted to final judgment; which action was to have the said deed from Joseph Hodges and wife to said Sarah E. Comstock adjudged fraudulent and void as against the plaintiff in that action.

"(6) Said judgment has never been appealed from, modified, or reversed. A notice in due form of the pendency of said action was filed and recorded in the registry of deeds of said county on August 17, 1873, and a duly-certified copy of the final judgment aforesaid was likewise filed and recorded therein on July 1, 1876, the day after its entry in the clerk's office. Nothing in any part of this stipulation shall be construed to be an admission on the part of the plaintiff that said court of common pleas was ever constitutionally created or legally existed, or that said alleged judgment is a valid judgment. At the commencement of said action, and during all the proceedings therein, the said plaintiff was not a resident of the state of Minnesota.

"(7) Said William E. Hale, as such assignee, in pursuance of an order of said United States district court empowering him to sell the estate of said bankrupt, including the real estate now in controversy, in consideration of three thousand six hundred and fifty (3,650) dollars, to him paid by one A. Y. Davidson, executed a conveyance of said premises and other lands to said Davidson, dated February 23, 1877, and duly recorded in said county on August 23, 1877. The money so paid by said Davidson was duly applied to the payment of said bankrupt's debts.

"(8) Whatever title to the premises herein involved was acquired by said Davidson by virtue of the proceedings aforesaid duly passed by mesne conveyances to one George F. French, and on May 13, 1881, this defendant purchased and took a conveyance of the same from said French for a valuable

consideration, without knowledge that said plaintiff made any claim of title thereto, and without notice of any defect in the title of said French other than such as is to be implied by law from the records and proceedings herein mentioned. Upon such purchase defendant proceeded to occupy said real estate, and to build up and otherwise improve the same, and now occupies same as his place of residence. * * *

"(10) The act of legislature of Minnesota establishing said court of common pleas (chapter 177, Sp. Laws 1872) is printed in the official volume of said laws, beginning on page 558. The bill for said act (House File No. 115) passed the house of representatives, as appears by the printed journal thereof, on February 21, 1872, by a vote of yeas, 68, nays, none. It passed the senate on February 26, 1872, but the journal does not show how many votes were cast either for or against the same. The legislature of that year consisted of forty-one (41) senators and one hundred and six (106) representatives. The bill was duly enrolled and signed by the presiding officer of each house, and was approved by the governor of said state on March 4, 1872. Said court of common pleas was soon after organized, pursuant to the provisions of said act, and continued to exercise all the powers purporting to be conferred by said chapter 177 until February 26, 1877, when it was merged in the district court for the fourth judicial district, by chapter 103 of the General Laws of 1877.

"(11) The following acts, regularly adopted and approved, pertaining to said court, have been passed by the legislature of Minnesota, none of which, however, are shown by the journals to have been passed by a two-third vote:

"(a) Chapter 44, Gen. Laws 1875, p. 77, requiring the judges of the several common pleas courts of the state to meet with the district judges, to formulate rules of practice governing procedure in both courts.

"(b) Chapter 243, Sp. Laws 1876, p. 316, amending the act of 1872 by providing for a transfer of causes to the district court in case the judge is interested in the litigation, and for calling in the judge of another court of common pleas in case of illness.

"(c) Chapter 103, Gen. Laws 1877, p. 194, merging the court of common pleas of Hennepin county with the district court of the fourth judicial district, and continuing the judge of the former court in office as one of the judges of the latter; also transferring to the latter court all pending causes."

"It is further stipulated herein that all questions relating to the title or right of possession of said real estate may be tried and determined by the court without a jury."

The other facts necessary to the determination of the action are stated in the latter part of the opinion of the court.

F. C. Stevens and Cobb & Wheelwright, for plaintiff.

Daniel Fish, for defendant.

THOMAS, J., (*after stating the facts as above.*) Upon these conceded facts the plaintiff contends that the judgment of the court of common pleas of Hennepin county in *Hale v. Comstock*, avoiding the deed from Joseph Hodges and wife to the plaintiff, under which she claims title to the property in question, is, and was at the time of its rendition, absolutely void, because said court was never constitutionally created or established. Section 1, art. 6, of the constitution of the state of Minnesota reads as follows:

"The judicial power of the state shall be vested in the supreme court, district courts, courts of probate, justices of the peace, and such other courts, in-

ferior to the supreme court, as the legislature may from time to time establish by a two-thirds vote."

The supreme court of the state of Minnesota has held in *State v. Gould*, 31 Minn. 189, 17 N. W. Rep. 276, that the "two-thirds vote by which the constitution authorizes the legislature to establish courts is a vote in each house of two-thirds of all the members thereof." Under the stipulation allowing either party to object to any or all of the facts on the ground of competency or materiality as evidence, the defendant interposed an objection on the trial to that part of subdivision 10 of the agreed statement by which the plaintiff offered to prove by the journals of the two houses of the legislature that the act purporting to create the court of common pleas of Hennepin county was never passed by the requisite two-thirds vote as irrelevant and immaterial, for the reason that the question cannot be raised or determined in this action, or in any collateral proceeding; citing *Supervisors v. Heenan*, 2 Minn. 330, (Gil. 281); *State v. City of Hastings*, 24 Minn. 78; *Burt v. Railroad Co.*, 31 Minn. 472, 18 N. W. Rep. 285, 289. Reference to subdivision 10 of the agreed statement shows that the bill in question was duly enrolled and signed by the presiding officers of each house, was approved by the governor, and promulgated along with the other laws of the session of the year 1872. The act upon its face must be presumed to be valid, and to have been passed in accordance with the requirements of the constitution. Relying upon its apparent validity, a judge was appointed, and the court organized in accordance with the terms of the act. For over five years that court exercised jurisdiction in civil and criminal cases in one of the most populous and important judicial districts in the state, embracing the progressive city of Minneapolis, without question, and unchallenged as to its constitutional creation. It was apparently recognized as a valid, existing court by the legislature of the state in 1875, by an act requiring the judges of the several common pleas courts of the state to meet with the district judges to promulgate rules of practice governing the procedure of both courts; in 1876, by amending the act of 1872, by providing for the transfer of causes to the district court in case the judge is interested in the litigation, and for calling in the judge of another court of common pleas in case of illness; in 1877, by an act merging this court with the district court of the fourth judicial district, and continuing the judge of the former court in office as one of the judges of the latter; also transferring to the latter court all pending cases. It is admitted that these various acts were regularly adopted and approved, except that none of them show by the journals to have been passed by two-thirds vote. Rules of property have necessarily been established, and rights vested, or supposed to have been vested, by the judgments of that court. The consequences following and naturally resulting from a judgment declaring the judgments of the court absolutely void would or might be serious. In view of these facts and consequences, this court, sitting and exercising jurisdiction in this state, should approach the question involved with due care and caution. Section 5, art. 4, of the constitution of the state of Minnesota is as follows:

"The house of representatives shall elect its presiding officer, and the senate and house of representatives shall elect such other officers as may be provided by law. They shall keep journals of their proceedings, and from time to time publish the same, and the yeas and nays, when taken on any question, shall be entered on such journals."

The statute of the state relating to such journals also provides:

"Each journal shall be recorded in books to be furnished by the secretary of state for that purpose. After the journals are recorded, said books shall be deposited with the secretary of state, who shall carefully preserve the same, and said records shall be considered the true and authentic journal." Gen. St. Minn. 1878, c. 5, § 23; Laws Minn. 1868, c. 46, § 23.

Should this court look to the journals and inspect them in this action for the purpose of ascertaining whether or not the act in question received the requisite two-thirds vote in each house? In other words, should this court appropriate the journals as evidence to determine the ultimate fact as to whether or not this law received the requisite two-thirds votes upon this collateral attack? The law is upon its face presumptively valid, and can only be successfully attacked, if at all, by going back of the regular authenticated enrolled bills, bearing the approval of the executive, and regularly deposited in the archives of the state. We must go to the journals to find the death wound of the statute, if at all. In view of the law as now laid down in the federal courts relative to following the decisions of the highest court of the state respecting rules of property and actions, what is our duty in relation to the facts of this case? In *State v. Gould*, *supra*, the supreme court of the state held that, in a direct proceeding to test the question of the passage of a similar law of the state in accordance with the constitutional requirements, the court would resort to the journals of the legislature in order to ascertain whether the law had been constitutionally passed. In *Supervisors v. Heenan*, *supra*, it was held that the court might inspect the original bills on file with the secretary of state, and have recourse to the journals of the legislature, to ascertain whether or not the law had received all the constitutional sanctions to its validity. There was an application for a writ of *mandamus* in that case by the supervisors of the county to compel the register of deeds to deliver to the board certain books and papers relating to the taxes of the county. The application was made under section 9 of the act of August 13, 1858. It was argued against the issuing of the writ that the act was unconstitutional, it not having been read on three different days in each house of the legislature, and twice at length, and not having been voted for by a majority of all the members elected to each house. The court examined the journals, and came to the conclusion that the act had been constitutionally passed. In *State v. City of Hastings*, *supra*, an application was so made for a writ of *mandamus* by the St. Paul & Chicago Railway Company, to compel the city of Hastings to issue certain bonds. The issue was authorized by Sp. Laws 1869, c. 34; but the city refused to issue the bonds, on the ground, as it claimed, that the senate in passing the bill did not com-

ply with section 20, art. 4, of the state constitution, which reads as follows:

"Every bill shall be read on three different days in each separate house, unless in case of urgency two-thirds of the house where such bill is pending shall deem it expedient to dispense with this rule; and no bill shall be passed by either house until it shall have been previously read twice at length."

The court, speaking through BARRY, J., said in that case:

"In *Supervisors v. Heenan*, 2 Minn. 330, (Gil. 281,) it was held that, upon an inquiry whether an alleged statute has been passed in accordance with the requirements of the constitution, the court may inspect the original bills on file with the secretary of state, and have recourse to the journals of the houses of the legislature, to ascertain whether or not the law has received all constitutional sanctions to its validity. The respondent's claim in the case at bar is that in passing the special laws of 1869, c. 34, the senate did not comply with section 20, art. 4, of our state constitution, and that therefore said chapter is not a law. No other objection is made to the validity of the chapter mentioned, and to sustain this the respondent relies wholly upon the senate journal. The enrolled bill on file with the secretary of state is properly authenticated in accordance with section 21, art. 4, of our constitution, which provides that every bill having passed both houses shall be carefully enrolled, and shall be signed by the presiding officer of each house. The effect of a compliance with this direction of the constitution is to authenticate the bill; and, being thus authenticated, it is to be presumed to have passed in accordance with the requirements of the constitution. But under the rules laid down in *Supervisors v. Heenan*, *supra*, this presumption is not conclusive, but may be overthrown by a reference to the journals. Section 13, art. 4, of the constitution declares that no law shall be passed unless voted for by a majority of all the members elected to each branch of the legislature, and the vote entered upon the journal of each house. Section 5, same article, provides that the senate and house shall keep journals of their proceedings, and from time to time publish the same, and the yeas and nays, when taken on any question, be entered on such journals; and there are other provisions of the constitution specifically requiring certain facts to be entered upon the journals of the houses. Now, whatever might be the effect of the failure of the journals to show the entry of any of these matters specifically required to be entered, it is obvious that the presumption arising from the authentication of the enrolled bill under section 21 cannot be overcome by the failure of the journals to show any fact which is not required to be entered thereon. Of this character are the facts with regard to the reading of the bill under section 20. There is no provision of the constitution specifically requiring their entry upon the journal. For the respondent, it is argued that they are required to be entered by the latter clause of section 5, which declares that the two houses shall keep journals of their proceedings. * * * In the case at bar there is nothing in the journals to show that the provisions of section 20 were not complied with on the passage of the bill in question. From the foregoing consideration, it follows, then, that the presumption arising from the due authentication of the bill is not overthrown by the journals, and it is therefore to be taken to have passed in accordance with the directions of the constitution."

Subsequently, at the January term of that court, an appeal from an order of the municipal court of Mankato was argued and submitted, but, before the court rendered its decision on this appeal, the case of *State v. Gould*, *supra*, was decided, and the appellant on said appeal moved the court to disaffirm the judgment appealed from, on the alleged ground that

the court rendering it was not a legal court, and its judgment therefore a nullity; because the act assuming to establish it, to-wit, "An act of November 22, 1881, entitled 'An act to establish a municipal court in the city of Mankato, Blue Earth county, Minnesota,' did not receive a vote of two-thirds of the entire senate in its passage through that body, and consequently it did not pass in accordance with the requirements of the constitution, as construed by the court at this term in the case of *State v. Gould*." Upon the application to disaffirm, the court, speaking through GILFILLAN, C. J., said:

"To establish the fact it [the Winona & St. Peter R. R. Co.] refers to the journal of the senate, and claims that the courts take judicial notice of the journals of the legislature in respect to the passage of bills. The plaintiff answers that the court, if not a *de jure*, was at least a *de facto*, court, and its acts and judgments cannot be impeached collaterally for want of legality in the court itself, nor its legal existence be called in question except in a direct proceeding on behalf of the state for that purpose, as was the case in *State v. Gould*. The argument of the defendant is that a judgment rendered without jurisdiction is void; that want of jurisdiction may always be shown; that if the legislative act under which the court assumes to act as such be void, there is a want of jurisdiction; and that, this act being void, there was no jurisdiction. Generally, if the record shows that a court has assumed jurisdiction over a matter not committed to it by the constitution or some valid statute, it may be inquired into, and the excess of jurisdiction corrected or annulled on appeal from its judgment. The defect here alleged is the non-existence in law of the court itself. That presents a somewhat different case from an exception to the right of a court admitted to exist to try particular matters. The latter is permitted, while public policy may prohibit the other."

The court then discusses the doctrine of a *de facto* court. Further along in the opinion the court said:

"We may go so far as to lay down this proposition, that, where a court or office has been established by an act of the legislature apparently valid, and the court has gone into operation, or the office is filled, and exists under such act, it is to be regarded as a *de facto* court or office; in other words, that the people shall not be made to suffer because misled by the apparent legality of such public institutions."

Again:

"The act in question having been authenticated in the proper manner, and approved by the governor, and the subject of it being within the constitutional power of the legislature, was, under the presumption cited in *State v. City of Hastings, supra*, *prima facie* a valid law, and the court it attempted to create *prima facie* a legal court."

MITCHELL, J., dissenting, with whom concurred BARRY, J., said:

"I concur in the conclusion that, under the facts of this case, the legal existence of the municipal court of Mankato cannot be attacked collaterally in this action, but only by direct proceeding for that purpose; and this, as I understand it, is, strictly speaking, the only matter properly before us at this time."

The two judges dissenting refused to adopt the doctrine of a *de facto* court. *Burt v. Railroad Co.*, 31 Minn. 472, 18 N. W. Rep. 285, 289.

Thus stands the law as interpreted by the supreme court of the state of Minnesota, so far as the same has been called to my attention. These decisions are to the effect that an apparent statute, regularly authenticated by the signature of the presiding officer of each house, approved by the executive, and printed and promulgated with the other session laws, is presumed to be valid, but the presumption is not conclusive; it may be overthrown by reference to the journals as evidence in a direct proceeding, but not when the attack is made collaterally. Upon that presumption rest all the judgments and determinations of the court in question. Thus by the adjudication of the supreme court of the state of Minnesota a rule of property and evidence has been established in all cases applicable. Title to real and personal property fixed and determined by the judgments of that court rest secure upon the decisions of the state. Is it the duty of this court, administering justice in the same state, to follow and respect the decisions of that court in this regard, or must we hold, in accordance with the contention of the plaintiff, that the statute was not constitutionally passed; that the judgment on which this title rests, and may rest securely under the laws of the state where the property is situated, is absolutely void; that the learned judge who presided in that court and adorned the bench during the years of its existence was a mere intruder; that the act in question, bearing upon its face all the *indicia* of its validity, created no office; that the judgments and decrees of that court are entitled to no respect, and are, in legal effect, as inoperative as though they had never been rendered; that they establish no rights and afford no protection? Independent of all precedent or judicial interpretations of the laws of congress, I could not give my consent to such a doctrine. The spirit and reason, if not the letter, of section 721 and section 914 of the Revised Statutes of the United States are opposed to the contention. But there is ample authority to sustain the position of the learned counsel for the defendant that it is the duty of this court in this case to follow the rule laid down by the supreme court of the state.

In *Hinde v. Vattier's Lessee*, 5 Pet. 398, the supreme court of the United States held that the circuit court of the United States sitting in Ohio rightly followed the rule of evidence as laid down by the courts of the state of Ohio, wherein the state court held that the land laws of Ohio, published by authority of that state, were admissible in evidence to prove the grant from the United States to one John C. Summes and his associates. The court, speaking through BALDWIN, J., says:

"There is no principle better established and more uniformly adhered to in this court than that the circuit courts, in deciding on titles to real property, are bound to decide precisely as the state courts ought to do; citing *Wilkinson v. Leland*, 2 Pet. 656. The rules of property and of evidence, whether derived from the laws or adjudications of the judicial tribunals of a state, furnish the guides and rules of decision in those of the Union, in all cases to which they apply, where the constitution, treaties, or statutes of the United States do not otherwise provide."

The federal courts follow the latest settled adjudication of the supreme court of the state, relating to rules of property and matters of a local character. *Myrick v. Heard*, 31 Fed. Rep. 241.

In an action of ejectment in the circuit court of the United States sitting in the state of Pennsylvania, (*Clement v. Packer*, 125 U. S. 309, 8 Sup. Ct. Rep. 907,) which involved a question concerning the location of the boundary of a private estate, the rule of evidence respecting the admission of the declarations of deceased persons, touching the disputed boundary, which had been laid down by the highest court of that state, is the rule which was held to govern the United States court in that case. The court, speaking through Justice LAMAR, said:

"The limitations upon this extension of the original rule are different in different states. We do not deem it necessary in the present case to lay down any definite rule applicable to all cases as to when declarations of deceased persons constitute valid evidence to establish private boundaries. The question is one involving the ownership of real property in Pennsylvania, and it becomes our duty to ascertain the rule established in that state, especially as respects the admissibility of the declarations of deceased surveyors in cases of boundaries between private estates."

The supreme court had adopted a different rule as to the admissibility of this class of evidence, as appears in *Hunnicut v. Peyton*, 102 U. S. 333, and *Ellicott v. Pearl*, 10 Pet. 412, and relied upon to sustain the rejection of the evidence in that case; but the court said: "As the question is one of Pennsylvania law, to be controlled by Pennsylvania decisions, the observations of the court in these cases cited are not pertinent."

In *Town of South Ottawa v. Perkins*, 94 U. S. 260, it appears from the opinion of the court that in consideration of the constitutional provisions the supreme court of Illinois had held that it was necessary to the validity of a statute that it should appear by the legislative journals that it was duly passed in the manner required by the constitution. Justice BRADLEY, referring to that case, on page 277, said:

"It follows that the court below, on retrying the case, must itself be satisfied whether the law in question was or was not constitutionally passed, and the vote entered on the journals, and instruct the jury accordingly. The evidence or means of ascertaining this fact must be such as is legally applicable to such a case, according to the laws of Illinois."

In *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. Rep. 10, the court, speaking through Justice BRADLEY, said:

"The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effects of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate, and the construction of state constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is."

In *Gormley v. Clark*, 134 U. S. 338, 348; 10 Sup. Ct. Rep. 554, the court, speaking through Chief Justice FULLER, said:

"Upon the construction of the constitution and laws of a state, this court, as a general rule, follows the decisions of her highest court, unless they conflict with or impair the efficacy of some provision of a federal constitution or of a federal statute, or a rule of general commercial law; citing *Norton v.*

Shelby Co., 118 U. S. 425, 6 Sup. Ct. Rep. 1121. And this is so where a course of those decisions, whether founded on statutes or not, have become rules of property within the state; also in regard to rules of evidence in actions at law; and also in reference to the common law of the state, and its laws and customs of a local character, when established by repeated decisions."

In *Railroad Tax Cases*, 13 Fed. Rep. 767, Justice FIELD, giving the opinion, says:

"Under the decisions of the courts upon constitutional provisions in all respects similar to that in the present constitution of California, it is settled that the court, to inform itself, will look to the journals of the legislature."

So the supreme court of the United States holds where it is so decided by the state courts in construing their own constitution and laws. On general principles, the question as to the existence or non-existence of a statute is a judicial one, and, though framed as an issue of fact, must, when it arises in the courts of the United States, be decided by them on evidence legally applicable under the laws of the state, without the advice of a jury on the subject. *Town of South Ottawa v. Perkins*, 94 U. S. 261; *Sherman v. Story*, 30 Cal. 253-277; *Gardner v. Collector*, 6 Wall. 509; *Post v. Supervisors*, 105 U. S. 667. On page 267, *Town of South Ottawa v. Perkins*, *supra*, Justice BRADLEY uses this language:

"It would be a very unseemly state of things, after the courts of Illinois have determined that a pretended statute of that state is not such, having never been constitutionally passed, for the courts of the United States, with the same evidence before them, to hold otherwise."

Applying these remarks to the facts of this case, it seems to me that it would be an unseemly state of things, after the courts of the state of Minnesota have held that it would not resort to the journals as evidence or otherwise, to see if the law creating a court of general jurisdiction had been constitutionally passed in a collateral proceeding, for this court, sitting and administering justice in the same state, to hold directly to the contrary, and overturn all the judgments of the court in question, and disturb the rules of property and of action fixed and determined by that court.

Applying the principles enunciated in the foregoing cited cases, the conclusion seems irresistible that it is the duty of this court, upon the conceded facts of this case, on this collateral attack, to follow the rule laid down in *Burt v. Railroad Co.*, *supra*, in so far as that court holds that it will not look to the journals as evidence for the purpose of whether or not the statute in question was constitutionally passed. I do not think the rule laid down in *Norton v. Shelby Co.*, 118 U. S. 425, 6 Sup. Ct. Rep. 1121, so far as the facts and conclusions are applicable to the conceded facts in the case at bar, is inconsistent with the foregoing conclusions. As was well said by the counsel for the defendant in this case in his brief:

"What is really decided in the case of *Norton v. Shelby Co.* is that the federal court is bound by the decisions of the state court, holding that the act of the Tennessee legislature, which assumed to create a certain board of county commissioners, was in conflict with the state constitution. What is said be-

yond that is said solely with reference to the facts of the pending cases, and should not be strained to cover an entirely different case. A distinction is also to be made between an act which, like that considered in the *Norton Case*, shows its infirmity upon its face, and one like that now before the court, which, if void at all, is so because of extrinsic facts connected with the history of its passage through the legislature. If the act now in question had assumed, for instance, to establish a court having revisory powers over the supreme court, its unconstitutionality would have been apparent, as a mere matter of legal interpretation. All men are presumed to know the law, but certainly no man is presumed to know the facts as to the number of votes cast in the legislature for or against a particular bill. Questions of this kind are questions of evidence, as to the effect of which courts might differ. The act in question comes with all the *indicia* of validity. It assumes to do nothing which the legislature did not have full power to do, and the court which it apparently established was permitted, without question, to exercise the functions apparently conferred upon it. To say that, upon the subsequent discovery of some evidence of an extrinsic fact, all that such apparent court has ever done shall at once be deemed undone, or rather never done, is not warranted by the *Norton Case*."

The learned counsel who argued the *Norton Case* for the plaintiff in error in the supreme court of the United States contended that, even though the act in question in that case should be condemned as unconstitutional, yet the subscription to the stock made by the commissioners, and the bonds issued by them, while in the undisputed tenure of their office as justices of the county court, are good and binding as regards third persons and the public, including the holders of the bonds, as acts of a *de facto* court, or of *de facto* officials. The supreme court of the United States refused to sustain that doctrine, and held that—

"While acts of a *de facto* incumbent of any office lawfully created by law and existing are often held to be binding from reasons of public policy, the acts of a person assuming to fill and perform the duties of any office which does not exist *de jure* can have no validity whatever in law."

That question is not here necessarily involved, and I do not pass upon that question. That statute in question, upon the conceded facts, is presumed to have been constitutionally passed, the court in question is presumed to have been a *de jure* court, and, following the decision in *Burt v. Railroad Co.*, as I understand that decision upon the facts really and properly before that court, I think it is my duty to hold, as I do in this case, upon this collateral attack, that this court will not resort to the journals, or consider them as evidence or otherwise, for purposes of ascertaining whether or not that presumption can be overcome. Defendant's objection to the evidence is sustained.

But, conceding that the statute was constitutionally passed, and the court of common pleas of Hennepin county was in all respects a *de jure* court, plaintiff's counsel strenuously contends that the judgment in *Hale v. Comstock* was and is void, because it was not rendered within the issue presented by the complaint. The complaint in that action was as follows:

"The plaintiff in the above-entitled case complains of the defendant in said cause, and shows to the court—

"(1) That on the 13th day of February, A. D. 1874, the said Joseph Hodges filed in the district court of the United States for the district of Minnesota his petition, pursuant to the eleventh section of the act of congress entitled 'An act to establish a uniform system of bankruptcy throughout the United States, approved March 2, 1867,' praying that he might be adjudged to be a bankrupt within the purview of said bankrupt act; that thereafter, and on the said 13th day of February, 1874, such proceedings were had in said court in bankruptcy in said matter of said Hodges; that the said Hodges was adjudged to be a bankrupt; that thereafter, and on the 6th day of May, 1874, such proceedings were had in said bankruptcy matter; that said plaintiff was by said court duly appointed assignee therein; that said plaintiff accepted said trust, and duly qualified as such assignee, and thereafter, and on the 15th day of June, 1874, received from Albert Edgerton, Esq., register in bankruptcy of said district, an assignment and conveyance, under the hand of said register and the seal of said court, of all the estate to which the said Joseph Hodges was, on the 13th day of February, 1874, in any manner entitled, and thereafter said plaintiff entered upon his duties as such assignee.

"(2) And said plaintiff further says that on the 30th day of May, 1873, at the city of Minneapolis, of said state of Minnesota, the said Joseph Hodges and his wife made and executed a certain deed to said defendant, a copy of which deed is hereto attached, made a part of this complaint, and marked 'Exhibit A,' pretending to convey to said defendant the following described property situate in the county of Hennepin and state of Minnesota, to-wit, block four, (4.) Groveland addition to Minneapolis, according to the record plat thereof on file in the office of the register of deeds for Hennepin county; that said deed was recorded in the office of the register of deeds in and for said county on the 31st day of December, A. D. 1873, at 9 o'clock in the forenoon of said day, in Book number forty-three (43) of Deeds, on page six hundred and three, (603.)

"(3) And said plaintiff further says that the said deed was not delivered to said defendant, nor to any person for her, until long after the same was recorded, nor did defendant know of such deed until after the same was recorded; that said deed was not accompanied by an immediate and actual change of possession of the property; that ever since the same was executed and delivered, and up to the present time, the said property has remained in the actual possession and under the control of said Joseph Hodges, who has retained possession and control thereof under the false and fraudulent pretense that he is the agent of said defendant.

"(4) That the pretended consideration set forth in said deed as paid by defendant to said Joseph Hodges and his wife is fictitious; that in fact no consideration, nor was ever any consideration, received by said Hodges or paid by defendant for said deed, but that said consideration of one dollar is therein inserted for the purpose of deceiving creditors of the said Hodges.

"(5) That at the time of the making, recording, and delivery of said deed the said Joseph Hodges was largely indebted to many persons, amounting in the aggregate to the sum of fifty thousand dollars, and was then insolvent, and in contemplation of bankruptcy, all of which the said defendant then well knew; that said deed was delivered to defendant within six months before the filing of the said petition heretofore mentioned, by said Hodges, and accepted by said defendant, with a view to prevent the property therein described from coming to his (said Hodges') assignee in bankruptcy, and to prevent the same from being distributed according to said bankruptcy act, and for the purpose and with the intent to hinder, delay, and defraud the just creditors of said Hodges of their lawful claims and demands.

"(6) That said Hodges was, as a matter of fact, notwithstanding the making, recording, and delivery of said deed on the 13th day of February, A. D.

1874, and for a long time prior thereto had been, the true and lawful owner in fee-simple of said described property; that the real value of said property is six thousand (6,000) dollars; that by virtue of said assignment the said land became on the 13th day of February, 1874, the property of said plaintiff.

"Wherefore, said plaintiff demands judgment: That said deed from said Joseph Hodges and wife to said defendant be adjudged fraudulent and void as against the plaintiff, and for such other and further relief as to the court may seem meet, and the costs and disbursements of this action.

"Dated Aug. 14, 1874, Minneapolis, Minn."

The defendant did not appear. Service was had upon her by publication, in compliance with the laws of the state. The court acquired jurisdiction by such service to render a verdict *in rem* in that case. *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. Rep. 557.

The contention of the plaintiff is that the complaint sets forth a cause of action only under the thirty-fifth section of the United States bankruptcy act, and that the form of action under that section requires the existence of four different facts, which constitute the essential averments of the complaint in *Hale v. Comstock*, namely: (1) The party making the transfer must be insolvent, or in contemplation of insolvency. (2) The recipient must be one who has reason to believe him insolvent, or acting in contemplation of insolvency. (3) The conveyance must be made within six months prior to the filing of the petition in bankruptcy. (4) The act must be done to prevent the property from coming into the hands of the assignee in bankruptcy, and from being distributed under the bankrupt law. It is claimed by plaintiff that none of these essential facts appear in the findings or in the decree. The court found that there was no delivery of the deed prior to June, 1874; that there was no consideration paid for the same; that there was no knowledge on the part of the defendant of its existence; and that upon these facts the court based its conclusion of law; "that, no delivery of the deed having been made prior to Hodges' adjudication as a bankrupt, no title passed by it; and that the plaintiff was entitled to judgment vacating and setting aside said deed," and that the judgment itself declares that said deed be vacated and set aside, and declares it to be null and void and of no effect.

Upon an inspection of the complaint, the findings of fact, and conclusions of law, and after careful consideration of the elaborate and exhaustive brief of the learned counsel for the plaintiff, and the cases cited, I am unable to sustain the contention of the plaintiff. On the contrary, I think that the findings and judgment in that case are within the issue tendered by the complaint. The complaint is inartificially drawn, but I am of the opinion that it contains issuable facts sufficient to sustain the judgment. The court had jurisdiction of the parties and of the subject-matter for the purpose of that action, and the subject-matter of the action was the alleged right of the plaintiff to have the deed in question made in fraud of creditors annulled in so far as might be necessary to enable him to appropriate the property therein described to the payment of grantor's creditors. It is alleged that the deed was executed in May, 1873, recorded in December, 1873, and not delivered

to the grantee till long after it was recorded; that there was no actual change in the possession of the property; that the consideration expressed (\$1) was fictitious; that the grantor was insolvent at the time; and that the grantee accepted the deed within six months before the filing of the debtor's petition in bankruptcy, with a view to cover up the property in the interests of the grantor; that he retained possession and control of the property in the false and fraudulent pretense that he was the agent of the defendant, the grantee; that Hodges was in fact the real owner; that the real value of the property was \$6,000. The prayer of the complaint is that this deed be adjudged fraudulent and void as against the plaintiff, and for general relief.

The findings of fact are that the defendant was a sister of Hodges', who was insolvent at the time of the execution of the deed, and that it was not delivered to her until about June, 1874, long after the bankruptcy proceedings were instituted, and that it did not appear that any consideration was paid, or even that the defendant had any knowledge of the transaction until after Hodges had been adjudged a bankrupt. These averments were sufficient to support the findings and judgment. Eliminate every other averment from the complaint, and I think it necessarily follows from the remaining averments that a cause of action is set forth in the complaint sufficient to support the judgment. The supreme court of the state of Minnesota have had this question before it in the parallel case of *Lane v. Innes*, 43 Minn. 137, 45 N. W. Rep. 4, and I think the law laid down in that case is applicable here, and the principles enunciated in that case I adopt. That court said:

"In considering this and several other objections to the validity of the judgment, the distinction between errors and defects which go to the jurisdiction and renders the proceeding wholly void, of no effect, and such as must be remedied in the same proceeding by appeal or otherwise, must be carefully observed. Quoting *Salter v. Hilgen*, 40 Wis. 365, 366: 'It is not enough that there are irregularities in practice or insubstantial variances between the summons and complaint, or that the pleading is double, or improperly unites several causes of action, or contains more allegations or grounds for relief than is essential, or that the complaint is defective or incomplete, or that the findings of the court fail to cover all the issues tendered. If the matters determined are decisive of the case, and within the general scope of the allegations made and relief asked, the determination is not void, though the defendant has not appeared.'"

Judgment must be entered for the defendant, and it is so ordered.

UNITED STATES *v.* ENGERMAN *et al.*¹*(District Court, E. D. New York. May 12, 1891.)*

EMINENT DOMAIN—RIGHT TO JURY TRIAL.

In a proceeding taken by the government under Act Cong. Aug. 18, 1890, to condemn lands to the use of the United States, the owner of the land is not entitled as a matter of right to a trial by jury.

At Law.

The United States having filed a petition in this court under the act of August 18, 1890, (26 St. at Large, 316,) to condemn a part of Plum island, upon which the government wished to erect a mortar battery, the owner of the land appeared, and filed an answer, denying the allegations of the petition. The case coming on for trial, defendants demanded a trial by jury, claiming that there must be a trial of the question of the right to condemn before the question of the amount of compensation is entered upon.

Jesse Johnson, U. S. Dist. Atty.

Thomas E. Pearsall, (*Robert D. Benedict*, of counsel,) for defendants.

BENEDICT, J. In this matter, which is a proceeding to condemn certain lands to the use of the United States, instituted in pursuance of a statute of the United States passed August 18, 1890, (26 St. at Large, p. 316,) two questions have been presented for decision. One is whether the hearing upon the petition and answer is required to be had before the judge and a jury, or whether it can be had before the judge alone, without the aid of a jury.

Upon this question my opinion is that the provision in the seventh amendment to the constitution of the United States, upon which the respondents rely, does not entitle the defendants, as a matter of right, to a trial by jury, and consequently that the refusal of the respondents' request for a trial by jury was not error.

The second question is whether the evidence produced is sufficient to prove that the parties were unable to agree upon a price to be paid for the land, within the meaning of the provision in the general statute of New York Laws of 1890, to which statute the district attorney has sought to make the present proceeding conform.

Upon this question my opinion is that the evidence is sufficient to warrant finding that the parties have been unable to agree upon a price for the land.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

SHANKENBERY v. METROPOLITAN ST. RY. CO.

(Circuit Court, W. D. Missouri, W. D. March 17, 1891.)

1. STREET-RAILWAY COMPANIES—ACCIDENT AT RAILROAD CROSSING—NEGLIGENCE.

Where a passenger on a street-railway car is brought into apparent imminent danger from a collision at a railroad crossing by the negligence of the motor-man in attempting to cross when he could see that there was a probability of the engine reaching there first, she can recover for injuries received in attempting to flee from it, though she would have been uninjured if she had kept her seat; but, if it would not have been brought into such danger except for the sudden, unexpected, and unanticipated obstruction of the car by a wagon, when there would be no liability on the part of the company.

2. SAME.

The right of precedence in crossing between two railroad trains considered.

At Law.

Hollis & Latshaw, for plaintiff.

Pratt, Ferry & Hagerman, for defendant.

PHILIPS, J., (*orally charging jury*.) This action is predicated of the negligent conduct of the defendant in its failure to comply with and perform its contract with the plaintiff in carrying her as a passenger on its cars from some point over in Kansas into Kansas City, Mo. The law exacts of a carrier of passengers, in consideration of the hire it receives for the service, that it shall carry them safely, and as expeditiously as possible, from the point of their admission to their destination. By this, however, is not meant that a carrier of passengers is an absolute insurer of their safety. Its undertaking under its contract is to exercise the highest degree of diligence and care in seeing that no injury comes to them by failure on its part to perform its contract, which is for the safe carriage and transportation of the passenger. The law as applied to these personal injuries on railway cars is that, when an injury to a passenger occurs, the plaintiff has made out a *prima facie* case by showing the accident and consequent injury, then it devolves upon the defendant, the carrier, to show by evidence that it has exercised due care and caution in order to prevent the accident. If it has done that, it has exonerated itself. The law, gentlemen of the jury, is a reasonable thing. It proceeds on lines of common sense, and possesses sufficient flexibility to adapt itself to the varying circumstances of each particular case as it arises. Its rules are not senselessly arbitrary. In this case there was no disaster to the carriage or car in which plaintiff was being transported. There was no mismanagement on the car by which any derailment or any collision with any obstacle was occasioned, by reason of which this injury occurred; but the injury in this case resulted from fright of the plaintiff, which caused her to flee from what she supposed to be an impending danger, and in getting from the car while it was yet on the track the injury occurred. Now in order, under that state of facts, to fix a responsibility upon the railroad company, it devolves upon the plaintiff to show by evidence to your satisfaction that this danger to which the plaintiff in this case was seemingly exposed, which caused her to

leave her seat and get into the tumult whereby the injury occurred, was brought about through some neglect of duty on the part of the defendant railroad company. If it was free from neglect in bringing the plaintiff into that position of apparent danger, there is no liability on the part of this defendant. Therefore, the evidence must go further in this case than that there was an accident and an injury, and show that the defendant was guilty of some culpable neglect of duty. The evidence shows that the point where this injury occurred was the intersection of two different railroad lines; one was occupied by the motor railroad, the defendant company, and the other by the Ft. Scott & Gulf Railroad Company, operating steam-engines and running cars over this intersection. The law of right of way applies to intersecting railroad companies, just as it does to vehicles passing through the country. Both of these railroad companies have rights there, and each, under the law of the land, must respect the rights of the other. The law exacts of each of these railroad companies a degree of vigilance, watchfulness, and care on its part proportioned to the danger incident to the operation of their respective trains of cars. At the point of intersection one party or the other, under the circumstances of the case, must have the right of way, so far as they themselves are concerned, and so far even as the public is concerned; and, in the absence of any evidence as to any special contract between these two railroads as to the right of way there, the law of the land would be that the railroad car which approached the crossing first had the right of way; and it was the duty of the other road, whose car or engine had not reached the point of crossing, to hold itself in check, and to give the right of way to the one first approaching. This is a law almost of necessity, and this case must be considered with regard to the surrounding circumstances of the place and time. In a city like this, where are being operated these street-railway cars, and where they are operating steam-engines, each one having its tracks and passages, it must be kept in mind by the jury that there is more or less hazard and peril at points of intersection; that trains cannot be stopped and stayed without cause, because they must make progress,—they must make their way; and that a street-car approaching a railroad crossing, in consequence of the danger to which its passengers are exposed, should exercise great vigilance, proportionate to the dangers to which passengers may be exposed. It must yet effect a crossing, and the law will assume that when it approaches such crossing, and finds it clear, no other train coming there having precedence by reason of having reached there first, it can proceed on its way, on the assumption that the other train will perform its duty both to the party making the crossing and the public, giving the one first approaching the right of way. So that if you find from the evidence that when the defendant's motor-car reached this point of intersection the Ft. Scott engine was from 60 to 100 yards distant, then the right of way was secured by law to the motor company, and it had the right to proceed, upon the assumption that the other road would observe its duty, not only to the car, but to the public, and would stay its engine, and not make a collision.

If, on the other hand, gentlemen of the jury, you find from the evidence that when the defendant train approached this crossing it received a signal notice from the flagman of the Ft. Scott road, who seems to have stayed at this junction,—that if it received a signal of danger or warning from him to stop, and the motor-man saw, or should have seen by the exercise of due vigilance, that warning, and failed or neglected to pay attention to it, and proceeded, nevertheless, upon the crossing, then he took upon himself, for his company, the responsibility of a collision that might occur there. But if, as a matter of fact, at that time the engine was 60 to 100 yards distant, and he did not see the flagman, as the motor-man testifies he did not, and that the flagman was not in his accustomed place giving the signal, and, as a matter of fact, he did not see him, and that at that time the engine was where the witnesses, principally on the part of plaintiff, place it, then he had the right to proceed upon the assumption that the way was clear. If, however, the motor-man, when he started upon the right of way, saw the engine approaching, and saw it was under headway, and that likely the chances were not only evenly balanced, but that there was a probability—a reasonable anticipation—that the engine might reach there first, it was then his duty to stop, and give the engine the right of way, in order to protect his passengers. If the engine was approaching this street-car as it was crossing, as is claimed on the part of the plaintiff, and had reached so near to it that the plaintiff became alarmed, she would not be precluded from recovering, if the antecedent negligence transpired or existed upon the part of the motor-man, simply from the fact that if she had kept her seat she would not have been injured; because, as I have stated, the law is always reasonable, and the liability attaches to the party who brings another, through his negligence, into a position of peril. If parties thus exposed to imminent danger—such as would strike the mind of a reasonable person as imminent—do not exercise the best judgment and prudence under the circumstances, yet the law does not hold them liable for it, because the law lays the burden of responsibility upon the carrier who negligently brings the passenger into the position of apparent peril. Then, again, gentlemen, if you find from the evidence that defendant's car had effected the crossing before the passengers started from the car, and before the injury occurred, and that it would have cleared the track, and gone on out of danger, but for some sudden, unexpected, and unanticipated obstruction in front of the car, and that injury occurred to this plaintiff by reason of that obstruction, then there would be no liability on the part of this defendant; in other words, to make it plainer, if the car would have effected the crossing, and would have gone clear of any collision with the engine, and the parties would not have passed from the car, and plaintiff would not have been injured, but for the motor-car coming into collision with, or a threatened collision with, what is termed in evidence a "barrel wagon" suddenly appearing in front, which caused the car to stop,—if but for that the car would have gone clear, and this plaintiff would not have been injured,—there is no case against the defendant. Now, gentlemen

of the jury, whether or not a barrel wagon thus presented itself, which caused this sudden stopping of the car, is a question of fact for you to determine. Of that matter you are the exclusive judges, because you are the judges of the credibility of the witnesses and the weight of evidence. There are two witnesses in this case who testify before this court and jury to that fact. The motor-man testifies directly to it, and the witness Lucas also testifies to it. Something has been said here in argument about the latter witness not being here. That evidence is in the form of a deposition of the man Lucas, and should have the same weight as if the party had sworn to the fact from the witness stand.

The whole case simply resolves itself into a question of fact as to whether or not it was the fault and neglect of the motor-man in first bringing his car into the position where he did, and, in the next place, whether his way was obstructed after he had effected his crossing by reason of the barrel wagon. The other witnesses in the case (plaintiff's witnesses) did not see any barrel wagon; at least, they do not state that they saw it. The attention of all the other parties was directed to the engine up the track, so that if, as a matter of fact, the barrel wagon was there, and these other parties saw it, it is very easy to understand why the other witnesses did not see it, because their attention was diverted and directed to the engine coming down the track, being in anticipation of some peril from it. The burden of proof is on the plaintiff to make out her case by a simple preponderance of evidence, and, if the weight of evidence is in her favor, as applied to the law of the case, you will so decide; if otherwise, you will find for defendant. If you find for the plaintiff in this case, gentlemen of the jury, you will determine the measure of damages, taking into consideration the nature, character, and extent of plaintiff's injury, her mental suffering, if any, in connection with and as incident to her physical suffering. As to the loss of time and medical bills, she is not entitled to any recovery in this case. Her services belong to her husband, and he would be entitled to recover for the loss of services and medical bills and attendance. You will allow her what is, in your judgment, a reasonable and round compensation for her injuries and physical and mental suffering in this case, having in view the character of the injury, as to whether it is temporary or whether it is permanent.

NOTE. The jury returned a verdict for defendant. Plaintiff filed motion for a new trial on account of alleged error in the charge. This motion was by the court overruled, without an opinion.

BOLLIN v. BLYTHE *et al.*

(Circuit Court, D. South Carolina. May 7, 1891.)

1. MARSHAL'S BOND—ACTION FOR FEES OF DEPUTY.

Though deputy-marshals of the United States are recognized officers of the court, (Rev. St. U. S. §§ 628, 748, 780, 782, 788, 789,) still they are engaged and compensated by the marshal, subject only to the provision of section 841 that the allowance to the deputy shall in no case exceed three-fourths of the fees payable to the marshal for the services rendered by him, and are in no sense creditors of the United States for the amount of their compensation, and, if the marshal fails to pay them out of the fees coming to his hands, he will not be liable upon his bond to an assignee of their claims, as for a failure to properly disburse public funds in his hands, under section 782.

2. SAME—FEES OF GOVERNMENT WITNESSES—ASSIGNMENT.

The claim of a witness for the United States for fees earned by attendance on a federal court is a claim against the marshal, and not against the government, and therefore not within the prohibition against assignments contained in Rev. St. U. S. § 3477, and an action will lie by the assignee of witness' certificates on the bond of a marshal who has received the money to pay them in his official capacity, but has failed to do so.

At Law. Action on marshal's bond. Trial by the court without a jury.

L. W. Parker, for plaintiff.

Brawley & Barnwell, for defendants.

SIMONTON, J. The plaintiff holds by assignment certain claims of deputy-marshals for services rendered in cases in which the United States was a party. He also holds by assignment pay certificates of witnesses who attended court at the expense of the United States. He has made demand on Blythe, late marshal for this district, for payment. Upon his failure to comply with this demand, plaintiff sues on the official bond of the marshal, seeking to hold the sureties responsible therefor. Blythe has made default, and judgment has been entered against him. The sureties interpose two demurrers raising these questions: Admitting the fact that the marshal has received from the United States the fees earned in the cases in which the deputy-marshals did the service, and in which the witnesses attended court, and the further fact that he has not paid either the deputies or the witnesses, does this constitute a breach of the bond for which the sureties are liable? *Second*, if this be such a breach of the bond, can the assignee of these claims sustain a suit in his own name?

Is the non-payment of this money on the part of the marshal a breach of his bond? The bond of the marshal to the United States is for the faithful performance of his duties by himself and his deputies. Rev. St. § 783. These duties are the execution of all lawful precepts directed to him, and such others as pertain to his office, and to take only his lawful fees. Section 782. It is primarily to the United States, and covers the proper disbursement of all public moneys coming to his hands. It inures for the protection of any person injured by a breach of the bond. Section 784. This undertaking is to receive a strict interpretation, and is not to extend by implication beyond the fair scope of its terms. *U.*

S. v. Giles, 9 Cranch, 212; *U. S. v. Boyd*, 15 Pet. 187. If the money placed in the hands of the marshal for disbursement to persons creditors of the United States be diverted, his bond is liable to the United States. Witnesses and jurors attending court are entitled, under the act of congress, to compensation. Sections 848-852. The marshal is the disbursing officer for this. Section 855. The bond is liable for moneys received for and not paid to witnesses. Are deputy-marshals in the same category,—creditors of the United States? There is no express provision in the fee-bill for payment of costs or fees to deputy-marshals. They are recognized as officers of the court. Sections 628, 748, 780, 782, 788, 789. They are to be compensated. But no fixed allowance is made for them. No mode of payment is provided for them. They are to be engaged by and compensated by the marshal. "The allowance to any deputy shall in no case exceed three-fourths of the fees and emoluments received or payable for the services rendered by him." Section 841. Received by or payable to whom? The marshal. For when we come to examine the statute we find that the fees, etc., for all such services are for the marshal. The deputy is not mentioned. No restriction is put on the marshal as to the mode of compensation, and none as to the amounts within the three-fourths limit. It is evident from the context that this limit is put in because the compensation, the aggregate fees of the marshal, less proper allowance for the expenses of his office, cannot exceed a fixed sum, \$6,000. A closer examination will make this clear. Every marshal is required to make a semi-annual report to the attorney general of all the fees and emoluments of his office, of every manner and character, and of all the necessary expenses of his office, including clerk hire, together with the vouchers for the payment of the same. He in this report states, separately, the fees and emoluments received or payable for services rendered by himself personally, those received for services rendered by each deputy by name, and the proportion of such fees, etc., which by the terms of his service each deputy is to receive. Section 833. Out of the gross aggregate of this return he is allowed to retain for his personal service not exceeding the rate of \$6,000, over and above the necessary expenses of his office, including clerk hire * * * and a proper allowance to his deputies. *Id.* That is to say, all his fees and emoluments belong to the United States. Out of them the marshal retains the necessary expenses of his office, and a sum not exceeding \$6,000 per annum. Among the necessary expenses of his office are the allowances to his deputies, which expense is limited to not more, under any circumstances, than three-fourths of the fees allowed the marshal for the service of such deputy. Now, all these are retained by the marshal in his own hands, as his own money. When he shows the accounting officer of the treasury his gross receipts and his necessary expenses, and deducts these and the sum due him for compensation, and pays over the balance, he and his bond are discharged. He must show his necessary expenses, because he can only retain \$6,000 per annum besides these. And the details, setting out the amount earned by himself, the amount earned through each deputy, and the expense

incurred in employing this deputy, are required simply to keep the marshal within his maximum. When this maximum has been reached in the first half of the year, the marshal in his next account states the gross earnings of his office, deducts all necessary expenses, including the allowance to each deputy, and pays over all the remainder to the United States. The government concerns itself with and holds him responsible for the net result only of the earnings of his office appearing after the deduction of all necessary expenses. When, therefore, the marshal retains this money, it is either to reimburse himself for money paid by him already to his deputy, or to enable him to carry out his contract made by himself with his deputy. In either case, it is his money, for which he alone is responsible, and for the exact disbursement of which he is in no sense responsible to the government. As the United States, therefore, could not in such case maintain an action on his bond, no private party can. See *Wallace v. Douglas*, (N. C.) 9 S. E. Rep. 453.

The second question raised on demurrer is, can the plaintiff, assignee of the witness' certificates, maintain an action in his own name on the marshal's bond? The demurrer admits the fact that the money has been received by the marshal in his official capacity for these witnesses, and has not been paid by him. The claim is based on a chose in action, and, like any other chose in action, can be assigned. It is not a claim against the government, and therefore does not come within the prohibition of section 3477 of the Revised Statutes. It is a claim against the marshal. Being assignable, the assignee can maintain an action upon it. This action, under the Code of Civil Procedure in South Carolina, adopted in this court, must be in the name of the real party in interest, the assignee. The courts of the United States have jurisdiction in suits on a marshal's bond, as in a case arising under the laws of the United States. *Bachrack v. Norton*, 132 U. S. 337, 10 Sup. Ct. Rep. 106. Under section 784, suit can be brought by the party injured by the breach of the marshal's bond, "in his own name and for his sole use." It would be a narrow and technical construction of this remedial statute to confine the right to sue to the original holder of the claim. The words, "in his own name and for his sole use," mean that, instead of suing in the name of the United States, the obligee of the bond, a private party can sue in his own name; and that the benefit of the suit will inure, primarily, not for all persons injured, but for him solely. Besides this, a person purchasing a claim upon such a certificate relies upon the performance of his duty by the marshal,—a performance secured by his bond. If the marshal refuse to pay him, a breach of the bond is committed, and he is injured thereby. I am of the opinion, therefore, that the action, to this extent, can be maintained by the plaintiff. Let the verdict be prepared in accordance with this opinion.

DOBSON *et al.* v. COOPER, Collector.

(District Court, E. D. Pennsylvania. April 7, 1891.)

CUSTOMS DUTIES—GOAT-HAIR.

Goat-hair is not dutiable under the provision in the tariff act for "class 2, combing wools," including "hair of the alpaca goat and other like animals," if it is: (1) Either common goat-hair, known as such in the trade, and salable only as such; or (2) if not being common goat-hair, it is not combing hair,—that is, long hair, like alpaca hair of long fiber, which can be combed out, and which is capable of being used for combing purposes.

At Law.

This was a suit brought by the importer against the collector to recover the sum of \$307.10 claimed to be an excessive duty unlawfully exacted upon an importation of hair, invoiced as "white cattle-hair," (goat,) and entered as common goat-hair. The appraiser classified the article as hair class 2 under 30 cents per pound, subject to a duty of 10 cents per pound, and the liquidation was made in accordance with the appraiser's return. The protest claimed that the article in question was common goat-hair, not fit for combing purposes, and should have been admitted free of duty, under the provisions in the free-list for hair, horse or cattle, and hair of all kinds, cleaned or uncleaned, drawn or undrawn, not specially provided for. The assessment was made under Tariff Ind. (New,) par. 354, Schedule K; Act March 3, 1883; Treasury decision 9810. The plaintiffs' witnesses testified that the imported article was known in the trade as common goat or cattle hair, and that it was not commercially known as "Angora goat-hair," nor was it salable as Angora goat-hair, and that also it was not combing hair or fit for combing purposes. The defendant's witnesses admitted that the hair was not combing hair, but testified that it was a low grade of Angora goat-hair, which, having been taken from a dead animal by the liming process, has become unfit for combing purposes. Defendant presented points which are summarized below.

Richard P. White, for plaintiffs.

W. Wilkins Carr, Asst. U. S. Atty., and *John R. Read*, U. S. Atty., for defendant, contended that under the hide clause, paragraph 719, Tariff Ind. (New,) sheep-skins with the wool on were excepted from the free-list and subject to duty, but Angora goat-skins without the wool were made free, and that with the wool, therefore, Angora goat-skins were subject to duty. The word "wool" in the clause referred to being used for hair of the Angora goat, under paragraph 360, Id., wools on the skin were dutiable as other wools; the quantity and value to be ascertained, and therefore goat-hair or wool off the skin was dutiable as other wools. They also contended for the defendant that under Schedule K, pars. 354, 358, Id., all hair of the goat was dutiable under class 2 irrespective of its fitness for combing purposes.

BUTLER, J., (*orally charging jury.*) The plaintiffs in this case imported this merchandise, the hair from which the specimen or sample

before you was taken, into this port and entered it at the custom-house as goat or cattle hair, free of duty, under a section of the tariff law. The government appraiser, whose duty it was to examine and pass upon the question, disagreed with the importers, and classified the hair as belonging to class 2,—that section reading as follows:

“Class 2. Combing wool; that is to say, Leicester, Cotswold, Lincolnshire, Down combing wool, Canada long wool, or other like combing wool of English blood usually known by the terms herein used, and also all hair of the alpaca goat and other like animals.”

The plaintiffs protested against this classification, adhering to their original claim that this is common hair, not combing hair, appealed unsuccessfully from the action of the appraiser, eventually paid the money demanded by the government, and then brought this suit to recover it back.

The questions presented are: First, is this common goat or cattle hair, as distinguished from mohair or combing hair? Is it what is known to commerce, to those who deal in the article, as common goat, or cattle hair? That is the first question, and you are to decide it by the evidence. You have heard this. It does not cover a great space and is readily understood. It has been explained and commented upon by counsel, and you are to say how the question should be decided. Are you satisfied that this article is what is known to commerce, to those who deal in such hair, as common goat-hair or cattle-hair? If you find it is, your verdict will be for the plaintiffs for the amount of their claim; because if it is such common goat or cattle hair it is not to be classified under the section applied to it by the appraiser. I repeat, if the evidence satisfies your minds, that this is what is called common goat-hair or cattle-hair by the trade, then your verdict should be for the plaintiffs in the amount of their claim. If you are not satisfied that it is such common hair, known to commerce by that designation, then a second question arises, to-wit: Is this what is known to commerce as “combing hair?” If it is not, (though it be something else than common hair,) it was wrongfully classified. It could only be classified as the government classified it on the ground that it is combing hair. Thus if you are not satisfied that it is what is called common hair and do not find a verdict for the plaintiffs upon that ground, then you pass to the second question, and determine whether or not it is combing hair; because if it is not combing hair, the plaintiffs are entitled to your verdict for the amount of their claim, although it be not such common hair, as before described. It can only be classified as it has been upon the ground that it is combing hair. If it was cattle or common goat hair it was not combing hair, and if it is not common hair, but still not combing hair, the plaintiffs are entitled to a verdict. Upon the question of combing hair is there any evidence at all that it is such hair? A number of witnesses testified that it is not. They told you the characteristics of combing hair, that it is a long hair like the long alpaca hair which is before you, that combing hair or combing wool is a hair or wool of long fiber, which can be combed out, leaving the short hair that grows near the skin at the bottom of the hair as a sort of refuse.

Thus you have before you all there is in this case. Have the plaintiffs satisfied you that this is what is known to commerce as "common goat or cattle hair" as distinguished from combing hair or mohair? If they have, your verdict will be in their favor. If they have not satisfied you of that, still if they have satisfied you that this is not combing hair, (and there is no answer to their evidence that it is not, as I remember,) your verdict should be for the plaintiffs. The points presented by the defendant I cannot affirm. They may be marked severally, "Disaffirmed."

The verdict was for plaintiffs for the amount of their claim.

JESSUP & MOORE PAPER CO. v. COOPER, Collector.¹

(District Court, E. D. Pennsylvania. April 7, 1891.)

1. CUSTOMS DUTIES—GUNNY BAGS.

Plaintiffs entered second-hand gunny bags as paper stock. The appraiser returned some of the bags as gunny bagging, suitable for the uses to which cotton bagging may be applied. *Held*, if the bagging was commercially valuable only to be, and could only profitably be, converted into paper, and was of no other commercial value, it was admissible as paper stock, and that the purpose for which it was imported or used after importation was irrelevant.

2. SAME.

The burden of proof to show that the bagging was only fit for paper stock was on the plaintiff.

At Law.

This was a suit to recover the sum of \$357.57 alleged to have been unlawfully exacted as customs duties in an importation of gunny bagging and so-called "paper stock." It was entered as paper stock, but returned under Tariff Ind. (New) par. 343, as gunny bagging suitable to the uses for which cotton bagging may be applied and valued at less than 7 cents per pound. The claim of the importer was under paragraph 754, Id., free list, providing for paper stock, crude, of every description, including gunny bags, gunny cloth, old and refuse, to be used in making and fit only to be converted into paper, and unfit for any other manufacture. The testimony of the plaintiff's witnesses tended to show that the article was fit only for paper stock, and also that it had been in fact so used.

Edward L. Perkins, for plaintiff.

Wm. Wilkins Carr, Asst. U. S. Atty., and *John R. Read*, U. S. Atty., for defendant.

BUTLER, J., (*charging jury*.) The plaintiff in this case, the Jessup & Moore Paper Company, imported into this country, and landed at the port of Philadelphia on October 18, 1889, a cargo of old or second-hand gunny bagging, and entered the same at the custom-house, as free of

¹Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

duty, under a provision of the statute relating to the subject, which reads as follows: (Court read from statute.) Thirty-seven bales of the bagging were, however, treated by the appraiser as not falling within the terms of the statute, just read, but as suitable for use again as cotton bagging, and subjected to duty accordingly, under another provision of the statute. From this action of the appraiser the plaintiffs appealed, on the ground that the bagging so subjected to duty "is fit only to be converted into paper, and not fit for any other manufacture." In the language of the plaintiffs: "We protest." (Court read from protest.) Thus is presented the only question which we have to try—to-wit: Was the bagging fit only to be so converted, and "not fit for some other manufacture." The plaintiff asks the court to charge you as follows:

"(1) If the jury believe that the gunny bagging forming the subject-matter of the claim in this suit was imported as and for paper stock, was sold for that purpose, and was in fact used as such and converted into paper, their verdict must be for the plaintiff."

We cannot so charge. The point does not present the question involved.

"(2) If the gunny bagging, the subject of dispute in this action, was fit only to be converted into paper, and was unfit for any other manufacture, your verdict must be for the plaintiff."

This we affirm. It properly states the question which you are to decide.

"(3) If the said gunny bagging was commercially fit only to be converted into paper, and was commercially unfit for any other manufacture, your verdict must be for the plaintiff."

This is a statement of the same thing in somewhat different language, and is also true.

"(4) If, upon all the facts in this case, there exists a doubt in your minds, that doubt must be resolved in favor of the plaintiff and your verdict must be for it, as duties are never to be imposed on the citizen upon vague or doubtful interpretation."

We cannot affirm this. The burden is on the plaintiff to satisfy you by evidence that the bagging was commercially fit only to be converted into paper, and was commercially unfit for any other manufacture; otherwise your verdict must be against him. The plaintiff's fifth point which is disaffirmed I need not read. The defendant has also presented points, the first and third of which are disaffirmed, and need not be read. His second point, which reads as follows: "If you believe the article in question is not fit to be converted into paper only, but is also fit for some other manufacture, then your verdict should be for the defendant," is affirmed. This is an accurate presentation of the question which you are to decide, as we have before stated. By fitness for some other manufacture, however, is meant commercial fitness. If the bagging could not profitably be applied to some other manufacture, then it was not commercially fit for such purpose. Considering this question in the light of all the evidence you must say whether it is proved that

the bagging in question was fit only to be converted into paper, and not fit commercially for any other manufacture. It would be unprofitable to recount what the witnesses on the one side and the other have said on the subject. Their testimony is brief, and has been fully commented on by counsel, and you cannot fail to understand and appreciate it. If your minds are satisfied that the bagging was fit only to be converted into paper, and not fit commercially for any other manufacture, your verdict should be for the plaintiffs in the amount of their claim; otherwise it should be for the defendant.

Verdict for plaintiff.

HOSTETTER CO. v. BRUEGGEMAN-REINERT DISTILLING CO.

(Circuit Court, E. D. Missouri, E. D. May 9, 1891.)

TRADE-MARK—INFRINGEMENT—INJUNCTION.

On bill for injunction it appeared that complainant was engaged in the manufacture and sale of "Hostetter's Bitters," and is the owner of the trade-marks, brands, labels, etc., used in connection with such sale; that defendant manufactures an article of bitters closely resembling Hostetter's Bitters in appearance and flavor, which it sold in bulk to its customers, advising them at the same time to refill bottles that originally contained Hostetter's Bitters with the spurious article, and put them on the market as genuine; that in all probability the plaintiff had been thereby to some extent damaged, and the public deceived. *Held* that, though defendant did not itself use plaintiff's labels and bottles, still in advising its customers it was guilty of a wrong which a court of equity will enjoin.

In Equity. On bill for injunction.

George Dennison and *M. L. Gray*, for complainant.

H. B. Davis, for defendant.

THAYER, J. The complainant is engaged in the manufacture and sale of Hostetter's Bitters, and is the owner of the trade-marks, brands, labels, etc., used in connection with the sale of such bitters. It charges that defendant has sold and intends to sell, "as and for Hostetter's Bitters," a spurious article or preparation of bitters, not manufactured by the complainant, with intent to deceive the public, and to deprive the complainant of a portion of its patronage, and of profits that it would otherwise realize by the sale of the genuine article. The proof does not establish that defendant has itself sold a spurious article of bitters put up in bottles made in imitation of those in use by complainant, or that it has counterfeited the complainant's labels, trade-marks, etc.; but the proof does show that defendant manufactures an article of bitters which closely resembles Hostetter's Bitters in appearance and flavor, and that it has sold the same in bulk to its customers, advising them at the time of such sales to refill bottles that originally contained Hostetter's Bitters with the spurious article, and to put the bottles thus refilled on the market as containing genuine Hostetter's Bitters. It is most probable, I

think, that in accordance with such counsel and advice a spurious article has been sold by some of defendant's customers, in the manner last described, and that complainant has been thereby damaged to some extent, and that the public has been deceived. Under these circumstances I think the complainant is entitled to an injunction restraining the defendant from selling a spurious article of bitters as and for Hostetter's Bitters. Customers of defendant, who have thus been advised and induced to use genuine bottles and labels in the manner above mentioned, are clearly guilty of a wrongful act which a court of equity will enjoin; and a person who counsels and advises another to perpetrate a fraud, and who also furnishes him the means of consummating the same, is himself a wrong-doer, and, as such, is liable for the injury inflicted. *Soci   Anonyme, etc., v. Western Distilling Co.*, 42 Fed. Rep. 96. The defendant cannot shield itself from an injunction by the plea that it has not itself sold a spurious article in a false dress. The fact that it has advised its customers to perpetrate a fraud of that description, and that it has furnished them the spurious article, and that some of its customers have probably acted on the suggestion, is sufficient to render them liable to an injunction. A restraining order will be awarded at defendant's cost.

PAINE v. SNOWDEN.¹

(Circuit Court, E. D. Pennsylvania. April 20, 1891.)

PATENTS FOR INVENTION—PATENTABILITY—ANTICIPATION.

Complainant's patent was for a design for bow-backed chair consisting in having the upper portion of the bow covered with a piece of material conforming to its shape at the top and leaving the rounds between the lower edge of the piece and the seat exposed. *Held*, in view of a prior patent showing a chair having the top of the back formed of a wood strip of some breadth and rounds extending between it and the seat, the design did not possess patentable novelty.

In Equity. Bill by Henry H. Paine to enjoin one Snowden from continuing an alleged infringement of design patent No. 13,405, for backs for chairs, November 14, 1882.

Complainant's claims were:

"(1) The improved design for common round, bow-back chairs, consisting in the upper part of the bow and rounds provided with a sheet of suitable material, as wood, bent to conform to the curvature of said bow-back and rounds, leaving the rounds between said sheet and seat exposed, substantially as and for the purpose specified. (2) The improved design for common round, bow-back chairs, consisting in the upper part of the bow and rounds provided with perforated wooden plates or sheets, substantially as shown and described. (3) The improved design for chairs, which consists in the seat-frame with perforated wood seat and the back with a round bow, and with a perforated wooden plate or sheet secured to said bow near its top, sub-

¹Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

stantially as shown. (4) The improved design for chair backs, which consists of the round bow, A, rounds, B, curved perforated back piece, E, secured to said bow and rounds by ornamental nails, F, G, substantially as shown."

The illustration of complainant's design showed a bow-back chair having a thin ornamental flexible back sheet or plate, cut, bent and given the curvature to fit the bow-back chair and leaving a space between it and the seat in which the rungs were exposed. The defendant put in evidence the following letters patent: J. H. Belter, No. 19,405, February 23, 1858; Michael Ohmer, No. 179,721, July 11, 1876; George Gardner, February 24, 1880, reissue No. 9,094. The patent to Ohmer (a mechanical patent) showed a chair having the top of the back formed of a broad strip having the bottom cut into a somewhat similar form with the bottom of applied piece in the design and having rungs extending between it and the chair-seat.

Horace Pettitt, for complainant.

Hector T. Fenton, for respondent.

BUTLER, J. We cannot sustain the complainant's patent. In view of the prior state of the art his "design for chair-backs" does not in our estimation show patentable novelty. In appearance, or effect upon the eye, (which alone is involved) the "design" is scarcely distinguishable from Ohmer's chair-backs. The similarity seems greater than that between Gorham & Co.'s "design for spoon and fork handles" and White's involved in the suit of *Gorham v. White*, 14 Wall. 511,—where the court found nothing to distinguish the one from the other. If the similarity was less, however, we would have to hold that in view of the old chair-backs shown by the record, including those of Ohmer, the complainant's design shows no invention. A further discussion of the subject is deemed unnecessary. For the reasons stated the bill must be dismissed.

ROCHESTER COACH-LACE CO. v. SCHAEFER *et al.*

(Circuit Court, N. D. New York. May 11, 1891.)

PATENTS FOR INVENTIONS—NOVELTY.

Letters patent issued May 9, 1876, to Oscar Boehme, for improvement in the manufacture of balls and rosettes of yarn, consisting in the use of a funnel-shaped tube through which the yarn is drawn, so that it comes out of the small end in a compressed condition, ready to be bound and cut, are void for want of patentable novelty.

In Equity.

Hey & Wilkinson, for complainant.

Fred. F. Church, for defendants.

COXE, J. This is an action in equity for the infringement of letters patent granted to Oscar Boehme, May 9, 1876, for an improvement in

the manufacture of balls and rosettes of yarn. The patent has, by mesne assignments, been transferred to the complainant. The object of the patentee was to facilitate the manufacture, in ornamental designs, of balls, tufts and rosettes of yarn. These are produced by tightly binding, at intervals, a mass of threads which are cut between the points where they are bound; the ends thus released spreading out in spherical form. The patentee states that prior to his invention this binding was effected while the skein of yarn was held in the hands of the operator, and that balls so made were ragged in appearance and required subsequent trimming. This difficulty he obviates by means of a funnel-shaped tube, into the flaring end of which the yarn enters and from the contracted end of which it is firmly and evenly delivered in a proper condition for being bound and cut. When the skein is cut at a point close to the binding, the expansion of the threads being confined to one side only, will produce half of a ball, or a rosette or tuft. The claim involved is in the following words:

"(1) As an improvement in the manufacture of balls, tufts, or rosettes of yarn, the mode described of first condensing the threads, and then binding and severing the same, as set forth."

The defenses are non-infringement and that the patent is void for lack of novelty and invention. It is well to remember in considering the questions involved that we are dealing only with the mode of manufacture described in the first claim. It is clearly erroneous to attribute all the improvements which have since been made in the business of manufacturing tufts to Boehme's contribution to the art. The specification and drawings describe a reed-plate, the object of which is to produce ornamental designs in the balls or tufts. The second claim covers the reed-plate in combination with the condensing-tube. Concededly, the reed-plate was old and is no part of the first claim. And yet the witnesses speak of the advantages growing out of the use of the reed-plate as belonging to the invention in question. Again, the process of the first claim is alluded to as including the manufacture of tufts by the compression of the yarn to such an extent that it is practically as solid as a piece of board, so that the ends can be grasped and retained by the flanges of a metal button back. There is nothing of this in the patent. The manufacture of tufts by clamping a metallic button back to the yarn, solid or otherwise, is nowhere alluded to. The only described method of holding the yarn is by tying it with a cord. That the patentee did not contemplate the degree of pressure which is now asserted to be due to the action of the tube, is quite clearly demonstrated by the drawings, where the simple pressure exerted by tying a cord around the yarn is evidently much greater than that to which it is subjected in the tube as indicated by the decreased diameter under the binding cord. A string tied ever so tightly around a piece of "pine board" would hardly produce such a depression. Neither is it correct to speak of the successive acts described in the first claim as a new "process" invented by Boehme, for the reason that, concededly, every step had been taken, although, perhaps, in a comparatively crude and bungling way, long prior to the patent. Before 1876 hanks of yarn had been held tightly, bound at in-

tervals and cut between the bindings. The patentee only describes an improvement upon an old process.

The foregoing are some of the misapprehensions which have found their way into the testimony. Eliminating, then, what the patentee did not do, and confining the attention to what he did do, it becomes important to examine the claim in question. It is a claim for an improvement in the manufacture of balls and tufts. Three steps are described: *First*, compressing the yarn by passing it through a funnel-shaped tube of any suitable material; *second*, binding the yarn after it emerges from the small end of the tube; and, *third*, cutting it between the bindings. It is obvious that the only improvement over the former primitive mode is found in the use of the funnel-shaped tube. The yarn had previously been held by a hand of flesh and blood. Boehme, assuming that he was the first to do it, substituted a hand of wood or metal. Undoubtedly its introduction into this art was an improvement. It produced no new product but it produced an old product in a better way. It might be said that the use of a convenient apparatus for holding the yarn tightly compressed while it is being tied would be obvious to the skilled mechanic, and that evidence in support of the proposition may be drawn from this record, where it appears that an idea very similar did actually occur, at different times and places, to boys and sewing women. It may, however, be assumed for the purposes of the present inquiry, that the first introduction of a condensing-tube to the art involved invention. Was Boheme the first to use the tube? Two prior patents granted to J. Rinek for improvements in making rope show a condensing-tube and one of these patents shows a condensing-tube in combination with a reed-plate, similar to the reed-plate of the patent in hand. The rope passes through this tube and the strands are thus compressed and made uniform in diameter. The Rinek patents do not anticipate, because they deal with strands of hemp instead of threads of yarn, and because there is no binding and cutting of the rope. But when it is remembered that the successive steps of holding, binding and cutting yarn were old, and that condensing-tubes were old, the question arises whether the palm of invention can be awarded to the tuft maker who passed his yarn through an old device used for similar purposes in an analogous art. A person who, in 1875, removed the strands of hemp from Rinek's tube and inserted a hank of yarn instead, and then tied and severed the yarn between the bindings, would have adopted the precise method of the Boehme patent. On the other hand, Boehme's tube could be substituted for Rinek's tube in the latter's structure and produce the same results. That the two are substantially the same is not disputed, and that they perform similar functions is unquestionably established. In view of what was known in the manufacture of balls and tufts prior to the patent it cannot be said that Boehme contributed any patentable improvement to the art by taking a hemp condensing-tube and using it thereafter as a yarn condensing-tube.

But, irrespective of these views, unless the court is to reject arbitrarily the evidence of several uncontradicted witnesses, the method described in the first claim was employed in at least two instances prior to the pat-

ent and in one instance as early as 1859. No reason is perceived why the court should not credit these witnesses. If we were dealing with a complicated machine or an abstruse and difficult process there would be reason to say that persons unskilled in the art might easily be mistaken in describing minute details. But here we have to do with the simplest possible contrivance,—an ordinary spool with some threads of yarn run through it. A person of average intelligence who had actually made balls of yarn by this method could hardly be mistaken about the use of the spool. There is nothing improbable in the story of these witnesses. No motive for perjury is suggested and no discrepancies which discredit the testimony upon the principal points are pointed out.

It does not avail the complainant to prove that the Shaefer, Warner and Burt methods do not anticipate the claim in controversy. It is thought that, upon the construction of the claim contended for by the complainant, it is anticipated by the Burt and Warner prior uses, but concede that it is not; it is certainly void for lack of invention. If the witnesses referred to, used a tube at all for the purpose of condensing the yarn and then tied and cut the yarn between the bindings, whether the tube was the hole through a spool or through an upright board, no room was left for invention by the substitution of the tube of the patent. If a spool were used in the manner described by the witnesses it is the end of complainant's patent. That it was so used there can be no reasonable doubt.

It is unnecessary to consider the question of infringement. It may, however, be said that in view of what was and was not known prior to the patent, and in view of the construction which in any event must be given the claim, it seems at least exceedingly doubtful whether the method adopted by the defendants of clamping a metallic button back onto the end of the mass of yarn and then cutting the yarn to form a tuft, is the method described in the claim. The bill is dismissed.

STEARNS v. BEARD.

(Circuit Court, N. D. New York. May 11, 1891.)

PATENTS FOR INVENTIONS—NOVELTY.

Letters patent No. 16,031, issued April 7, 1885, to Edward C. Stearns, for a design for the casing of a hay-fork pulley, consisting of side plates having a ring and hubs, central ribs, laterally projecting ears, and marginal beads, are not void for want of patentable novelty.

In Equity.

Hey & Wilkinson, for complainant.

Smith & Dennison, for defendant.

COXE, J. This is an equity action of infringement, based upon letters patent No. 16,031, granted to the complainant April 7, 1885, for a design for the casing of a hay-fork pulley. The claim is as follows:

v.46F.no.3—13

"The design for the casing of a hay-fork pulley, consisting of side plates, *c*, having a ring, *b*, and hubs, *d*, central ribs, *e*, laterally-projecting ears, *f*, and marginal beads, *g*, substantially as shown and described."

The defense is lack of patentable novelty. Infringement is conclusively proved. Pulley-casings, of course, were old. A pulley cannot operate without the casing. The record shows many different forms of casing, each, in general conformation, bearing a resemblance to every other. Necessarily this must be so. A new design for a pulley-case will resemble old pulley-cases just as a new design for a watch-case will resemble old watch-cases. If patents for designs are to be subjected to the test insisted upon by the defendant very few could survive the ordeal. In almost every instance these designs are made up of new combinations of old figures, forms, and structures taken from nature or art. In such cases it is not sufficient for the infringer to show that every line or curve or conformation, considered separately, is old; he must show that the design itself is old. He must prove that some one prior to the patentee had produced a similar design, a design which left a similar impression upon the eye. If a person by the exercise of his own inventive faculties produces a new design for a manufacture which possesses beauty and symmetry, and leaves a novel and pleasing impression upon the eye, if it creates for articles which embody it a popular demand, and thus secures to its originator a certain advantage over his competitors in trade, such a design is entitled to protection. *Perry v. Starrett*, 3 Ban. & A. 485; *Simpson v. Davis*, 12 Fed. Rep. 144; *Eclipse Co. v. Adkins*, 44 Fed. Rep. 280; *Miller v. Smith*, 5 Fed. Rep. 359; *Kraus v. Fitzpatrick*, 34 Fed. Rep. 39; Walk. Pat. § 64. Tested by this rule it is thought that the patent must be sustained. The design of the complainant has many points which clearly distinguish it from the exhibit which is said to resemble it most closely. It created a demand for complainant's pulleys, and made them popular with the trade. The defendant could have chosen any of the casings introduced in evidence with perfect propriety and safety. He could have invented a casing of his own; he had the prior art and the whole material universe from which to select a design. This he did not do. What he did do was to appropriate the complainant's design down to the most minute particulars. He did this intentionally, with full knowledge of what the complainant had done, and the presumption from his acts and language is well-nigh conclusive that he did it with the deliberate purpose of securing to himself the benefits of the complainant's labor. It is unnecessary to characterize his acts further than to say that they certainly do not commend him to the favorable consideration of a court of equity. The patent is simple and the controversy comparatively trivial, but the complainant having originated a meritorious and popular design is entitled to protection. There should be a decree for the complainant.

RICE v. BOSS.

(Circuit Court, N. D. New York. May 11, 1891.)

PATENTS FOR INVENTIONS—LICENSE.

A conveyance by a patentee of the right "to use and manufacture and sell rights to use" the patented article in a certain county is a mere license, not entitling the grantee to sue for infringement in his own name, since it does not convey the right to sell the patented article.

In Equity.

George B. Selden, for complainant.

S. D. Bentley, for defendant.

COXE, J. This is an action in equity, founded upon letters patent No. 172,608, granted to John W. Cassidy, January 25, 1876, for an improved fruit-drying apparatus. On the 4th of March, 1881, the patentee conveyed to the complainant the right, under the patent, for the county of Wayne in this state, "to use and manufacture and sell rights to use in said county, and in no other place or places." The defendant insists that this instrument is not a territorial assignment, but a license merely, and that the complainant has no standing to maintain this suit alone. The patent granted to Cassidy "the exclusive right to make, use and vend the said invention throughout the United States and the territories thereof." Unless the complainant possesses the same right for the county of Wayne, viz.: "The exclusive right to make, use and vend the invention," it is entirely clear that he cannot maintain the action in his own name. In the case of *Waterman v. Mackenzie*, 11 Sup. Ct. Rep. 334, the supreme court say:

"The patentee or his assigns may, by instrument in writing, assign, grant and convey, either, (1) the whole patent, comprising the exclusive right to make, use and vend the invention throughout the United States; or, (2) an undivided part or share of that exclusive right; or, (3) the exclusive right under the patent within and throughout a specified part of the United States. * * * Any assignment or transfer, short of one of these, is a mere license, giving the licensee no title in the patent, and no right to sue at law in his own name for an infringement. * * * The grant of an exclusive right under the patent within a certain district, which does not include the right to make, and the right to use, and the right to sell, is not a grant of a title in the whole patent-right within the district, and is therefore only a license."

In *Mitchell v. Hawley*, 16 Wall. 544, the conveyance was very similar to the one at bar. The language was as follows:

"The exclusive right to make and use, and to license to others the right to use the said machines in the said states of Massachusetts and New Hampshire, and in no other place or places."

The supreme court regarded this as a license only.

In *Gayler v. Wilder*, 10 How. 477, the agreement granted "the exclusive right to make and vend the Salamander safe in the city, county and state of New York," but it reserved to the grantor the right to manufact-

ure the safes at a greater distance than 50 miles from the city of New York and sell them in the state on paying a royalty to the grantee. It was decided that this was only a license, the court holding, that in order to enable the assignee to sue in his own name "the assignment must undoubtedly convey to him the entire and unqualified monopoly which the patentee held in the territory specified, excluding the patentee himself, as well as others. Any assignment short of this is a mere license."

In *Oliver v. Chemical Works*, 109 U. S. 75, 3 Sup. Ct. Rep. 61, the grant was of "the exclusive right to use, within the territory specified, the patented acid in making self-raising flour, and to use and sell in said territory the flour so made." The court held this to be a license. It was decided, further, that in order to give a territorial grantee an exclusive right no interest must be left in the grantor for that territory, as to anything granted by the patent.

In *Hatfield v. Smith*, 44 Fed. Rep. 355, it was held that a contract which transferred "the sole and exclusive right to manufacture and sell and vend the patented improvements throughout the United States, the purchasers to have the right to use," was nothing more than a license. See, also, *Rubber Co. v. Goodyear*, 9 Wall. 788; *Potter v. Holland*, 4 Blatchf. 211; *Gamewell Co. v. Brooklyn*, 14 Fed. Rep. 255; *Ingalls v. Tice*, Id. 297; *Wilson v. Chickering*, Id. 917; *Bogart v. Hinds*, 25 Fed. Rep. 484; *Hammond v. Hunt*, 4 Ban. & A. 111; *Sanford v. Messer*, 1 Holmes, 149.

The rule deducible from these authorities is very clear. In the case of territorial grants the grantee, if he seeks to maintain an action in his own name, must be supreme within the assigned territory and possess all the rights of the patentee. He must be able to do all that the patentee could do, if the conveyance had not been made, and be in a position to treat all as infringers, including the patentee himself, who make, or use, or sell the invention within the assigned territory. If he does not possess these rights and occupy this position he is only a licensee. The pleader was, apparently, entirely familiar with this rule for he alleges that the patentee "assigned and transferred to your orator, the entire right, title and interest in and to the invention and discovery secured by the said letters patent in and for the county of Wayne. * * * And your orator became, and now is, the sole and exclusive owner of said letters patent for the said county." The proof fails to support this allegation. It seems reasonably clear that, tested by the rule in question, the conveyance of March 4, 1881, is, in legal contemplation, a license. It does not convey the entire right secured by the patent. The patentee reserves a part of that right. He can, notwithstanding the assignment, operate to a limited extent in Wayne county, without subjecting himself to a charge of infringement. When analyzed the instrument of March 4, 1881, will be found to convey to the complainant the right in Wayne county—*First*, to use the invention; *second*, to make the invention; and, *third*, to sell rights to use the invention. It will be observed that the patentee nowhere gives the complainant a right to sell the patented drier; he may make it; he may use it himself, and he

may license others to use it in Wayne county, but he must not sell it, or convey to others the right to make it or sell it. He can sell nothing but a right to use, and this right to use is restricted to the county of Wayne. It cannot be said that this language was inartistically used and that the intention was to convey the exclusive monopoly for Wayne county. No such inference can be drawn from the instrument itself. Indeed, the motive which actuated the assignor is quite apparent. He wished the complainant to have the monopoly for the county of Wayne, but he wished it to be strictly confined to that county. If permitted to sell the machines in the county of Wayne the complainant might set up a manufactory and make large sales there. The machines so sold in Wayne county could then be lawfully transported into the neighboring counties and used there, or anywhere else, to the manifest injury of the patentee. *Adams v. Burke*, 17 Wall. 453; *McKay v. Wooster*, 2 Sawy. 373; *Hobbie v. Smith*, 27 Fed. Rep. 656. To illustrate. Suppose that a third party should bring a patented drier into Wayne county and sell it there to some one residing in Ohio, for use in that state. This act would constitute an infringement, but could the complainant maintain an action against the infringer? Clearly not. None of his rights would be invaded. The patentee could sue, because he still retains the right to sell the invention for use elsewhere, but not the complainant. As the patentee has not parted with his right to sell in the county of Wayne, it is manifest that he can now sell driers in that county for use elsewhere if he sees fit. It is also plain that as this right to sell is not expressly transferred to the complainant he cannot treat as an infringer one who simply sells a drier in Wayne county, whether he be the patentee or a third person. In short, it is plain that the complainant has not received all that the patentee could give. His right under the patent is less than the whole, some part of the government grant to the patentee has been withheld from the complainant. The case of *Pickhardt v. Packard*, 23 Blatchf. 23, 22 Fed. Rep. 530, is not in conflict with these views, for there the complainants received from the patentee "the right to make, use and sell and vend to others to use and sell the invention throughout the United States." It follows that the action in its present form cannot be maintained.

THE WALLA WALLA.

HAMILTON v. THE WALLA WALLA.

(Circuit Court, D. Washington, N. D. April, 1891.)

INJURIES—SERVANT—NEGLIGENCE OF FELLOW-SERVANT.

In an action for personal injuries received by a longshore-man while engaged in helping to load the libeled steam-ship, and alleged to have been caused by the negligence of the second mate, it appeared that it was not the duty of the latter to employ or discharge the men engaged in loading the steamer, or to superintend them; that those duties belong to the first mate; that the second mate held a subordinate position, and was engaged in rushing forward the work, and urging the men to greater exertion. *Held*, that the second mate was not a vice-principal, but a fellow-servant, of plaintiff, and that defendant was not liable.

In Admiralty. Libel for personal injuries.

KNOWLES, J. In this case there was a trial in the district court of the first district of Washington Territory, and now stands on appeal in this court from the judgment against the defendant in the former court. The plaintiff was at the time he received the injury complained of what is commonly called a "longshore-man." He belonged to an association of longshore-men, who were employed through their president, Thomas Gafney, to assist in loading the Walla Walla. It does not appear with which officer of the steamer Gafney made the contract of employment. It is certain the plaintiff was in the employ of some one who had the authority to engage him in the work of placing the freight of the steamer on board. The evidence established that the injury which the plaintiff received while in the employ of the steamer was on account of the negligence of the second mate of the Walla Walla, one Fitz-Morris. Some of the evidence would indicate that the injury was occasioned through what might be called wanton negligence. His conduct, according to these witnesses, indicated a thorough disregard of the rights of the plaintiff. The conduct of the first officer of the ship, on being informed of the injury, was such as could not have been dictated by any kindly spirit, and indicated a disregard of common human sympathy. These considerations would impel a court, if possible under legal rules, to afford the plaintiff some redress for his injuries.

The first point urged on the part of the defendant is that the complaint was so defective as not to allow any proof against the defendant thereunder. The negligence is alleged to be that of the second mate, Fitz-Morris. There are no allegations of any duties of this officer in regard to the work of loading the ship that would make it liable for his act. He is alleged to have been second mate. I cannot find from any authority that his duties in respect to loading a ship are such as to make an implication of law that the ship would be responsible for his negligence. I think the negligence should have been alleged as the negligence of the ship or his employer, and not as his negligence. Then, if the evidence showed that he stood in the place of the master, doing a

master's work in loading this ship, the master—that is, the owner of the steamer—would have been liable. My judgment is that the complaint was not sufficient; that the best that could be said of it is that it might argumentatively appear that the ship or its owners were liable. It appears, however, that great liberty is allowed in regard to pleadings in admiralty. No objection seems to have been taken of this defect in the pleadings until on the trial, and then the defect does not appear to have been clearly pointed out on the first trial. Perhaps if the court should find that the evidence was sufficient to justify a judgment for defendant, as this is a trial of the cause, an amendment to the pleadings might be allowed, to make them correspond with the evidence. Upon this I now express no opinion, because in my opinion the facts in the case do not justify the legal conclusion reached in the district court. I do not think, under the present state of the law, the second mate can be considered as standing in the place of the master or owner. He did not hire the men employed in loading the steamer. It was not his duty to attend to the loading of the steamer. It appears from the evidence that it was the duty of the first officer or first mate to superintend the loading of the vessel. The second mate seems to have held a place subordinate to that of the first officer, and was engaged in rushing forward the work of loading the vessel. He was trying to urge the men engaged in loading the steamer to greater exertions in their work. I have not time to go through the authorities on this subject, but I feel confident that the weight of authority is against the view that, under such circumstances, the second mate could be classed as a vice-principal,—as one standing in the place of the master.

In the case of *Daub v. Railway Co.*, 18 Fed. Rep. 625, is to some extent an authority against my view of the law. But in that case the mate, who was not a second mate, hired the party injured. In that particular that case differs from this. But I think that case, considering all of the facts presented in the record, must be considered as standing by itself. It is against the weight of authority in the United States circuit court for the ninth judicial circuit of the United States. I find that in this case the second mate of the Walla Walla was a fellow-servant of the plaintiff, and that the defendant was not liable for his injuries. If the plaintiff had been injured through any negligence of the first mate, I should hold that the defendant was liable, but he was not.

I order judgment to be entered for the defendant, with costs.

RUSSELL v. RACKETT.¹

(District Court, S. D. New York. April 25, 1891.)

SEAMAN'S WAGES—VESSEL RUN ON SHARES—MASTER TO PAY WAGES—NOTICE TO SEAMAN—OWNER'S LIABILITY.

A schooner was run under an agreement between owner and master by which the master was to pay all wages of crew. Libelant was engaged as mate of the vessel, without notice that the schooner was running on a lay, which fact he learned incidentally some months later. On libelant's discharge the master gave him a written statement that "Capt. Schr. Eurotas & owner" owed him \$90 wages. This was not presented to the owner of the vessel, nor any notice of it given him until after the master had been discharged in debt to the owner. This suit was brought against the owner to recover the said amount of wages. *Held*, that the cumulative remedies against ship, master, and owner, which the law upholds in favor of a seaman for his wages, ought not to be abridged, except in cases of a clear, common understanding to that effect; that the accidental notice of the lay received by libelant was not sufficient to relieve the owner from liability in case the master were negligent or treacherous; and that libelant was entitled to recover.

In Admiralty. Suit to recover balance of seaman's wages.

C. Brainerd, Jr., for libelant.

Wilcox, Adams & Macklin, for respondent.

BROWN, J. The libelant, mate of the schooner Eurotas, sues the respondent, her owner, for a balance of \$90 wages, at the rate of \$25 per month, up to the 26th of April, 1889, when he was discharged. The schooner was engaged in the coasting trade, and was run by the master upon shares, under an agreement by which he was to pay for all provisions and wages of the crew and one-half of the port charges, the owner paying the other half of the port charges. The net proceeds of the freight were to be divided equally between the owner and the master. The mate was engaged by the master in September, 1888, without notice that the schooner was running on a lay. He was incidentally informed of the fact, however, by the master several months later, and he afterwards assisted the master sometimes in making up the computations. The balance of wages claimed accrued after he had this knowledge. Upon his discharge the master gave him a statement in writing that "Capt. Schr. Eurotas & owner" owed him \$90 wages. This was not presented to the respondent, nor any notice of it given him, until a demand by letter on the 20th of June, about 10 days after the master had been discharged. The respondent meantime had paid the master about \$250, and the master was then in debt to the respondent. The mate had been all the time in Haddam, Conn., and no other reason is given for not previously notifying the respondent than that he was expecting shortly to come to New York. The mate was informed by the master some time before he left the schooner that the lay was not turning out well, and he occasionally, he says, lent the master small sums of money, which were returned when the mate was discharged.

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

The various cumulative remedies against ship, master, and owner which the policy of the law upholds in favor of seamen for the collection of wages due them ought not to be abridged, except in cases of a clear, common understanding to that effect. *Skolfield v. Potter*, 2 Ware, 394; *Harding v. Souther*, 12 Cush. 308. Analogies drawn from supplies furnished to chartered ships are not precisely applicable to vessels running upon shares with the captain. It is more consonant with justice in the latter class of cases that the remedies of seamen and officers against all interested should remain unimpaired, except upon some distinct understanding to the contrary, either at the time of shipment, as intimated by Judge WARE, or subsequently by some notice equally explicit. It is always in the power of the owner, if it is his intention that the crew shall have no personal remedy against him, to give them explicit notice that such are the terms of service. No doubt in the present case it was expected that the master would pay the wages; but the libelant had no notice of the arrangement with the owner for several months after he shipped, and he first learned it, not on notice from the owner, but only upon casual information from the captain, evidently not intended to change the mate's relation to the owner, or to inform the mate of any curtailment of his security for wages. The respondent at no time did anything to protect himself against his ultimate responsibility in case the business of the ship should be unprofitable, except to inquire from time to time of the master whether all bills were paid. These inquiries were prudent, and they were consistent with the fact of the owner's ultimate responsibility in case the master was negligent or treacherous. No doubt the owner relied upon the master's information, but this did not prejudice the seamen.

I cannot doubt, upon the testimony of the libelant and the master, that the balance claimed is really due the libelant. The reason assigned by him for not presenting his claim to the owner sooner is not indeed very satisfactory; but the certificate which he received from the master stated that the master, as well as the owner, owed him the \$90 now claimed, and, as the master was expected to pay it in the first instance, the libelant might naturally give the master some further time to pay, and wait until he came to New York before calling upon the owner. The mere delay in presenting the claim does not constitute any such estoppel as to prevent recovery. The owner must look to the master for indemnity under his contract. Decree for libelant for \$90, with interest and costs.

CHAMBERLAIN v. THE TORGORM.

(District Court, D. South Carolina. May 6, 1891.)

1. ADMIRALTY—BILL OF LADING—LIBEL—PLEADING.

Where a railroad company libeled a steam-ship, alleging that it had delivered to it certain bales of cotton for transportation to Bremen under customary bills of lading, which cotton had been received by libelant at Atlanta under through bills of lading to Bremen, and that the master took the cotton, but refused to deliver to libelant any bill of lading therefor except one containing a provision that it should be subject to the conditions of a charter-party to which libelant is not a party, and by which it is not bound, and also refused to redeliver the cotton, the action is in no sense founded on the through bill of lading under which libelant first received the cotton, and the libel was not insufficient because it failed to set it out.

2. SAME.

Nor can the libelant be required to set out the terms of bills of lading expressed to be subjected to the conditions of the charter-party, which were tendered by the libelee, since it had not received and could not be expected to know their provisions.

3. SAME.

The through bills of lading under which libelant took the cotton provided that it should be delivered to the libelee steam-ship for transportation to Bremen under "customary bills of lading." *Held*, by this language it was intended to designate not a particular instrument, but a class of instruments whose tenor is susceptible of proof, and that it is no objection to the libel that it failed to set out such bill of lading, or have a copy thereof annexed.

In Admiralty. On exceptions to libel.

I. N. Nathans and *Mitchell & Smith*, for libelant.

I. K. Bryan, for claimant.

SIMONTON, J. The libel, after stating that libelant is the receiver of the South Carolina Railway Company, alleges that he delivered to the steam-ship Torgorm 52 bales of cotton, marked "Sa-Sa," to be carried from the port of Charleston to Bremen, under the usual and customary bills of lading, to be issued by said steam-ship to libelant; that the cotton had been transferred over the road of the South Carolina Railway from Atlanta, Ga., under what are known as "through bills of lading," and to be delivered by libelant to said steam-ship for transportation to Bremen under the customary bills of lading to be issued by said steam-ship; that the steam-ship received the cotton, and is about to depart without giving libelant proper bills of lading, and in lieu thereof tenders bills with the words written thereon, "subject to the conditions of a charter-party," to which libelant is not a party, and by which he is in no manner bound; that he has demanded proper bills of lading or redelivery of cotton to him; that the master has refused both; and fixes his damage at \$3,000. The master has intervened and filed claim for the owners, and makes exceptions to the libel for insufficiency and want of certainty and definitiveness in the allegations thereof:

1. Because it fails to set forth and allege the terms of the said alleged through bill of lading from Atlanta to Bremen, mentioned in paragraph 2 of said libel, and fails to attach thereto a copy of the same as an exhibit to said libel.

As to the First Exception. Whenever a suit is founded upon a written instrument, and it is not set out in full in the libel, the libelant should attach to the libel a copy of the instrument. 2 Conk. Adm. p. 485; *Card v. Hines*, 33 Fed. Rep. 189. Were this not so, the respondent, in preparing his defense, would be made dependent upon the construction given by his adversary to the instrument, or upon such parts only of it as it suited the other party to disclose. If this suit was founded on the through bills of lading, this rule would be enforced now. The libel is based upon the refusal of the ship to give customary bills of lading for cargo delivered to it for transportation. The contract upon which libelant relies is that arising out of the delivery of cargo. In order to show his right to bring the action he does not claim as owner, but alleges a qualified property in him as a common carrier. He is a carrier, not by delivery of cotton to him by its owner, but by virtue of a through bill of lading from Atlanta, Ga., from another carrier. This through bill of lading can only be used to show his title. It cannot be used to show a contract between him and the ship. He alleges that such contract arose from the fact of delivery. This being so, it would simply incumber the record to require the copy of the through bill of lading as an exhibit. This exception is overruled.

2. Because it fails to set forth and allege the terms of the said alleged bills of lading tendered, mentioned in paragraph 3 of said libel, and fails to attach thereto a copy of the same as an exhibit to said libel.

As to the Second Exception. This is founded on an error. The terms of the objectionable bill of lading, or, rather, the objectionable phrase in the bill of lading, is set out in the libel: "The words written thereon, 'subject to the conditions of a charter-party,' to which libelant is in no manner a party, and by which he is in no manner bound." Libelant cannot be expected to annex a copy of this, because he did not receive it.

3. Because it fails to set forth the terms of the alleged "customary bill of lading" mentioned in the fourth paragraph of said libel, and fails to annex a copy of the same as an exhibit to said libel.

As to the Third Exception. When libelant uses the term "customary bills of lading" he refers to no particular instrument, but to a class of instruments, whose tenor must be susceptible of proof. There is no necessity to annex a precedent of that class of instruments. The distinction is this: The cause of action, if in writing, should be set forth in full, either in the libel or in an exhibit to the libel. The latter is the better practice. Matters of evidence to sustain the cause of action need not be attached as exhibits, although they be written instruments. The exceptions are disallowed.

WOOD *et al.* v. TWO BARGES *et al.*

(Circuit Court, E. D. Louisiana. May 9, 1891.)

1. ADMIRALTY—"SHIPS"—COAL-BARGES—POSSESSORY ACTION.

Coal-barges, which are rough, square-cornered boxes, from 165 to 180 feet long, about 26 feet wide, and 8 to 10 feet deep, and have no motive or propelling power, no master or crew, no tackle, apparel, or furniture, and no name, being generally designated by number, and which are not permitted to be enrolled or licensed under any law of the United States, and have no license, are not "ships," within the language of admiralty rule No. 20, and cannot be made the subject of a possessory suit, therein provided for.

2. SAME—MARINE TORT.

Where the claimant had negotiated with the libelant for the purchase of certain coal barges, and, being informed of the location and price, and that he could have them, if suitable, took possession at once, without advising the libelant, and the latter subsequently sold them to a third party, and seeks by action to recover possession, so as to carry out that contract, there is no such fraudulent taking by the claimant as will enable the libelant to maintain an action for a marine tort, and the action must be regarded as a possessory action only.

In Admiralty. Appeal from district court.

T. M. Gill, for claimant.

W. S. Benedict, for libelants.

PARDEE, J. Suit was commenced in the district court by filing a sworn libel, as follows:

"The libel of the commercial firm of Wood, Schneidau & Co., of this district, composed of Jno. A. Wood & Co., of Pittsburg, state of Pennsylvania, and of P. M. Schneidau of this city, in a cause of tort on navigable waters from the sea, against James Sweeney of this district, and as against the property hereinafter named, alleges and articulately propounds as follows, namely: (1) That at the dates hereinafter named your libelant was the owner of two vessels engaged in carrying merchandise on the Mississippi river and tributaries, known as boat No. 137, of the Marmie Company, and boat No. 205, of the firm of Lysle & Son. (2) That said barges had come from Pittsburg, in the state of Pennsylvania, to this port laden with coal, and had been unladen by your libelant, and when so unladen, were, by libelant, sold to the firm of Thomas Fawcett & Sons of this city, and paid for, but delivery thereof was not effected by reason of the acts hereinafter set forth. (3) That after such sale one James Sweeney of this city called at the office of libelant, and expressed himself as desirous of purchasing said barges, and, no authorized person being present, the said Sweeney proceeded to take possession of said barges, and did so, without delivery order. His brother, being the representative of your libelant at the landing where said boats were located, did, without an order, and contrary to law and right, give possession of said boats to said James Sweeney, and, notwithstanding said fact, said James Sweeney has taken possession thereof, and threatens to take and carry same away. (4) That the said barges were of the full value of \$1,300, and now within the jurisdiction of this honorable court; and your libelant, as owner and vendor, not having made delivery, and delivery being demanded, has a maritime lien on said property, and is entitled to process to make perfect such right; that said property is movable, engaged in navigation upon navigable waters of this country, and they are entitled to a lien upon said property, as well as against said James Sweeney *in personam*, and for the possession of said property, with all damages sustained. (5) That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States and of this honorable court. Wherefore libelant prays that admiralty

process in due form do issue to the marshal to take possession of the said vessels wherever the same may be found in this district, and that process do issue *in personam* to said James Sweeney, and that, after due proceedings, this honorable court do adjudge in favor of libelant for the amount of the aforesaid claim, with interest, damages, and costs, and render such other order as may be meet and proper in the premises, and he prays for all such other orders as to the court may seem proper and necessary herein."

Admiralty process issued, commanding the marshal to take into his possession two certain barges, which was executed; whereupon James Sweeney, claiming to be the sole owner of the said barges, appeared and gave bond for the release of the said barges, and thereafter filed an exception to the jurisdiction of the court. It does not appear that any process *in personam* issued.

The district court ordered the exception aforesaid to be referred to the merits, and thereupon James Sweeney, claimant, filed an answer, admitting that the libelants were the owners of the two empty coal-boats, numbered 137 and 205, which had been used as coal-boats on the Mississippi river, that they had come from Pittsburg, and been unloaded, but denying all knowledge of any sale to Fawcett & Sons, but alleging that the same were sold to the claimant. He answered, further, that he had purchased from the libelants at their place of business and office said empty coal-boats at the price and sum of \$100; that the numbers and location of said boats were given to him, with instructions to take the same, and that he took possession of and removed the same on the day of the purchase; that said boats were only worth \$100; that he is the lawful owner of them, having purchased, taken possession, and removed the same in good faith, and having tendered the purchase price. The facts seem to be that the libelants had in possession as agents two empty coal-boats for sale; that application was made to them on behalf of Sweeney to purchase empty coal-barges. The price and location of the two in question were given, and Sweeney was informed that he could have them if suitable. Thereupon Sweeney sent his tug-boat, took possession of the barges, and removed them to his own landing. About the same time the agent of Thomas Fawcett & Sons made an arrangement or contract with libelants to buy empty coal-barges, and particularly the two herein involved. Immediately upon this transaction being communicated to the libelants' office, notice was sent to Sweeney, informing him that the two barges had been sold to Fawcett. Sweeney's reply was: "You are too late; why didn't you tell us in time? The tug has gone after them, and got them already,"—which seems to have been true. Five days after Sweeney got possession, Schneidau & Co. sent a written order to Sweeney to deliver the barges, which was refused.

On the hearing of the case the district court gave judgment dismissing the libel, on the ground that the suit, "being a possessory action, wherein ownership is claimed by both parties, the proceeding *in rem* cannot be entertained."

Under the facts, as shown by the evidence in this case, the controversy is one for the possession and ownership of two empty coal-barges. The twentieth admiralty rule provides:

"In all petitory and possessory suits between part owners or adverse proprietors, or by the owners of a ship, or the majority thereof, against the master of a ship, for the ascertainment of the title and the delivery of the possession only, * * * the process shall be by an arrest of the ship, and by a monition to the adverse party or parties to appear and make answer to the suit."

By a very liberal construction the libel in this cause may be considered as brought under and according to the twentieth rule. The appearance and answer of claimant may be considered as a waiver of the monition required by said rule, and the question of jurisdiction is thus presented, to-wit: Are these two empty coal-barges ships, within the meaning and proper construction of rule 20, so that they can be proceeded against as required by said rule? The evidence in the case shows that coal-barges are rough, square-cornered boxes, from 165 to 180 feet long, about 26 feet wide, and 8 to 10 feet deep, especially made for the transportation of coal down the Mississippi river and its tributaries. They are usually sold with the coal, and when the coal is unloaded they are broken up for old lumber and fire-wood. Sometimes, when in good condition, and if such boats are in demand, they are towed back up the river, and used once more. They have no motive or propelling power, no master nor crew, and none of the usual paraphernalia of a ship, nothing coming under the head of tackle, apparel, and furniture; no name even, being generally designated by number. They are not permitted to be enrolled or registered under any law of the United States, nor have they any license. It is only by a violent presumption that they can be classed in any way as ships. The decisions of the circuit and district courts with regard to admiralty jurisdiction over things of this character are apparently not uniform. In considering the adjudged cases, attention should be paid to the character of the particular case over which the admiralty jurisdiction is asserted or denied. Keeping this distinction in view, the adjudged cases sustain the proposition, in which I concur, that, for the exercise of jurisdiction in possessory or petitory actions, barges such as are here involved cannot be classed as ships, and, as such, by themselves, considered within and under the admiralty jurisdiction. That they can be held, under proper circumstances, within the admiralty jurisdiction in cases of certain maritime contracts,—towage, for instance,—in salvage cases, or in connection with a maritime tort, is not disputed; but, as for that matter, other articles of property under proper circumstances may be the subject of a maritime contract, or be subject to salvage services, and thus brought within the admiralty jurisdiction; and many things, not pretending to be ships, even constructions on land, may be brought within the admiralty jurisdiction in connection with maritime torts.

The learned proctor for libelants in this case has made some effort to show that this is a case of maritime tort, and not a possessory action, but the facts do not sustain any such view of the case. Even if claimant Sweeney had taken fraudulent possession of these empty barges, it is doubtful whether a tort, within the jurisdiction of the admiralty, would have been committed. The evidence, however, leaves no doubt of the

fact that Sweeney's original possession was in good faith, and with the consent of libelants' agent. His refusal to return the barges when demanded cannot be considered a maritime tort.

For these reasons the same decree will be entered in this court as in the district court, with costs of both courts to be taxed, and for which execution may issue after five days from the signing of this decree.

THE KHIO.

GUNBY *et al.* v. THE KHIO. BAKER-WHITELY CO. v. SAME. JOSEPH R. FOARD TRANSP. CO. v. SAME. UMBACH v. SAME.

(Circuit Court, D. Maryland. May, 1891)

SALVAGE—ABANDONMENT OF IMPERILED VESSEL.

The Khio, a large ocean-going steam-ship, was lying in a slip by a wharf. On the opposite side of the slip, about 100 feet in width, was a large elevator. In front of the Khio, and between it and the main body of water, was another steam-ship, the North Erin, of the same class. Suddenly, as if by an explosion, the elevator was enveloped in flames. The heat was intense, and both steam-ships were in imminent danger. The tug-boat Calvin Whitely, coming to the rescue, made fast to the North Erin, and towed her out of the slip to a place of safety. The Khio had put her lines on the Erin, thinking to follow her out, but they were thrown off by the captain of the Erin before they had made much headway. The stern lines of the Khio were still fast to the wharf, to keep her from being carried by the wind, which was a strong one, across the slip to the burning elevator, and when her bow-lines were thrown off her head was carried over the slip, and her danger was very great. Just then the tug-boat John S. Gunby, which had been helping the Whitely take the Erin out, seeing the great danger of the Khio, took a line which her officers had carried to the wharf, and towed her out of the slip to a place of safety. The court allowed in the case of the Erin \$1,700 salvage, and in the case of the Khio \$2,000. *Held*, on an appeal, as to the proper distribution of these funds, that the Whitely was not entitled to any portion of the amount paid by the Khio, since the casting off her lines in taking out the Erin put her in much greater danger.

Admiralty Appeal.

Wm. Pinckney Whyte, for Gunby.

John H. Thomas, for Baker-Whitely Coal Company.

Blackstone & Blackstone, for Joseph R. Foard Transportation Company.

Beverly W. Mister, for Umbach.

Convers & Kirlin, for the Khio.

BOND, J. This is a claim for salvage service. On the evening of the 13th of January, 1890, the steam-ship Khio was lying in a slip beside what was known as the "Iron Ore Wharf," pier No. 31. Ahead of her was another steamer, the North Erin, occupying the end of the wharf, or that part of it nearest the main body of water, the Patapsco river. Upon the opposite side of this slip, about 100 feet in width, was the Canton elevator No. 3. The two steamers Khio and North Erin were large ocean-going steam-ships, from 300 to 350 feet in length. While the steam-ships were thus fastened to the wharf on the west side of the slip, suddenly the elevator No. 3 on the east side, with a rapidity amounting almost to explosion, was discovered enveloped in flames.

The heat was intense, and the steam-ships in imminent danger of destruction. At this juncture the tug-boat Calvin Whitely came to the rescue. She made fast to the steam-ship North Erin, and towed her out of the slip to a place of safety. While the Calvin Whitely was making ready to tow the North Erin out of the slip, the captain of the Khio put his lines on the Erin, thinking to follow her out; but the captain of the Erin threw them off before they had made much headway. The Khio still had her stern lines fastened to the wharf purposely to keep the wind, which was a strong one from the west, from moving her into the burning elevator on the east side of the slip. When the Erin threw off her bowlines, her head was blown over to the other side of the slip, where she was in the most imminent peril by fire. However, at this juncture, the steam-tug John S. Gunby, which had been fastened to the North Erin to assist the Calvin Whitely to tow that steam-ship out, seeing the lines of the Khio thrown off the Erin, and the imminent danger she was in from the west wind carrying her into the burning elevator, took a line from the Khio, which her officers had carried to the wharf, and towed her out of the slip to the main water and place of safety. The district judge very properly considered this service rendered by the Calvin Whitely to the steam-ship North Erin, and that rendered by the John S. Gunby to the Khio, a salvage service. The amount allowed by the court in the case of the North Erin was \$1,700, and that allowed in the case of the Khio was \$2,000. The claimants of the steam-ships have not appealed, and state by their counsel here that they have no ground of complaint. The question is merely one of distribution of the fund allowed. The tug Calvin S. Whitely claims that, because she towed the North Erin out of the way, the Gunby had an opportunity and better chance to tow the Khio out of the slip. But the fact is that whoever had the charge of getting the North Erin out, as far as the Khio is concerned, put her in much greater peril by casting off her lines and suffering her to be drifted into the burning elevator than if she had been let alone. When a vessel starts to assist in a salvage service of two vessels and abandons one, as was done here, she has no claim for anything she may have done before she abandoned the imperiled ship. The Whitely assisted the North Erin to a place of safety, and was amply repaid in her case for that service. But the district judge allowed the tug Chicago and the tug Canton, the one \$250 and the other \$200, for some alleged service in behalf of the imperiled ships. To this allowance no one seems to make objection, but I am very much of the opinion that the service was of no avail in the rescue of the ships. It was all done after the Gunby had made fast to the Khio. She was abundantly able to tow her out, and was towing her out when these parties insisted upon throwing lines aboard, and the action of the officers of the two tugs Chicago and Canton looks much as if they had an eye to a salvage reward, rather than to any good they could do the Khio. They merely encumbered her with help. I will not alter the decree of the district judge, which I think extremely liberal; but the owners of the Calvin Whitely and Canton and Chicago, who have appealed, must pay the costs; and a decree will be entered in accordance with this opinion.

BUSHNELL v. PARK BROS. & Co., Limited.

(Circuit Court, S. D. New York. May 1, 1891.)

REMOVAL OF CAUSES—CITIZENSHIP—JOINT-STOCK COMPANY.

A joint-stock association, limited, created under Act Pa. June 2, 1874, (P. L. 271.) having some of the characteristics of a partnership and some of a corporation, including the right to a common seal, ownership of property, real and personal, by the association, and the right to sue and be sued by the corporate name, is a new artificial person, and as much a citizen of Pennsylvania as a corporation organized under its laws, and, when sued in a New York court, is entitled to removal to the federal court, irrespective of the citizenship of its individual members.

On Motion to Remand.

Parsons, Shepard & Ogden, for plaintiff.

Arnoux, Ritch & Woodford, for defendant.

LACOMBE, Circuit Judge. This motion must be determined upon the facts as they now appear. Section 5 of the judiciary act of 1875, as amended by the judiciary act of 1887. Defendant is organized under the laws of Pennsylvania. Act June 2, 1874, (P. L. 271.) If it were a corporation, it would therefore be a citizen of that state, and, so far as appears, a non-resident of this district. If it be not a corporation, but a limited partnership, then it does not appear that its members are citizens of a state or states different from that of which plaintiff is a citizen, and jurisdiction of a federal court over the matter in dispute is not shown. Whether associations formed under the constitution and laws of a particular state are legally corporations or not, is a question in answer to which the decision of the highest court of the state will be accepted as conclusive. *Secombe v. Railway Co.*, 23 Wall. 108. The supreme court of Pennsylvania, (1889,) commenting upon this statute, and the organizations formed under it, has held that when such organization "is called into life by the organic act, [recording the certificate of organization,] the promoters cease to act as individuals or as partners in the common business, but through the name and upon the credit of the joint-stock association;" and that the statute has "created a new artificial person, to be called a 'joint-stock association,' having some of the characteristics of a partnership and some of a corporation." *Hill v. Steller*, 127 Pa. St. 145, 13 Atl. Rep. 306, and 17 Atl. Rep. 887. Among these characteristics of a corporation are included the right to a common seal, ownership of property, real and personal, by the association, and the right to sue and be sued by the corporate name. Act of June 2, 1874, supplement and amendments. See, also, *Patterson v. Pipe Co.*, 12 Wkly. Notes Cas. 452. For the purposes of this suit the defendant must therefore be considered to be a Pennsylvania corporation, and as such had the right to remove.

Motion for remand is denied.

v.46F.no.4—14

PATON *et al.* v. MAJORS.

(Circuit Court, E. D. Louisiana. May 7, 1891.)

1. EQUITY—ADEQUATE REMEDY AT LAW.

Where it appears that complainants bought cotton of defendant, that defendant's agent who weighed it had an annual contract with him, guarantying him against loss by overweights, by which contract the agent was led to report weights which were, without defendant's knowledge, excessive, so that, though both complainants and defendant were innocent, there was paid to defendant a large sum in excess of the amount due for the cotton actually sold and received, the complainants' remedy at law is perfect by action for money had and received, and equity will not take jurisdiction.

2. SAME—DISCOVERY.

Semble, since under Rev. St. U. S. § 869, either party may call the other as a witness, and, by *subpœna duces tecum*, require him to produce books and papers, the complainant cannot give jurisdiction to a court of equity, in a proceeding where his remedy is otherwise perfect at law, by asking for a discovery.

In Equity. On demurrer to bill.

Farrar, Jones & Kruttschnitt, for complainants.

Thomas J. Semmes, for defendant.

BILLINGS, J. The case is submitted on a general demurrer to the bill of complaint. It being conceded that since the federal statute, (Rev. St. § 869,) which allows either party to call the other as a witness, and to require him, under a *subpœna duces*, to produce any papers or documents which are in his possession, takes away from the complainants any help which, without the statute, might have been theirs from regarding the bill as one of discovery, the question turns wholly on whether the complainant has, as to the case made by the bill, independently of discovery, an adequate remedy at law. The cause of action stated in the bill is that the complainants bought of the defendant a large quantity of cotton, that the agent of the defendant, who weighed the cotton, had an annual contract with the defendant, guarantying him against loss by false weights, by which contract he was led to report weights which were, without defendant's knowledge, excessive, so that, both the complainants and the respondent being innocent, there was paid \$4,200 to the defendant in excess of the amount due for the true amount of cotton sold and received, to recover which amount, with the aid of the discovery, the suit is brought. The cause of action, then, is the excess of price of cotton sold which was paid and received through the fraud of the defendant's, the vendor's, agent. Under our Code it would be a suit to recover a sum paid through error. But this cause of action has a definite name and place in the common-law actions. It would be classed with those actions falling under the head of *assumpsit* for money had and received. 1 Chit. Pl. p. 100; *Dana v. Kemble*, 17 Pick. 545. The fact that it was for a fraud would not of itself bring it within the cognizance of a court of equity. There must be some additional circumstance which must be found among those recognized as conferring equity jurisdiction. It is an action simply to recover money for a fraud, and it lacks all of those circumstances which give equity jurisdiction. In *Buzard v. Hous-*

ton, 119 U. S. 347, 7 Sup. Ct. Rep. 249, the court, at page 352, 119 U. S. and page 252, 7 Sup. Ct. Rep., say:

"In cases of fraud or mistake, as under any other head of chancery jurisdiction, a court of the United States will not sustain a bill in equity to obtain only a decree for the payment of money by way of damages, when the like amount can be recovered at law in an action sounding in tort, or for money had and received. *Parkersburg v. Brown*, 106 U. S. 487, 500, 1 Sup. Ct. Rep. 442; *Ambler v. Choteau*, 107 U. S. 586, 1 Sup. Ct. Rep. 556; *Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. Rep. 820. In England, indeed, the court of chancery, in cases of fraud, has sometimes maintained bills in equity to recover the same damages which might be recovered in an action for money had and received. But the reason for this, as clearly brought out by Lords Justices KNIGHT-BRUCE and TURNER in *Slim v. Croucher*, 1 De Gex, F. & J. 518, 527, 528, was that such cases were within the ancient and original jurisdiction in chancery, before any court of law had acquired jurisdiction of them, and that the assumption of jurisdiction by the courts of law, by gradually extending their powers, did not displace the earlier jurisdiction of the court of chancery."

The sixteenth section of the judiciary act of 1789, which declares "that suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate, and complete remedy may be had at law," as construed by the supreme court of the United States, would, since it is conceded that this suit cannot be maintained as a suit for discovery, require that it should be brought on the law side of the court, where there might be trial by jury. This section does not change the line of demarkation between law and equity cases, but it adds the emphasis of the statute of congress to what was before an established rule of decision in the courts of equity.

The demurrer must be sustained, and the bill dismissed, without prejudice to complainants' right to sue at law.

GRAND TRUNK RY. CO. *et al.* v. A. BACKUS, Jr., & SONS *et al.*

(Circuit Court, E. D. Michigan. May 15, 1891.)

1. HARBORS—UNLAWFUL EXTENSION OF DOCKS—INJUNCTION.

Act Cong. Sept. 19, 1890, § 7, provides that it shall be unlawful to build a wharf outside established harbor lines, or in any navigable waters of the United States where no harbor lines are or may be established, in such manner as to impair navigation, without the permission of the secretary of war. *Held*, that a preliminary injunction will be granted against the extension, without the consent of the secretary of war, of a dock 25 feet into a navigable river, to a point where the depth is from 26 to 28 feet, when such extension will seriously injure the commerce of an adjoining ferry company.

2. SAME.

The fact that a dock extends to a certain point in a river is no ground for not enjoining the extension of an adjacent dock to that point, when such extension is unlawful.

In Equity.

Alfred Russell, for complainants.

Don M. Dickinson, for defendants.

JACKSON, J., (*orally*). The court has considered the application for a temporary injunction in the case of the Grand Trunk Railway Company and the Wabash Railroad Company and the Canadian Pacific Railway against A. Backus & Sons, a corporation, and Absalom Backus, Jr. It is shown by the bill that the complainants are corporations of the Dominion of Canada and of the state of Missouri; that they are lessees and licensees of the Detroit Union Railroad Depot & Station Company; that they are engaged in interstate commerce traffic; that transfers are made from the Canadian side of the river to the Michigan side by three large steamers,—the Landsdowne, being 313 feet in length, and about 72 feet in width, making 18 trips a day, and carrying some 16 freight-cars and 10 passenger-cars at each trip,—and that these vessels, so making transfers for these companies, and doing an interstate commerce business from east to west, pass into the slip of the Detroit Union Railroad Depot & Station Company, of which they are licensees and lessees, and that that ferry-slip is necessary to the transaction of their business, and that the defendants Backus, Jr., & Sons, propose to extend a wharf in front of their adjoining property out into the river a distance, as charged in the bill, of 50 feet from its present front. The complainants allege that such extension would greatly impede their ingress to and egress from the ferry-slip they are using; that it would constitute a public nuisance, and an encroachment upon the navigable water of the river, and would entail upon them irreparable injury, and a serious interference with their business; and they seek, therefore, upon the ground that its erection would constitute a public nuisance, and that it would entail special damage upon them, to restrain defendants from proceeding to make such extension of their wharf or dock. The defendants answer, and deny that they propose to extend their dock 50 feet out into the river, and say they only propose to extend it 25 feet, and their affidavits support their answer on that point. They also claim that as the complainants now use their transfer boats, the Landsdowne, the Ontario, and Great Western, they are in fact appropriating defendants' land, inasmuch as those vessels when in the ferry-slip extend rearwards or backwards so as to cover some 25 feet of defendants' front, which they claim is private property, and deny the right of complainants to so use their private property. Various affidavits have been filed on each side.

No question is seriously made as to the equity of the bill, if the facts therein stated are substantially true, and no point can be made on the right of these complainants to seek for an injunction, and obtain it, if a public nuisance is being erected, which public nuisance will entail upon them serious special damage, or a serious interruption to their business. Before considering the affidavits and the points raised by the defendants, the court may make a few general observations:

1. It is not questioned, and cannot be, that the Detroit river is one of the navigable streams of the United States, which congress, under the

commercial clause of the constitution, has a paramount right and authority to regulate and control.

2. Until congress exercises its superior right of control over public water highways, it is certain that the state bordering thereon, or within the limits of which such navigable waters are located, may directly, or through the instrumentality of its municipalities, regulate the erection of wharves and docks and like structures therein, and also define the channel bank or line of navigability. In the absence of regulations by congress or the state or local authorities, it is also settled that the riparian proprietor or adjacent owner of land bordering upon such waters may erect for himself, or for the use of the public, docks and wharves in such waters, out to the line of their navigability.

In *Dutton v. Strong*, 1 Black, 132, where the subject was discussed as to the rights of the riparian owner upon our inland waters, the court says:

"Wherever the water of the shore is too shoal to be navigable, there is certainly the same necessity for such erections [wharves and docks] in such internal waters as in bays and arms of the sea; and, where that necessity exists, it is difficult to see any reason for denying to the adjacent owner the right to supply it, but the right must be understood as terminating at the point of navigability. If the riparian proprietor extends his docks, wharves, or other structures beyond the line of navigability, so as to obstruct or in any wise impede the navigation of the public water highway or stream over which the right of the public is paramount, he creates a public nuisance, which persons specially injured thereby are entitled to abate or enjoin."

Again, it is settled by the authorities, and I am not going to take time to refer to them, that state action or non-action in reference to the navigable waters of the United States in no way affects or restricts the right of congress to exercise its paramount authority, and supersede whatever has been sanctioned or permitted by local authority; because acts of congress upon subjects within the jurisdiction of the general government, such as are covered by the commercial clause of the constitution, are necessarily the paramount law of this country. Non-action by congress as to such matters of local character and operation is deemed a declaration that for the time being, and until congress sees fit to otherwise order, they may be regulated by state authority. The state authority of Michigan has in fact made no regulation upon this subject in respect to the Detroit river. In 1883, in rechartering the city of Detroit, it conferred upon the city the authority to fix and define and prescribe the harbor lines, and to define the points in the river beyond which these structures should not be extended. The city of Detroit exercised that authority. The defendants in this case therefore stand alone upon their rights as riparian proprietors, which they insist give them the right to extend their present dock frontage 25 feet out into the river. In extending it out that distance into the river, they will reach a depth of 26 and a fraction feet, or an average mean depth of between 26 and 28 feet, as shown by the soundings and affidavits of a disinterested party, Mr. Ferguson, the assistant engineer of the city. The commerce clause or provision of the constitution includes control of the navigable waters of

the United States so far as may be necessary to insure free navigation; and by navigable waters of the United States is meant such as are navigable in fact, and which by themselves, or by their connections with other waters, form a continuous channel for commerce with foreign countries or among the states.

In case of *The Daniel Ball*, 10 Wall. 557, this question of navigability, which forms the very essence of navigable water, is clearly and fully discussed, and they say in that case as to the test:

"A different test must therefore be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact; and they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

That constitutes its navigability, and must necessarily define the line or point to which navigability must extend. The case of *The Daniel Ball* has been repeatedly affirmed in various cases. I call attention to *Escanaba, etc., Co. v. City of Chicago*, 107 U. S. 678, 2 Sup. Ct. Rep. 185. It was also affirmed in *Miller v. Mayor*, 109 U. S. 385, 3 Sup. Ct. Rep. 228, and, in *Booming Co. v. Speechly*, 31 Mich. 336, Judge COOLEY, delivering the opinion of the supreme court of this state, announces substantially the same rule in determining that question. In *Allee v. Packet Co.*, 21 Wall. 389, the adjacent owner, without express authority of law from the state or from any municipal authority, extended his pier out into the Mississippi river, to a point where the water was 12 feet deep. It was held that the packet company whose boat struck the pier had a right of action against him for damages, because the structure was an unlawful one, and because it extended into navigable waters. It is true that in that case, under the admiralty rule, the packet company having brought its suit in the admiralty court, the court divided the damages, on the ground that the packet company in the navigation of its boat was also guilty of negligence, but, if the suit had been at law, the packet company would have recovered full damages. Take a case in connection with the navigability of the water in front of the defendants' present wharf. Could not a vessel of 20 tons burden and upwards navigate in front of the present wharf? Suppose a collision were to occur between the present front of the defendants' wharf and the front of the proposed extension, within the 25 feet, or within 10 feet of defendants' present front, could there be any doubt that the district court of the United States would have jurisdiction over that collision? It could not, unless they were navigable waters. Take the Michigan statute upon the subject of vessels of five tons burden and upwards. It is manifest that these vessels, and such as ordinarily navigate this stream, can pass in front of defendants' wharf as it now stands. The Landsdowne itself, with a capacity of 1,500 tons, and carrying these immense freight and passenger trains, draws 8 feet 4 inches, and can pass readily along in front of the existing dock-line of these premises. In

1873 the canal or channel through the St. Clair flats was only 13 feet in depth; now its regular depth is 16 feet. Sixteen feet, as shown by the government chart, as well as stated by the local engineer in charge, Gen. Poe, constitutes the present depth of the controlling channels for all this water highway navigation. It therefore cannot be true, as counsel for the defendants have contended, that the line of navigability in front of the city of Detroit ranges from 20 to 25 feet. If we were to make and define that as the line of navigability, we would practically and absolutely treat as worthless and unworthy of consideration the fact that the government in making the artificial channels only provides for or requires 16 feet. It would not do, therefore, to say, while the government provides 13, 14, and 16 feet as sufficient depth to accommodate the navigation of the vessels that traverse these waters, that the court should hold or find as a fact that 20 feet is necessary, or 23 is necessary, in the frontage of the city of Detroit. That would be wholly and utterly inconsistent.

The defendants have called the attention of the court to the government chart of the Detroit river, and on the margin of the chart is a statement explanatory thereof, to this effect: "The dotted surfaces and dotted curves represent, respectively, six, twelve, and eighteen feet, and serve to show the limits of navigation." Those dotted lines, running out from the shore at 6, 12, and 18 feet, respectively, were never intended to define the line of navigability, or the harbor line or channel bank. What they are intended to define and indicate and mean is simply this: that a vessel drawing 6 feet of water may go to that inner dotted line; that a vessel drawing or requiring 12 feet of water may go to that second dotted line with safety; and that one drawing 18 feet would be safe in going to that outer dotted line in a depth of 18 feet,—and it does not indicate anything more, and it never was so intended. So nothing can be gained from a reference to that chart.

But the right of the defendants in this case to build this structure is absolutely prohibited by the act of congress approved September 19, 1890, which was the first time congress took upon itself the exercise of its authority to legislate upon this subject. That legislation is paramount and controlling, and, even if this proposed extension had been under express legislative authority, it would have to give way before the act of congress of September 19, 1890. That act I shall refer to for a moment, because it has important bearing in this and other similar cases. By the seventh section of that act it is provided—

"That it shall not be lawful to build any wharf, pier, etc., or structure of any kind, outside established harbor lines, or in any navigable waters of the United States where no harbor lines are or may be established, without the permission of the secretary of war, in any port, roadstead, haven, navigable water or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters; and it shall not be lawful hereafter to commence the construction of any bridge, bridge-draw, bridge-piers, and abutments, causeway, or other works over or in any port, road, roadstead, haven, harbor, navigable water or navigable waters of the United States, under any act of the legislative assembly of any state, until the location and plan of such bridge or other works have been submitted to

and approved by the secretary of war, or to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, the channel of said navigable water of the United States, unless approved and authorized by the secretary of war: provided, that this section shall not apply to any bridge, bridge-draw, bridge-piers, and abutments the construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, draw-bridge, bridge-piers, and abutments, or other works, under an act of the legislature of any state, over or in any stream, port, road, roadstead, haven, or harbor, or other navigable water not wholly within the limits of such state."

The reason for adding that clause, "other navigable water not wholly within the limits of such state," was that line of decisions in the supreme court of the United States holding that, where the navigable water was located or lay wholly within the limits of a state, the state could, by legislative authority, permit or allow bridges or other structures to be erected entirely across them, and regulate the passage of vessels through the same. The tenth section is as follows: "That the creation of any obstruction not affirmatively authorized by law to the navigable capacity of any waters, in respect of which the United States has jurisdiction, is hereby prohibited,"—and to construct it or continue it is made a misdemeanor, punishable by a heavy fine or imprisonment, or both, in the discretion of the court. This structure, therefore, cannot be lawfully extended by the defendants. If extended it would be an unlawful structure, for which they would be subject to indictment and to imprisonment or fine, or both. It would extend into the waters to a depth, if erected, which would make it a public nuisance. That it will interfere with these complainants is perfectly manifest. That it will work ruinous injury to them, and the commerce they are carrying on, is manifest.

It is urged as a matter of equity for the defense that on the property west of them and adjoining them, owned by James F. Joy, and occupied by Mr. Letts, the wharf extends out to a depth about which they differ; the defendants saying it is 22 feet, and the city engineer fixing it at 19 and 20,—19 at the western end and 20 at the eastern. But, whatever depth it may have, it cannot be assumed that, because they go to that depth, the defendants have the right to come out to a line corresponding as a direct line, without reference to the depth of the water. It does not follow, if the fact be so, that Letts or Joy extended their dock so as to encroach upon the navigability of the river, that this defendant has the right to do so. If they are creating a public nuisance, they are liable to the people who are damaged by it, and, having done it without authority of the state or city, they may be creating and maintaining at that point a public nuisance. But that does not meet this question. It may be that they are subject to indictment for the continuance of that structure, and to penalty, but that has nothing to do with the question before the court. It is wholly immaterial. What will be the consequence and what is the present working of the system under which the defendants claim the right to go out to a line, without reference to depth of water, which will correspond with other docks belonging either to themselves or others? When they reach their 25 feet, the next man will want to

come to that, and his neighbor will want to come to that corresponding line, and thus the navigable waters of the shores will be steadily encroached upon. Already the frontage of the river has, by an attempt to acquire land and to secure additional property, and to secure greater facilities, been encroached upon all along the city front, running out to various depths that are not warranted by law, and constituting encroachments upon the navigable waters of the river. Because others are doing this, that does not confer upon the defendants the right to do it.

In reference to the complainants' slip, the slip of the Union Railroad Depot & Station Company, there is nothing to show the wharf line there, or whether or not they are trespassing upon public waters. It is stated that on their grounds they can get a depth of from 20 to 23 feet of water. The affidavits show that in the slip they are now using there is a depth of from 14 to 16 feet. However that may be, it is perfectly clear to the court that this extension by defendants will encroach upon the navigable waters of the river, and that it will constitute a public nuisance, and that it will work irreparable injury to the complainants in the use of their boats, and it must therefore be declared unlawful, and be restrained.

It is said by the defendants that it is an appropriation of their property to occupy this frontage. Certainly the complainants have no right to appropriate defendants' property. If the water in front of their present dock does not constitute public water over which the complainants have the right to navigate, of course they can enjoin or restrain them, but, as the court believes these waters are public waters, the complainants' boats have the right to cross them in the usual way, and enter their slip in the only practicable way in which they can enter, and this would be defeated if the defendants' proposed structure were erected. The court will grant the preliminary injunction in this case.

Mr. Dickinson. I desire to say a word. I wish to ask for a rehearing before your honor, or before a full bench. It will be universally conceded that on this great water-way this decision is of very great importance. As we understand the decision of the court, the line of navigability must be limited to the depth at which 20 ton vessels can approach, and that, therefore, the line of navigability in front of the city of Detroit may be as low as 6 feet. It is of very great importance, for the reason that the dock-line—and your honor misapprehended the statement of the defendants as intending to state that as the line of navigability—the dock-line in front of the city of Detroit, as it was intended to be stated is at a minimum depth of 20 feet throughout the length of the front of the city of Detroit; and, of course, if your honor's holding shall be sustained on a fuller review of the case by your honor, then any dock proprietor along the entire front of the city may be indicted for maintaining a public nuisance.

Court. I called attention to that in connection with future erections. I did not intend to pass upon that question.

Mr. Dickinson. There are continually new docks going up as the city grows. To show your honor the importance of this matter, and the

need of a fuller hearing than we can get upon a motion for an injunction, and a thorough understanding of the facts, let me say that, while the front of the real estate upon the street immediately contiguous to this property may be worth \$25 or \$50 a foot, the front upon the river is worth from \$500 to \$1,000 per foot, so we may say that this 60 feet front which it is sought to extend is of the value to-day of \$60,000, and its value is solely due because of the rights the defendants have to reach it from the river by navigation like their neighbors. That property by this decision would be rendered utterly worthless, because it is in a cove by itself, and could not be reached by reason of the projection of another dock 25 feet beyond it. No ship could get into his 60 feet, and if he should attempt to sell that which was ordinarily worth \$1,000 a foot, he would of course be unable to realize a dollar for it, because no ship could reach it. For these reasons, and because of the very great importance of your honor's decision, and because we apprehend on a fuller hearing your honor will decide that the line of navigability is not where a 20-ton ship would come, but the line of navigability is where ships of ordinary tonnage would come, we would ask for a rehearing. If your honor should fix the line of navigability where your honor does, where a ship of 20 or 30 tons would come, then it must be true that Detroit, throughout its whole water-front, must have a system of lighterage, because vessels cannot reach the docks.

Court. How do they get through the channels?

Mr. Dickinson. Gen. Poe is simply mistaken. Sixteen-foot ships come through the St. Clair flats, and no one for a moment will contend that a vessel drawing 16 feet could navigate in 16 feet of water, because the vessel would drag upon the bottom. However that may be, if it be true that the line of navigation must be fixed at a point where 20, 25, 30, and 50 ton ships can go, then Detroit on its whole front must, as ships bring freight and passengers, if the vessels draw more than that, have a system of lighterage to get out of the river.

Court. The decision is an important one, and I will hear you fully at any time when the court has opportunity, either by oral argument or by briefs; and the court does not now undertake to establish the line of navigability. Under the act of September 19, 1890, that matter is left to the secretary of war, and an application ought now to be made to the secretary of war to define the line of navigability of the Detroit river; otherwise, litigation will grow and be interminable on this question.

Mr. Dickinson. I would suggest to your honor that there is 60 feet front that is utterly worthless if your honor's decision shall stand, and I would suggest whether it would not be better, pending the hearing, that these gentlemen should file a bond to respond in damages if it should be subsequently determined liable for such damages?

Court. I will impose upon them the obligation of giving you a bond of \$25,000 to abide the result of this suit. If a bond is desired, I will require a bond in event the court may be mistaken. The bond would only cover damage resulting during the litigation, and these parties are amply able to give a bond of \$25,000 to indemnify you.

Mr. Russell. We have no objection to giving such a bond. If my friend desires speed in the matter on account of great suffering, and because vessels drawing 11 feet of water desire to get there, and cannot, I will file a replication to-day to his answer, and I will go to hearing in open court with witnesses at once.

Mr. Dickinson. We accept the suggestion, but, as we have all the material ready to make the extension to this dock, we desire the bond.

Court. Execute the bond. That is all the court can do now.

Mr. Russell. We will ask for costs upon the motion for preliminary injunction.

Court. I will let that abide the determination of the question.

LEMOINE v. DUNKLIN COUNTY.

(Circuit Court, E. D. Missouri, E. D. May 15, 1891.)

TRUST—LACHES.

Where, in a proceeding to obtain a transfer of the legal title to a large quantity of swamp land, alleged to be held by the defendant county in trust for the complainant, it appeared that the entries under which complainant claims were made more than 30 years before; that for more than 20 years the county had openly and persistently denied the trust, and had made sales and conveyances of large quantities of the lands to persons who have made improvements thereon; that complainant's title to a large portion of the lands depended upon a grant in aid of a plank-road; and that, although the road had never been built, the certificates of entry and sale were issued to the contractors, who are the parties under whom complainant claims; that the charter of the road was subsequently repealed, and the county had continuously contested the validity of the grant; that the witnesses who were conversant with the transaction of the issue of certificates of entry and sale are since dead; that in the civil war the records of the county were scattered; that those which were in existence up to the year 1872 were in that year destroyed by fire,—the complainant will be held guilty of laches, and the bill dismissed.

In Equity.

Cunningham & Eliot, for complainant.

Elencio Smith and Geo. H. Shields, for defendant.

THAYER, J. For the information of counsel it will be sufficient to say that the court dismisses the bill of complaint on the ground of laches. The bill charges in effect, that Dunklin county holds the legal title to about 17,000 acres of swamp land, situate in that county, in trust for the complainant, the land having been entered, as it is claimed, and paid for, by parties under whom complainant derives title, some time in the year 1857. The purpose of the proceeding is to obtain a transfer of the legal title, on the ground that complainant has succeeded to all the rights of those who originally entered the lands, and is now the equitable owner of the same, and entitled to a conveyance of the legal title. It will be seen, therefore, that the title which plaintiff asserts had its origin more than 30 years ago, and nothing appears to have stood in the way of an assertion of that title by the plaintiff, or by those under whom he claims,

at any time within the past 20 or 25 years; nevertheless, no steps were taken to enforce the right now asserted until July 2, 1888, when the present bill was filed. The testimony shows to my satisfaction that for more than 20 years the county of Dunklin has openly and persistently denied the trust which complainant now seeks to establish. During that period it has made sales and conveyances of large quantities of the lands in question to numerous purchasers. Many of the purchasers have entered into possession of the lands so conveyed to them by the county, and have made improvements thereon, and some of the purchasers have doubtless been in possession for such length of time as to acquire a perfect title to their several holdings under the statute of limitations. I have no doubt that the complainant, or those under whom he derives title, had both actual and constructive notice, at least 15 years before this suit was instituted, that the county of Dunklin was selling and conveying the lands in question as a part of the unsold swamp lands ceded to it by the state, which it had the right to sell; and, further, had knowledge that the county denied and would dispute the validity of the entries or sales made in 1857, on which plaintiff's alleged equitable title depends. Furthermore, it appears that plaintiff's right to a very large portion of the lands claimed in this proceeding, depends upon the validity of a grant of said lands made in the year 1857, to aid in the building of a plank-road from Kennett, in Dunklin county, to a point on the Mississippi river. The road it seems was never built, although a certificate of entry and sale of all swamp lands lying within six miles of the proposed route of the road was issued to the contractors, who are the parties under whom complainant claims. Shortly after the issuance of such certificate, the general assembly of this state for some reason repealed the charter authorizing the building of the road, and authorizing the donation of swamp lands by the county in aid of the enterprise. The county of Dunklin, as it seems, has contested the validity of the grant of swamp lands in aid of the building of the plank-road for more than 30 years last past. Whether the certificate of entry and sale of lands to aid in the building of the plank-road was regularly and lawfully issued by the register of swamp lands, it is now impossible to fully and fairly determine. Nearly all the persons conversant with the transaction have died. A civil war has swept over the country, the records of the county of that period have been scattered, and such as were in existence up to the year 1872 were in that year destroyed by fire.

The case made by the evidence presents certain features that were not disclosed by the bill when it was before the court on demurrer. *Vide*, 38 Fed. Rep. 567. It is obvious, from what has been said, that all the facts appear in evidence which are requisite to support the plea of laches. The complainant and those under whom he claims have acquiesced for years in an open and notorious denial by the county of the equitable title on which the complainant relies. In the mean time numerous persons, who are not parties to this suit, have acquired an interest in the lands described in the bill, whose titles would be clouded by a decree in favor of the complainant; and, in the third place, it appears that, by

lapse of time, the accidental destruction of public records, and the death of witnesses, the defendant is precluded from showing the invalidity of complainant's title to a large portion of the lands in dispute, which it very likely could have shown if this action had been brought at an earlier day. Complainant must accept the consequences of his own neglect, and the neglect of those under whom he claims. *Speidel v. Henrici*, 120 U. S. 387, 7 Sup. Ct. Rep. 610; *Hume v. Beale*, 17 Wall. 348; *Brown v. Buena Vista Co.*, 95 U. S. 161.

There are some other defenses which it is unnecessary to notice. The bill must be dismissed, for the reason stated.

HOEY v. COLEMAN *et al.*

(Circuit Court, S. D. New York. May 14, 1891.)

1. CORPORATIONS—JOINT STOCK COMPANY—TAXATION.

A company which is a copartnership, constituted by written articles of association, having its capital divided into shares which are transferable, which is not dissolved by the death of a shareholder, the business of which is conducted by a board of managers, and which has all its property vested in the exclusive custody of three trustees, and conducts all legal proceedings in the name of the president or of the three trustees, though a *quasi* corporation, as between the members, by their voluntary contract, but not incorporated or created by franchise, is not within the meaning of a statute subjecting to taxation all moneyed or stock corporations deriving an income or profit from their capital stock or otherwise.

2. EQUITY—ADEQUATE REMEDY AT LAW—ILLEGAL TAXATION.

In a proceeding in equity, the objection that there is a plain and adequate remedy at law is jurisdictional, and a bill for injunction to restrain the collection of a tax must be dismissed, where such a remedy exists, notwithstanding the objection is not raised by the defendant either by plea, demurrer, or answer.

In Equity.

B. H. Bristow and Seward, Guthrie & Morawetz, for complainant.

George S. Coleman and Wm. H. Clark, for defendant.

WALLACE, J. In my judgment the tax, the collection of which is sought to be restrained by this suit, is in no sense a tax upon commerce, and its legality depends solely upon the question whether the collective body known as "Adams Express Company" is a corporation within the meaning of the state statute which subjects to taxation "all moneyed or stock corporations deriving an income or profit from their capital or otherwise." If the company is a corporation or a partnership, having its domicile in this state, its capital is taxable by the state, notwithstanding it may be wholly invested in the business of interstate commerce, and in property used in other states for the transportation of goods. The present tax is assessed upon the capital stock of the company. The company is a copartnership, domiciled in this state, and constituted by written articles of association, whereby its capital is divided into shares. The shares are transferable. The death of a shareholder does not work a dissolution. The business is conducted by a board of managers. The

property is vested in the exclusive possession of three trustees, and all legal proceedings are conducted in the name of the president or of the three trustees. Thus it is a *quasi* corporation as between the members by their voluntary contract. But the responsibility of the members for the obligations of the company is not limited, and each is liable for the whole. As to third persons, it is a partnership, having many of the characteristics of a corporation, but none of those immunities which are conferred by the state exclusively upon corporations, either by special charter or general laws. Inasmuch as a corporation is always created by a franchise, while this company is self-constituted, and a corporation is only known to the law as a legal entity, in which the members have lost their individuality, while this company is known to the law only as an aggregation of individuals, whose identity and personal responsibility are unchanged, the proposition that the Adams Express Company is not a corporation in legal definition is too self-evident for discussion. The real question, however, is as to the sense in which the term "corporation" is used in the state statute, and whether it can be interpreted to embrace partnerships which masquerade as corporations, or which are permitted by state laws to enjoy some of the privileges which are usually conferred upon incorporated companies. Upon such a question—the interpretation of a state statute—the federal courts yield their own opinions to the judgment of the highest court of the state. It is understood that a case now pending, which has been decided by the lower courts, is soon to be reviewed by the court of appeals, in which the precise question now involved must be determined, and that any decision of this court will be taken for review to the supreme court of the United States; and it is supposed that before this cause can be reached in the supreme court the court of appeals will have decided the question. Under these circumstances it would serve no useful purpose to attempt any extended statement of the reasons which lead me to conclude that the statute does not authorize the present tax. The conclusions reached by the supreme court of this state in *Bell v. Streeter*, 1 N. Y. Trans. (N. S.) 6, by STRONG, J., and in *People v. Coleman*, 5 N. Y. Supp. 394, by BARRETT, J., affirmed at general term, (13 N. Y. Supp. 833,) coincide with my own, and are adopted for present purposes.

The reasoning of the opinion in *People v. Wemple*, 117 N. Y. 136, 22 N. E. Rep. 1046, DANFORTH, J., delivering the opinion of the court of appeals, undoubtedly tends to an opposite result. In that case it was decided that an association organized by contract substantially like that of the Adams Express Company was properly taxed under a statute subjecting to a franchise tax "every corporation, joint stock company, or association whatever, now or hereafter incorporated or organized by or under the laws of any other state or country, and doing business in this state." The opinion adopts the view that the word "incorporated" is not to be taken in that statute in a technical or restricted sense, but embraces any combination of individuals so organized for conducting business as to enjoy the privileges of bodies corporate by providing for a permanent investment of capital, the right of succession, the transfer of in-

terests by assignment of certificates, the prosecution of debts in the name of an agent, and having capacity to avail themselves of enabling statutes, which confer such privileges upon aggregate bodies. Manifestly the object of that statute is to tax the privilege of doing business in aggregate bodies, and its language denotes persuasively an intention to tax all corporations and all associations of an analogous type doing business within the state. The literal interpretation which was contended for would exclude associations within the spirit, although not within the strict language, of the act. But when a statute imposes a tax upon the capital of "moneyed or stock corporations," without more, there is little room for interpretation.

Upon the authority of *Shelton v. Platt*, 11 Sup. Ct. Rep. 646, (decided by the supreme court, April 6, 1891,) the present bill must be dismissed, because the case made is one in which there is plain, adequate, and complete remedy at law. It had been adjudged frequently by the supreme court prior to the cases of *Reynes v. Dumont*, 130 U. S. 254, 9 Sup. Ct. Rep. 486, and *Brown v. Iron Co.*, 134 U. S. 354, 10 Sup. Ct. Rep. 604, that the objection that there is plain and adequate remedy at law is jurisdictional, and should be enforced by the court of its own motion; but in those cases the court indicated that the objection should not be entertained in a case where the relief sought is of an equitable nature, unless it is raised by the defendant before he enters upon his defense at large; that is, by a demurrer or plea. The defendants have not raised this objection even by answer. The averment of the answer that the laws of the state of New York provide a simple, speedy, and adequate method for the review and cancellation of an erroneous or illegal assessment does not present a defense. Parties who are entitled to resort to the federal courts to have their rights adjudicated cannot be turned away because state laws may give them an adequate remedy in the state court. In the case of *Allen v. Car Co.*, 11 Sup. Ct. Rep. 682, (decided April 13, 1891,) the supreme court has dismissed a bill filed to restrain the collection of a tax, upon the ground that there was an adequate remedy at law, notwithstanding the objection was raised in that court in the first instance, and had not been taken by plea, demurrer, or answer in the circuit court. In the opinion the cases of *Reynes v. Dumont* and *Brown v. Iron Co.* are referred to, but the former rule, as declared in many adjudications, that the objection may be raised notwithstanding it has not been taken by demurrer or plea, is again applied.

I regret to be obliged to dismiss the bill, because it seems to me plain that the association is not subject to the tax which has been assessed against it; and the suggestions which have been urged by counsel for the complainants, to show that the remedy at law is not as practical and efficient as the remedy in equity, have been considered with an earnest desire to be convinced by them. The only one which requires any comment is the one that a suit at law could not be prosecuted with practical effect in a federal court, owing to the vast number of plaintiffs who would have to be joined; the stockholders of the association being over 1,000 in number. If it were necessary to make all the

stockholders parties, it might be considered that the remedy at law would be so cumbersome and inconvenient as to be less adequate and convenient than a suit in equity, in which one person may sue in behalf of a large number of persons similarly situated. But the laws of this state authorize a suit in behalf of such an association to be brought in the name of its president, and the practice and mode of proceeding in the federal courts at law is regulated by the practice prevailing in the courts of the state in which the federal court is held, and required to conform as near as may be to the practice of the state courts; and I cannot regard it as in the least doubtful that a suit at law to recover the amount of the present tax could be brought in this court in the name of the president of the association. The observation of Mr. Justice LAMAR in *Chapman v. Barney*, 129 U. S. 677, 9 Sup. Ct. Rep. 426, that a statute of New York could not give the association power to sue in a federal court, was addressed to the case which was then before the court, in which the suit was brought in the state of Illinois. It was directed to a case to which the federal practice act, requiring conformity in actions at law between the practice of the federal courts and the state courts, has no application.

The bill is dismissed.

BYERS *v.* COLEMAN *et al.* CHENEY *v.* SAME. CRISSEY *v.* SAME.

(Circuit Court, S. D. New York. May 13, 1891.)

In Equity.

Carter & Ledyard, for complainants.

Wm. H. Clark, for defendants.

WALLACE, J. The decision just announced in the case of *Hoey v. Coleman*, 46 Fed. Rep. 221, controls the disposition of these causes. The bills are dismissed, because the remedy is at law.

NORTHERN PAC. R. CO. *v.* CANNON *et al.*

(Circuit Court, D. Montana. April 6, 1891.)

1. PUBLIC LANDS—RAILROAD GRANT—LEGAL TITLE.

The grant of public lands to the Northern Pacific Railroad Company in aid of its railroad by Act Cong. July 2, 1864, vested the company with the legal title to such lands when the grant took effect, upon the designation of the route of the road, irrespective of the fact that no patents had been issued therefor.

2. SAME—INVALID PATENT—EQUITABLE RELIEF.

Having the legal title, and being out of possession, the company can maintain ejectment against persons holding under an invalid patent issued pursuant to an entry of the land as a mining claim, though in fact it was valuable only for agricultural purposes; but a bill by it to determine such adverse title is demurrable as failing to show grounds for equitable relief.

In Equity. On demurrer to bill.

Cullen, Sanders & Shelton and F. M. Dudley, for plaintiff.
M. Bullard and Toole & Wallace, for defendants.

KNOWLES, J. The plaintiff sets forth in its bill of complaint filed herein that it received a grant from the United States by virtue of an act dated July 2, 1864, on the line of its railroad to certain lands. There is set forth therein all the acts required of plaintiff in order to designate and vest in plaintiff the title to the lands granted by said act; that the land hereinafter named was, at the date of said grant, and at the date it fixed the general route of its railroad, public land belonging to the United States, free from any claims or rights whatever, and agricultural land; that the land herein described was within the limits of plaintiff's grant, upon an odd section, to-wit, the S. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, and the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, of section 29, in township 10 N., range 3 W., of the principal meridian of Montana; that about the 9th day of February, 1880, the said Catherine B. Cannon made application to patent said premises as mineral lands, and, with the view of defrauding plaintiff, the said defendants C. W. Cannon and Catherine B. Cannon falsely and fraudulently represented to the officers of the United States land-office that the same was mineral land, and introduced false testimony and affidavits to support said application in said office; that on or about the 18th day of October, 1881, the said United States land-office issued to the said Catherine B. Cannon a patent from the United States to said premises as mineral land; that the said patent is a cloud upon plaintiff's title, and prevents it from receiving a patent to said premises to which it is entitled. The principal prayer in said bill is:

"And your orator prays that your honors may decree that the said defendants have no estate or interest whatever in or to said lands or premises, and that the title of your orator is good and valid, and that the said defendants, and each of them, be forever enjoined and restrained from asserting any claim whatsoever in and to said lands and premises adverse to your orator, and for such other and further relief as the equity of the case may require, and to your honors may seem meet."

The only allegation as to the possession of said premises is as follows:

"And your orator further shows on its information and belief that such premises have been vacant, unoccupied, unfenced, and unimproved, and not used for any purposes, until within less than five years prior to the commencement of this action."

To this bill of complaint all the defendants but Mrs. Walker demur. The first ground of demurrer is "that it appears by the plaintiff's own showing in the said bill that the said plaintiff is not entitled to the relief prayed by the bill against these defendants." There are many other grounds stated in the demurrer, but the only one which will be noticed is as to whether the bill states facts sufficient to show that the case is within the equity jurisdiction of this court, and in considering this the first question presented is, what is the nature of the title of the Northern Pacific Railroad Company to the lands embraced within its grant? Is

it a legal or an equitable one? It fully appears that it has no patent for the lands specified in this bill. In considering this question I am much perplexed, for it appears to me there are two lines of decisions upon this point, one of which holds that its title is a legal one, the other that it is an equitable one. The grant of lands to the Union Pacific Railroad Company is similar to that to the Northern Pacific Railroad Company. It has been held by decisions of the supreme court that as to the granting of lands they are in substance the same. In the case of *Railway Co. v. Prescott*, 16 Wall. 608, the supreme court says:

"As the government retains the legal title until the company, or some one interested in the same grant or title, shall pay these expenses, the state cannot levy taxes on the land, and, under such levy, sell and make titles which might in any event defeat this right of the federal government, reserved in the act by which the inchoate grant was made."

In the case of *Railway Co. v. McShane*, 22 Wall. 444, the same court uses this language:

"That the payment of these costs of surveying the land is a condition precedent to the right to receive the title from the government can admit of no doubt. Until this is done, the equitable title of the company is incomplete. There remains a payment to be made to perfect it."

Again—

"The United States retains the legal title by withholding the patent, for the purpose of securing the payment of these expenses, and it cannot be permitted to the states to defeat or embarrass this right by a sale of the land for taxes."

In the case of *Railroad Co. v. Traill Co.*, 115 U. S. 600, 6 Sup. Ct. Rep. 201, the same court again considers this same question in connection with the grant now under consideration, and held:

"The United States made a magnificent grant to this company of lands equal to forty or fifty thousand square miles, an area as large as an average state of the Union. It thought proper to require of the grantee the payment of the costs of making the surveys necessary to the location and ascertainment of these lands. To secure the payment of these expenses, it decided to retain the legal title in its own hands until they were paid. The government was as to these costs in the condition of a trustee in a conveyance to secure payment of money; but, if the land was liable to be sold for taxes due to state, territorial, or county organizations, this security would be easily lost."

In this case the supreme court held that the statute passed in 1870 upon the subject of the Northern Pacific Railroad Company's paying for the costs of surveying the lands within its grant placed it in the same condition as the Union Pacific Railroad Company and the Kansas Pacific Railroad Company, so far as its land grant was concerned. This statute of 1870 is as follows:

"That before any land granted to said company by the United States shall be conveyed to any party entitled thereto under any of the acts incorporating or relating to said company, there shall first be paid into the treasury of the United States the cost of surveying, selecting, and conveying the same by the said company or party in interest." 16 U. S. St. at Large, 305.

This statute the supreme court holds is in substance the same as section 21 of the act of 1864, concerning the grant of lands to the Union Pacific Company, which reads as follows:

"That before any lands granted by this act shall be conveyed to any company or party entitled thereto * * * there shall first be paid into the treasury of the United States the cost of surveying, selecting, and conveying the same by the said company or party in interest, as the titles shall be required by said company." 13 U. S. St. 365.

In effect it would appear that these two statutes are the same; and the three decisions construing the grants to the Kansas Pacific, Union Pacific, and Northern Pacific Railroad Companies arrive at the same conclusion: That the title in these companies to their lands is an equitable one; that, until these costs of surveying and conveying the same are paid, the railroad companies have not a complete equitable title even to their land. *Railroad Co. v. Traill Co.*, *supra*. If I understand correctly the purport of the decisions in the case of *Railroad Co. v. U. S.*, 124 U. S. 124, 8 Sup. Ct. Rep. 417, the same doctrine is maintained.

I come now to consider the other line of decisions which appear to me to maintain the view that the legal title to the land granted to these several railroad companies is in them. In the case of *Schulenberg v. Harri-man*, 21 Wall. 44, the supreme court held that the words in the act granting land to the state of Wisconsin for railroad purposes, "that there be, and is hereby, granted," imply the present granting of the title in fee. Sustaining this view are: *Railroad Co. v. U. S.*, 92 U. S. 741; *Missouri, etc., Ry. Co. v. Kansas Pac. Ry. Co.*, 97 U. S. 491; and *Wood v. Railroad Co.*, 104 U. S. 329. In the case of *Buttz v. Railroad Co.*, 119 U. S. 66, 7 Sup. Ct. Rep. 100, the supreme court, upon this subject, uses this language:

"At the time the act of July 2, 1864, was passed the title of the Indian tribes was not extinguished. But that fact did not prevent the grant of congress from operating to pass the fee of the land to the company. The fee was in the United States. The Indians had merely a right of occupancy,—a right to use the land subject to the dominion and control of the government. The grant conveyed the fee, subject to this right of occupancy."

In *Denny v. Dodson*, 13 Sawy. 66-75, 32 Fed. Rep. 899, Justice FIELD, sitting as circuit justice, after referring to some of the decisions cited as to the grant being one *in presenti*, said:

"The present title here mentioned is a legal title, as distinguished from an equitable or inchoate interest arising upon a contract or promise of the government. The words 'there be, and is hereby, granted' are not words of contract or promise, but, as said in the citations, are words of absolute donation; that is, they transfer a present legal right to the sections designated, which become attached to them specifically whenever they are identified."

In this case that eminent jurist stated that he did not think the supreme court in the case of *Railroad Co. v. Traill Co.*, *supra*, "intended to hold that a legal title to the land had not passed by the grant to the company." In regard to the effect of the patent in that case this language was used:

"Why, it is asked, is there a necessity of such patents, if the title passed by the act itself? There are many reasons why patents should be issued upon the completion of portions of the road. They would identify the lands which are coterminous with the road completed. They would be evidence that the grantee, in the construction of that portion of the road, had fully complied with the conditions of the grant, and to that extent the grant was relieved of possibility of forfeiture for breach of its conditions; and they would obviate the necessity of any other evidence of the grantee's title to the lands embraced in them. They would thus be deeds of further assurance, confirmatory of the grantee's title, and so be invaluable to them as a source of quiet and peace in their possession."

In the case of *Railroad Co. v. Price Co.*, 133 U. S. 509, 10 Sup. Ct. Rep. 341, the supreme court says:

"The title conferred by the grant was necessarily an imperfect one, because, until the lands were identified by the definite location of the road, it could not be known what specific lands would be embraced in the sections named. The grant was, therefore, until such location, afloat. But when the route of the road was definitely fixed the sections granted became susceptible of identification, and the title attached to them, and took effect as of the date of the grant so as to cut off all intervening claims."

Again:

"The subsequent issue of the patents by the United States was not essential to the right of the company to those parcels, although in many respects they would have been of great service to it. They would have served to identify the land as coterminous with the road completed. They would have been evidence that the grantee had complied with the conditions of the grant, and to that extent that the grant was relieved of possibility of forfeiture for breach of them. They would have obviated the necessity of any other evidence of the grantee's right to the lands, and they would have been evidence that the lands were subject to the disposal of the railroad company with the consent of the government. They would have been, in these respects, deeds of further assurance of the patentee's title, and, therefore, a source of quiet and peace to it in its possessions."

This last clause, it will be observed, is almost identical with the one already quoted from *Denny v. Dodson*. The same distinguished judge wrote both opinions, hence it cannot be doubted what was meant by the language used in this last one. It is true it is stated in this opinion that it makes no difference as to that case whether the railroad company had a complete title in equity or a legal title; still the conclusion seems inevitable that the views expressed in *Denny v. Dodson* are adopted by that court, and that the views expressed in *Buttz v. Railroad Co.*, *supra*, are confirmed. In this case it is also stated that the land grants to the several railroads, made between 1860 and 1880, are similar in terms, and hence the interpretation of one applies to all. I hold that the latest expression of the supreme court is that the plaintiff in this case has the legal title, if any, to the premises in controversy. If this were a new question, I should be disposed to hold, as was held by Judge DEADY in *U. S. v. Childers*, 8 Sawy. 171, 12 Fed. Rep. 586, that the terms used in the grant, taken altogether, show that it was not the intention of congress to grant a present legal title to the lands granted to the Northern Pacific Railroad Company, but only a title which was to be perfected

when a patent should issue therefor, which patent would by relation take effect from the date of the grant. But the views of the supreme court must control this. It has been held that a grant of the legal title by an act of congress to land owned by the United States is entitled to greater weight than a patent title executed by a ministerial officer of the government. *Smythe v. Henry*, 41 Fed. Rep. 705; *Whitney v. Morrow*, 112 U. S. 693, 5 Sup. Ct. Rep. 333.

The next question for consideration is, should the plaintiff, having the legal title, have shown in its bill that it was in the possession of the premises in dispute? The bill does not so allege. It is set forth therein, "that to within a period of five years the premises were vacant, unoccupied, unfenced, and unimproved, and not used for any purpose." The inference is that the said premises were, at the commencement of this suit, occupied by some one, and it is not alleged that the plaintiff is that person. If possession in plaintiff was necessary in order to enable it to maintain this action, this should affirmatively appear in the bill. The above allegation was probably made with the view of showing that the statute of limitation had not run against this action. In the case of *Orton v. Smith*, 18 How. 263-265, the supreme court says:

"Those only who have a clear, legal, and equitable title to land, connected with possession, have any right to claim the interference of a court of equity to give them peace, or dissipate a cloud on the title."

To the same effect are *Hipp v. Babon*, 19 How. 271; *Ellis v. Davis*, 109 U. S. 485, 3 Sup. Ct. Rep. 327; *Killian v. Ebbinghaus*, 110 U. S. 568, 4 Sup. Ct. Rep. 232; *Fussell v. Gregg*, 113 U. S. 550, 5 Sup. Ct. Rep. 631; *U. S. v. Wilson*, 118 U. S. 86, 6 Sup. Ct. Rep. 991. The general rule is that those who have a legal title and are out of possession cannot maintain an action to remove a cloud upon their title. Possession must first be obtained in an action at law. Pom. Eq. Jur. §§ 1398, 1399, and note 4. If the statute law of the state gave the right to maintain an action where the plaintiff owns a legal title and is not in possession, the same right might be enforced in a federal court. Where a new equity is given by a state statute, that equity may be enforced in a court of the United States. There is, however, no statute in Montana which gives this right when the plaintiff is not in possession. The only statute upon this subject is as follows:

"An action may be brought by any person in possession by himself or his tenant of real property against any person who claims an estate or interest therein adverse to him for the purpose of determining such adverse claim, estate, or interest." Comp. St. p. 160, § 366.

This is the same statute as exists in California upon this subject, and was copied from the statutes of that state by the legislative authority in the territory of Montana. It had received an interpretation in that state before its adoption in Montana, and since that date. The courts of California have held that under this statute it must affirmatively appear that the plaintiff is in the actual possession of the premises from the title to which he seeks to remove a cloud. *Curtis v. Sutter*, 15 Cal. 260; *Rico v. Spence*, 21 Cal. 504; *Lyle v. Rollins*, 25 Cal. 437; *Ferris v. Irving*, 28

Cal. 645. Other cases might be referred to. Plaintiff has cited, as supporting a contrary view, the case of *Railroad Co. v. Wiggs*, 43 Fed. Rep. 333. The learned and distinguished jurist who rendered that opinion does not state therein whether he holds to the view that plaintiff has a legal or an equitable title to the lands specified in plaintiff's bill. He does say that the remedy of plaintiff in that case was not as adequate and complete at law as in equity, and he cites in support of this view *Van Wyck v. Knevals*, 106 U. S. 370, 1 Sup. Ct. Rep. 336, and *Pixley v. Huggins*, 15 Cal. 128. In the first of these the supreme court says, (see opinion, page 365, 106 U. S., and page 337, 1 Sup. Ct. Rep:) "The legal title under the grant goes to the state, but the equitable right vests in the company." It is evident that in this case the court was considering a cloud upon an equitable, not a legal, title. There are many cases which support the view that where the plaintiff has only an equitable title he has the right to maintain an action to remove a cloud upon the same, although not in possession, on the ground that he has no adequate remedy at law. In the last case it does not appear whether the plaintiff claimed under an equitable or a legal title. I do not think this case can be considered in opposition to numerous cases in the California supreme court that hold that in such cases, if plaintiff has a legal title in the premises, he must have possession. It should be remarked that at the time the opinion in the case of *Railroad Co. v. Wiggs*, *supra*, was rendered, the statute law in California had been so changed as to permit an action to remove a cloud upon a title to be maintained by one having a legal title, though not in possession; and this may interpret that decision. *People v. Center*, 66 Cal. 551, 555, 556, 5 Pac. Rep. 263, and 6 Pac. Rep. 481. There is a class of cases which seem to clash with the general rule that in cases to remove a cloud upon a title plaintiff must show possession of the premises claimed. These are cases where a party has purchased real estate at a sheriff's sale, and obtained a sheriff's deed therefor, and the judgment debtor has sold the same to a third party, with the view of defrauding his creditors. A bill is supported in these cases upon the ground that it partakes of the nature of a creditors' bill. *Sands v. Hildreth*, 14 Johns. 493; *Hager v. Shindler*, 29 Cal. 48; *Lick v. Ray*, 43 Cal. 83. There is another class of cases which at times appear to be confounded with these for determining the adverse title to lands. These are bills of complaint which have for their object the canceling and annulling of some deed or other instrument which affects the title to land which was obtained by fraud. In these cases the question of title to the land is not involved. Such is the class of cases referred to in Story, Eq. Jur. § 694; *U. S. v. Minor*, 114 U. S. 233, 5 Sup. Ct. Rep. 836. The bill of complaint shows that this case is one to determine the adverse title of defendants, and not an action to cancel the patent to the premises named, issued to the defendant Catherine B. Cannon. If it could be considered an action to cancel the patent to said defendant for fraud, I should have doubts of the ability of the plaintiff to maintain this action. The fraud, if any, was perpetrated upon the United States; and the United States and said defendants are

the parties to the conveyance. Plaintiff had received its title, if any, to the premises long prior to the issuing of this patent. In the case of *Field v. Seabury*, 19 How. 323, the supreme court says:

"In England a bill in equity lies to set aside letters patent obtained from the king by fraud. (*Attorney General v. Vernon*, 1 Vern. 277, 370, 2 Rep. Ch. 353;) and it would in the United States; but it is a question exclusively between the sovereignty making the grant and the grantee."

In this, it might be said, the fraud complained of, as well as the contract embraced in the patent, is a question exclusively between the United States and the defendant. See, also, *White v. Burnley*, 20 How. 235; and, also, *Jackson v. Lawton*, 10 Johns. 24; *Hughes v. U. S.*, 4 Wall. 232; *Silver v. Ladd*, 7 Wall. 219; *Rubber Co. v. Goodyear*, 9 Wall. 788; *Mowry v. Whitney*, 14 Wall. 434. It seems to be contended by plaintiff that the allegations of fraud in the bill would give the court jurisdiction to determine all the questions involved in this case. The contention seems to be that, where a suit has been brought to cancel an instrument obtained by fraud, a court of equity will take jurisdiction of all matters connected with the subject-matter concerning which the fraud was perpetrated, and settle the whole controversy between the parties claiming an interest in the same. But the fraud which would give a court of equity jurisdiction must be a fraud of which the plaintiff has a right to complain, and not every fraud the defendant may have perpetrated concerning the subject-matter in controversy. In the case of *Vance v. Burbank*, 101 U. S. 519, the supreme court said that the fraud which could be complained of in that case must be such as was practiced upon the unsuccessful party, and prevented him from fully exhibiting his case to the department; and that the unsuccessful party had nothing to do with the fraud practiced upon the United States. In that case the plaintiff sought to make the defendant a trustee of the title he had received from the government. If the fraud in this case is a matter exclusively between the United States and the said defendant, it is not one the plaintiff can bring an action for, or one to annul the contract made with said defendant by the United States. Fraud in a conveyance does not render the same void as to every one. The person deceived by the fraud has a right to rescind the contract induced by it, or affirm it, and sue for damages for the fraud perpetrated. I do not think plaintiff has a right to step into the place of the United States, and say: "For the fraud perpetrated upon the United States I will rescind this conveyance made to said defendant." The reason assigned for asking to have the patent set aside is that it prevents the plaintiff from receiving a patent to said premises from the United States. This may be an excuse for not issuing the patent to plaintiff, but not a legal one, if it is entitled to a patent to the premises. What would be the effect of annulling the patent to Mrs. Cannon? The decree would affect only the parties to this action, and, as far as the United States, which is not a party herein, and said defendant are concerned, the patent would still exist, (*Mowry v. Whitney*, 14 Wall. 434,) and plaintiff, I apprehend, would not have removed the obstacle in its way to a patent to said premises. Certainly there would be no compulsion on the part

of the commissioner of the general land-office to issue such a patent any more after such a decree than before it. If plaintiff can bring a suit to set aside this conveyance for fraud perpetrated on the United States, then it can maintain an action to set aside every patent made by the United States to any portion of an odd section within its grant, before as well as after the date of the same, unless prevented by the statute of limitations or the terms of its grant. As before stated, however, I cannot view this case in any other light than an action to determine the adverse title to a tract of land. That is the object of this suit.

The plaintiff has called the attention of the court to decisions in several of the states where it is held that actual possession is not necessary in order to maintain this action. In Illinois there is some statute which provides that this action can be maintained when the plaintiff is in possession of the premises, or they are unoccupied. *Hardin v. Jones*, 86 Ill. 315. Where statutes similar to this have been enacted the United States courts have recognized the right to the relief awarded, and have enforced it. *U. S. v. Wilson*, 118 U. S. 89, 6 Sup. Ct. Rep. 991; *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. Rep. 495; *Reynolds v. Bank*, 112 U. S. 405, 5 Sup. Ct. Rep. 213; *Chapman v. Brewer*, 114 U. S. 158, 5 Sup. Ct. Rep. 799. It is evident, without such statutes the general rule must prevail. Plaintiff, with considerable apparent confidence, cites the case of *Gage v. Kaufman*, 133 U. S. 471, 10 Sup. Ct. Rep. 406, as holding a different view than that expressed above. The allegation in that bill was, "seized in fee-simple." The term "seised" is equivalent to the term "possessed." "Seisin" means "possession." "Liverty of seisin" meant "delivering possession." The allegation was equivalent to saying that plaintiff was in possession, and held a title in fee. 1 Daniell, Ch. Pr. (5th Ed.) 363. It is urged, however, that where there is an equitable ground for relief possessed by a party he can seek a court of equity, and that, when a court of equity has taken jurisdiction of the matter, it will proceed to determine the whole case. This is the general rule. In this case it is urged that the court may take jurisdiction in order to prevent a multiplicity of suits. The bill does, perhaps, show several parties; but, as the legal title, if any, is in plaintiff, it might bring one suit against all these parties. The fact that they may claim different portions of the same quarter sections of land in dispute makes no difference. They can all be joined as defendants in one action of law to recover the possession of the premises. That a bill in equity would not lie in an action of this nature for the reason it would prevent a multiplicity of suits was determined in the case of *City and County of San Francisco v. Beideman*, 17 Cal. 461. Where a bill fails to show any ground for equitable relief the defect is one of jurisdiction, and this court cannot proceed to determine the merits of the controversy. *Oelrichs v. Spain*, 15 Wall. 227, 228; *Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. Rep. 820. Many other cases might be cited to the same effect.

The other points presented in the demurrer herein will therefore not be considered. The demurrer is sustained upon the ground that plaintiff's bill shows no ground for any equitable relief.

NORTHERN PAC. R. CO. v. AMACKER *et al.*

(Circuit Court, D. Montana. April 13, 1891.)

RAILROAD GRANTS—ILLEGAL PATENT—EQUITABLE RELIEF—REMEDY AT LAW.

A railroad company claiming land under a legislative grant, and having a legal title, if any, cannot, when out of possession, maintain a bill against parties claiming under a subsequent patent to determine title, on the ground that the exercise of equitable jurisdiction will prevent a multiplicity of actions, as in an action in the nature of ejectment plaintiff can join any number of parties defendant without regard to the extent or character of their possessions.

In Equity. On demurrer to bill of complaint.

F. M. Dudley and Cullen, Sanders & Shelton, for complainant.

Bach & Buck, for defendants.

KNOWLES, J. Plaintiff sets forth in its bill of complaint the grant to it of the alternate sections of land odd in number on the line of the definite route of its railroad constructed by it by virtue of an act of congress dated July 2, 1864; and facts sufficient also to show that all lands granted by said act within 40 miles on each side of the definite line of its road where it passes through Montana had vested in it, and that the land in controversy and described in the bill was upon an odd section within the limits of said grant. Plaintiff also sets forth certain facts which it is claimed show that said land is not within any of the exceptions in said grant, and also facts showing or tending to show that the patent issued to the said Maria Amacker was obtained from the United States upon false suggestions, and that the same is a cloud upon plaintiff's title. The prayer of the bill is:

"And your orator prays that your honors may decree that the said defendants, and each of them, have no estate or interest whatsoever in or to said lands or premises, and that the title of your orator is good and valid, and that the said defendants, and each of them, be forever enjoined and restrained from asserting any claim whatsoever in and to said land and premises adverse to your orator, and for such other and further relief as the equity of the case may require, and to your honors may seem meet."

The defendants interpose to plaintiff's bill a general demurrer as follows:

"That it appeareth by plaintiff's own showing by said bill that it is not entitled to the relief prayed by the said bill against the defendants."

We are here confronted with the proposition as to whether the bill does state facts sufficient to show that it has a right to appeal to the equity jurisdiction of this court. There is no allegation in the bill that plaintiff is in possession of the premises described therein. It is alleged that two of the defendants are in possession of certain lots which have been laid out on a portion of the same, and that the remainder of said premises is vacant, unimproved land. This is an analogous case to that of *Railroad Co. v. Cannon*, 46 Fed. Rep. 224, decided this term. The only difference appears to be that in that case one of the defendants procured a

patent to the premises in dispute, as it is alleged, upon the false representation that the premises named in the patent was mineral land excepted from the grant above named to plaintiff. In this case plaintiff sets forth certain facts which it is claimed show that the premises named in the bill were never excepted from plaintiff's said grant, and that, as the patent to the defendant Maria Amacker, under whom all the other defendants claim, was issued subsequent to plaintiff's grant, said patent was void. It was held by this court in the case of *Railroad Co. v. Cannon*, *supra*, that the title which the Northern Pacific Railroad Company received to the land granted to it within the limits of its grant was a legal title, and not an equitable one. It was also determined in that case that, having a legal title, plaintiff could not maintain an action in equity to have this court adjudge concerning the adverse claims to its land, or to remove a cloud upon its title to the same, without showing that it was in possession of the land concerning which it sought such relief; that, while in some of the states there were statutory provisions which allowed the bringing of such an action where the land was vacant and unoccupied, no such provision of law existed in Montana; and that without such a statute such an action could not be maintained. It was not denied but there might be equitable grounds for exercising chancery jurisdiction where the plaintiff had a legal title, and was not in possession of the land in dispute; that the equitable ground claimed to exist in that case was that the exercise of the equitable jurisdiction might prevent a multiplicity of suits. The court held, however, that the bill did not show that there was any multiplicity of suits to be prevented in that case. The court is confronted in this case with the same claim, that the exercise of the equity powers of the court will prevent in the controversy about the land in dispute a multiplicity of suits. In this case the allegations are more full upon this point than in the former. The bill makes 11 parties defendant, alleging that each claims some interest in or to the premises or to some part thereof, and then this allegation follows:

"And your orator further shows upon its information and belief that there are more than one hundred and fifty persons claiming some right, title, or interest in and to lots and blocks in said McLean Park addition, under said patent so issued to said Maria Amacker, as aforesaid, through mesne conveyances and instruments in writing from said Maria Amacker and John Amacker and their grantees; that the greater number of said instruments have not been recorded in the office of the recorder of Lewis and Clarke county, Montana, and your orator has no information, and cannot show to your honors, the names and residences of said persons, and such persons cannot, without inconvenience and oppressive delays, be all brought before your honors in this action."

And again:

"And your orator further shows that by reason of the great number of said defendants it will be necessary to bring a multiplicity of suits in order to maintain the rights of your orator in and to said premises, unless your honors should permit and allow the parties defendant herein to defend for their interests of these claimants of portions of said premises who are not expressly named as defendants, as well as for their own rights."

It is evident plaintiff holds to the view that, should it proceed at law, it would be obliged to institute a separate suit against each claimant in said premises. But this is not the case. The plaintiff would not be required to bring more than one action at law to determine the right of possession of said premises against all parties claiming the same, or any part thereof, who are in possession of any part of the same, or who, having deeds thereto, have exercised acts of ownership over it. Such has been the recognized practice in the courts of Montana; and in the state of California, from which Montana borrowed its Code of Civil Procedure, such has been the practice for years. In the case of *Ritchie v. Dorland*, 6 Cal. 33, the court held that plaintiff in an action in the nature of ejectment "could join any number of parties defendant without regard to the extent or character of their possessions, subject only to their right to answer separately or demand separate verdicts." It was held also in this case that, where the defense is the same in any action of this nature, the court could compel all to proceed in one trial. In the case of *City of San Francisco v. Beideman*, 17 Cal. 461, the supreme court of California says:

"Nor can the bill be maintained upon the ground of a prevention of multiplicity of suits. A single action of ejectment would determine the whole title. All the tenants can, under our practice, be sued together, and the right of the plaintiff fully vindicated in a single suit."

It will be observed that in this case the jurisdiction of the court as a court of equity was invoked on the ground that the suit would prevent a multiplicity of suits; and the court held that there was no necessity for a multiplicity of suits, although there were several defendants claiming and possessing the premises. In the case of *Nevitt v. Gillespie*, 26 Amer. Dec. 696, the court says:

"Courts of equity will also interpose to prevent a multiplicity of suits where the subject-matter of the contest is held by one individual in opposition to a number of persons who controvert his right, and who hold separate and distinct interests depending upon a common source."

The general language here used would seem to cover the case at bar; but a little further on in the opinion we find the following:

"The plaintiff, by its interposition, [that is, a court of chancery,] is relieved from the necessity of bringing a number of suits at law against different individuals to quiet the same common right, where each suit would establish only the particular right in question between the plaintiff and defendant in that suit."

Here we find the rule first specified based upon the idea that there would have to be a number of suits instituted to determine all the rights of plaintiff. Where this would not be the case there is no ground for equitable jurisdiction; and I do not think a case of any weight can be found which would sustain the jurisdiction of a court of equity in a case where the parties in a single action at law might be numerous. In a proper case at law, as well as in equity, a portion of the parties in interest may defend or prosecute an action for the others in interest. The practice established by the statutes and courts of Montana, in such

cases as the one at bar, has been adopted by a statute of the United States for the federal courts in this state. This view is sustained where the state practice was adopted by rule of court previous to the United States statute above referred to. *Beard v. Federy*, 3 Wall. 478. Nor does this practice in any way curtail the equity jurisdiction of the courts. It was not so intended. It confers no equity jurisdiction upon a law court. The object in adopting such a practice was to simplify legal proceedings. The common-law action of ejectment did not determine the title to land; and hence, after one or two trials of this nature at law, concerning a tract of land, a court of equity, with a view of preventing a multiplicity of suits, might interpose, and settle the issue once for all. Now the action under the Code practice in the nature of an action of ejectment does, where the question of title is invoked, determines and settles it between the parties to the action, and there is no necessity for a court of equity to interfere. The perfecting of legal proceedings has often done away with the necessity of a resort to equitable remedies. It may be doubted whether the case at bar should be classed as one which would give a court of equity jurisdiction with a view of preventing a multiplicity of suits, even should the plaintiff have to bring an action against each one claiming title to the land in controversy. The supreme court of California, in the cases of *Ritchie v. Dorland*, 6 Cal., of opinion page 40, and in *Knowles v. Inches*, 12 Cal. 213, did not think it would; but that point I am not called upon to decide. If the land is unoccupied I see no reason why the plaintiff cannot take possession of the same, and then bring the appropriate action to determine the title to the same. The great hardship which would be devolved upon plaintiff if it should be compelled to take possession of its lands before bringing such an action as this was alluded to by counsel for plaintiff. This hardship was based upon the extended landed possessions of plaintiff. I know of no rule of law which would allow plaintiff, on account of its extended landed possessions, to invoke any rule of practice in this matter different from a person of limited domain. Perhaps the rule in a court of equity, which denies its right to determine an adverse title to or remove a cloud upon land where the land is vacant and unoccupied, should be changed in Montana, as it has in many states, by statute law. Until this is done I do not see how I can disregard the well-established rules of equity jurisdiction upon this point.

There is another point worthy of consideration in considering the question of multiplicity of suits. The action usually called "ejectment" lies on behalf of a plaintiff against a defendant who withholds from him the possession of real estate to which he is entitled. The bill in this case shows upon its face that only two of the defendants named, and none of the one hundred and fifty who it is alleged claim some interest in the premises described in the bill, are withholding from plaintiff any portion of said premises. The only actions at law which the plaintiff has concerning these premises, then, are two,—hardly enough to be called such a multiplicity of suits as to demand the intervention of a court of equity. For the reasons stated above I do not think the bill shows any

equity. Where a bill fails to state facts sufficient to present a case within the equitable jurisdiction of the court the United States courts have held that a court of equity is without authority to determine anything further in the case than its own jurisdiction. The demurrer in this case is sustained.

NORTHERN PAC. R. CO. v. CANNON *et al.*

(Circuit Court, Montana. April 13, 1891.)

RAILROAD GRANTS—INVALID PATENT—EQUITABLE RELIEF.

A railroad company which has, if anything, a legal title to lands by reason of a legislative grant, cannot maintain a bill in equity against parties claiming under a subsequent patent to have them decreed trustees of plaintiff and to convey the land to plaintiff, as, if plaintiff's title is good, then defendants have none, and such decree would not supply the place of the patent to which plaintiff is entitled.

In Equity. On demurrer to bill of complaint.

F. M. Dudley and Cullen, Sanders & Shelton, for complainant.

M. Bullard and Toole & Wallace, for defendants.

KNOWLES, J. Plaintiff in this action sets forth in its bill of complaint a grant to it by virtue of an act of congress dated July 2, 1864, of the alternate sections, odd in number, to a distance of 40 miles on each side of the line of its railroad as definitely located in Montana; that the land described in its bill is a portion of an odd section within the limits of said 40 miles, and agricultural in character; that defendants, subsequent to the date of said grant, to-wit, on the 17th day of August, 1879, procured a patent to said premises named in the bill, upon the false representation that the same was mineral land. The relief plaintiff asks is as follows:

"Wherefore it prays the equitable intervention of this honorable court that the said defendants be decreed in and about the ownership and possession of the title to said premises to be the trustees of this plaintiff, and that they be decreed within some time to be fixed by the court to convey the same to the said plaintiff, or, in default of said defendants making such conveyance, that the court appoint a commissioner for them and in their name to make, execute, and deliver to the plaintiff a deed conveying the right, title, interest, and estate of said defendants to the said plaintiff; that the inchoate claim of dower of the said Catherine B. Cannon be annulled; and that the plaintiff have such other and further relief as in equity it is entitled to receive, and also judgment for its costs."

To this bill defendants interposed their demurrer, one of the grounds of which is: "Said amended complaint seeks equitable relief without showing any equitable grounds." This raises the question as to whether the bill does present any equity. The object of the bill is one now quite familiar to the courts. It seeks to obtain a decree declaring the defendants their trustees as to the title to the land described in the bill, upon

the ground that they obtained the same wrongfully from the United States, when plaintiff was entitled to the same. There is no equity stated in the bill which can be considered under the general prayer therein. The bill, as framed, brings to the consideration of the court whether sufficient facts are stated to show that plaintiff is entitled to the special relief it asks. This court held in the case of *Railroad Co. v. Cannon* and other parties, not named in this bill, (46 Fed. Rep. 224,) concerning another tract of land, that whatever title the Northern Pacific Railroad Company received to the land in the odd sections within its grant was a legal title, and not an equitable one. The issue is now presented as to whether, the plaintiff having already a legal title, if any, in the premises in controversy, it can have a decree declaring the defendants to hold any title it may have acquired by virtue of a patent to said premises in controversy, in trust for it. Plaintiff's legal title, if it has any, was prior to defendants'. In fact, if it received such a title, defendants have none. Their patent is void. A patent for premises previously granted is of no validity, and conveys no rights. *Reichart v. Felps*, 6 Wall. 160; *Stoddard v. Chambers*, 2 How. 284; *Bissell v. Penrose*, 8 How. 317. And it may be said generally that when a proprietor of land conveys the same to one party, a deed to another party of the same land, who has knowledge of the previous conveyance, is void. The defendants were bound to take notice of the grant to the plaintiff. In the case of *Dalton v. Hamilton*, 50 Cal. 422, the supreme court of California held, if the complaint in an action to compel the defendant to make a conveyance of real estate alleges facts which show that the plaintiff has the legal title already, upon which he may recover in ejectment, the complaint contains no equity. This seems to be the case at bar. Plaintiff has a legal title, if any, as it appears from the allegations in the bill, which is prior to that of defendants, and would avail it in an action of ejectment. If the court should decree defendants to convey to plaintiff their title to the premises in controversy, would it supply the place of the patent which plaintiff is entitled to from the United States? The functions of a patent to land conveyed by legislative act is thus stated in the case of *Railroad Co. v. Price Co.*, 133 U. S. 510, 10 Sup. Ct. Rep. 341:

"The subsequent issue of the patent by the United States was not essential to the right of the company to those parcels, although in many respects they would have been of great service to it. They would have served to identify the land as coterminous with the road completed. They would have been evidence that the grantee had complied with the conditions of the grant, and to that extent that the grant was relieved of possibility of forfeiture for breach of them. They would have obviated the necessity of any other evidence of the grantee's right to the lands, and they would have been evidence that the lands were subject to the disposal of the railroad company with the consent of the government. They would have been in these respects deeds of further assurance of the patentee's title, and therefore a source of quiet and peace to it in its possessions."

This was the same language used in *Denny v. Dodson*, 13 Sawy. 68, 32 Fed. Rep. 899, where the very grant under consideration was interpreted, and in which case it was held that plaintiff had a legal title to

the lands embraced within its grant. Now, the land-officers of the United States did not consider in issuing a patent to defendants that the plaintiff had complied with the conditions of its grant. They did not consider the title of the Northern Pacific Railroad Company, and the patent issued to them would be no evidence of a confirmation of that grant; and, if the patent to defendants did not determine these questions, a conveyance from defendants to them would not. Whether or not the plaintiff complied with the conditions of its grant cannot be determined in this action. Where a grant is a public grant of the nature of the one to plaintiff, it can be forfeited only by the government making the grant by judicial or legislative proceedings. *Denny v. Dodson, supra; Schulenberg v. Harriman*, 21 Wall. 62; *Railway Co. v. McGee*, 115 U. S. 473, 6 Sup. Ct. Rep. 123. It is evident, therefore, if the court should decree that defendants should convey to plaintiff their title, if any, to said premises, this conveyance would not place plaintiff in any better condition than now, if it has the legal title to the premises. It would not give the plaintiff a conveyance which would have the effect a patent to said lands would. For these reasons I do not think the bill shows sufficient equity to entitle plaintiff to the special relief asked, and upon the one ground above set forth specified in the demurrer the same is sustained.

NORTHERN PAC. R. CO. v. SANDERS *et al.*

(Circuit Court, D. Montana. April 16, 1891.)

1. LAND GRANT—NORTHERN PACIFIC RAILROAD—CONSTRUCTION.

The provision of the Northern Pacific Railroad Company's grant of public lands, that "the president of the United States shall cause the lands to be surveyed for forty miles on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad, and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company, as provided in this act," will not be construed as withdrawing the lands within the limits indicated from sale or entry until the line of the road was definitely fixed by filing a map thereof with the commissioner of the general land-office, as required by the statute.

2. SAME—PENDING CLAIMS THERETO.

The grant to the Northern Pacific Railroad Company of certain specified lands along the line thereof whenever "the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land-office," will not be held to include lands which had been entered as mining claims, and the applications for patents to which were pending when the plat of the road was filed, although the lands were subsequently declared to be agricultural, and the entries held invalid.

At Law. On demurrer to answer.

F. M. Dudley, for plaintiff.

Adkinson & Miller and W. F. Sanders, for defendants.

KNOWLES, J. The complaint in this case sets forth a cause of action in the nature of ejectment to recover the possession of section 21, in

township 10 north, range 3 west, in Lewis and Clarke county, Mont. In it enough is set forth to show that plaintiff received from the United States a grant of 20 alternate sections of land per mile on each side of its road in Montana as definitely fixed. This land was to be such as at the time plaintiff's road should be definitely fixed and a plat thereof filed in the office of the commissioner of the general land-office the United States had full title to, and which was not reserved, sold, granted, or otherwise appropriated, and was free from pre-emption or other claims or rights. It is set forth that the land is non-mineral, and an alternate section within the limits of said grant agricultural in character, and was on the 6th day of July, 1882, public land to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights. The answer admits that the land is non-mineral; that defendants have entered upon said premises, and are now withholding the possession thereof from plaintiff; and then denies the allegations of the complaint that the said land was public land to which the United States had full title and was free from pre-emption or other claims or rights not reserved, sold, granted, or otherwise appropriated at the time the route of plaintiff's road was definitely fixed and a plat thereof filed in the office of the commissioner of the general land-office by setting up affirmatively (1) that on the 2d day of August, 1880, Theodore H. Kleinschmidt, Edward W. Knight, and six others located under the mining laws of the United States and the laws of the territory of Montana, as eight distinct mining claims, the north-east quarter of said section 21; (2) that on the 12th day of August, 1880, George P. Reeves, Helen H. Reeves, and six others located under the mining laws of the United States and the laws of the territory of Montana, as eight distinct mining claims, the north-west quarter of said section 21; (3) that on the 19th day of February, 1881, Theodore H. Kleinschmidt, Henry M. Parchen, and six others located under the mining laws of the United States and the laws of the territory of Montana, as eight separate mining claims, the south-west quarter of said section 21; (4) that on the 13th day of March, 1880, Cornelius Hedges, Thomas A. H. Hay, and six others located according to the mineral laws of the United States and the laws of the territory of Montana, as eight separate mining claims, the south-east quarter of said section 21; that each of the locators above named were citizens of the United States; that afterwards the above-named parties made application to patent said lands as mineral in the United States land-office at Helena, Mont., and for this purpose filed all the necessary affidavits and notices and proofs required in such cases; that afterwards plaintiff in this case protested against the issuing of patents to said parties on the ground that the same was non-mineral in character, and not subject to be patented as mineral land; that on account of this protest a contest was inaugurated in said land-office as to the right of said parties to a patent for said premises; that said contest existed and was pending on the 6th day of July, 1882, when the line of plaintiff's road was definitely fixed opposite to said land, and a plat thereof filed in the office of the commissioner of the general land-office.

To this answer plaintiff filed its demurrer, setting forth that the answer does not state facts sufficient to constitute a defense to the cause of action set up in the complaint. This brings up for consideration the question whether or not a mining location made according to law upon an odd section of land within the limits of the Northern Pacific Railroad Company's grant, and an application made by the locators thereof to patent such claim in the United States land-office as mineral land, and claiming the same to be such, and filing all the necessary proofs of location, mineral character, and work accompanying such application as is required by law and the rules of the land department, and which is pending, and a contest in regard to the right of said parties to patent the same is existing in the United States land-office at the time the railroad of said company was definitely fixed, is sufficient to take such land out of such grant, although admitted now to have been non-mineral in character, and hence not subject to be located or patented as mineral land. That portion of the act making the land grant to the Northern Pacific Railroad Company, which bears upon this point, is as follows:

"There be and is hereby granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph lines to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of said railway, every alternate section of public land not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line as said company may adopt through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land-office."

It is urged by defendants that it sufficiently appears from their answer that at the time plaintiff's road was definitely fixed a claim had attached to this land which excepted it from plaintiff's grant. Plaintiff urges (1) that at the time of the location of this land as mining claims no claims could attach to this land, because the same was at that time withdrawn from settlement or sale by virtue of section 6 of the act above referred to, as within 40 miles of the general route of its road as located in 1872; (2) that, considering there was this claim, it was not a valid claim, as it is admitted it was for mineral purposes upon agricultural land. Several cases were cited by plaintiff in support of its first proposition, which I do not feel called upon to review, because I have found no railroad grants to other railroad companies which correspond in all particulars with that of plaintiff upon that point. The section of the act of congress in which is found plaintiff's grant, which it is claimed withdraws this land entirely from market after the general route of plaintiff's road was located, is as follows:

"The president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the
v.46F.no.4—16

general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company, as provided in this act."

The provisions corresponding to this in the act granting to the Union Pacific Railroad Company their land is found in section 7 of that act, and is as follows:

"That within two years after the passage of this act said company shall designate the general route of said road as near as may be, and shall file a map of the same in the department of the interior, whereupon the secretary of the interior shall cause the land within fifteen miles of said designated route to be withdrawn from pre-emption, private entry, and sale; and when any portion of said route shall be finally located the secretary of the interior shall cause the said lands hereinbefore granted to be surveyed, and set off as fast as may be necessary for the purposes herein named." See 12 St. U. S. 493.

This act was so amended as to make "fifteen" in this section read "twenty." 13 Id. 358. It will be seen by an examination of this section as amended that all lands, whether odd or even numbered sections, for 20 miles on each side of the general route of said company's road, are withdrawn from pre-emption, private entry, and sale at the time of the fixing of the general route of that company's railroad, without any reference as to whether they are granted lands or not. The Central Pacific Railroad Company's grant is the same as the Union Pacific Railroad Company's, and subject to the same limitations. There is no doubt about the provisions of the Union Pacific Railroad and Central Pacific Railroad act requiring all lands, whether granted or not, to be withdrawn at the time the general route of the road is fixed within the limits of its grant. The act making the land grant to the Atlantic & Pacific Railroad Company, which is the same as the grant to the Southern Pacific Railroad Company, is also materially different from that of the act making plaintiff's grant. The section in the act making the grant is the third, and is as follows:

"That there be and is hereby granted to the Atlantic & Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway and its branches, every alternate section of public land not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line as said company may adopt through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof filed in the office of the commissioner of the general land-office." 14 St. U. S. 294.

It will be seen by a comparison of this grant with that of plaintiff's that in the former the grant takes effect when the line of the road is designated by the filing of the plat thereof in the office named; in the lat-

ter, only when the line is definitely fixed, and a plat thereof filed in the proper office. I do not see but that in the former a plat designating the general route of that road, filed in the proper office, would cause the grant to become fixed, while in the latter the definite route has to be fixed. The provision in the Atlantic & Pacific Railroad Company's grant, which is similar to that of the sixth section in plaintiff's grant, and withdraws lands along the route of that road from sale, is as follows:

"That the president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad, and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company, as provided by this act."

If I understand the case of *Railway Co. v. Orton*, 32 Fed. Rep. 458, the position is that the filing a plat designating even the general route of that company's road fixed the grant, and the law withdrawing the lands granted took effect. The decisions upon the construction of that grant, then, upon this point,—and certainly those that pertain to the Union and Central Pacific Railroad Companies,—do not apply in this case. They are not even analogous upon this point. Plaintiff, however, calls the attention of the court with a considerable confidence to the cases of *Buttz v. Railroad Co.*, 119 U. S. 55, 7 Sup. Ct. Rep. 100, and *Denny v. Dodson*, 13 Sawy. 68, 32 Fed. Rep. 899, upon this point. It cannot be denied that there is language in both cases which supports plaintiff's view; but in the first case, at least, the language used was not necessary to the decision of the question at issue. In the first case it appears from the statement of facts that one Peronto, under whom, I suppose, plaintiff Buttz claimed, settled upon the land in dispute on the 5th day of October, 1871, while the land was situate in the Indian country. The United States statutes prohibits any settlement upon land in the Indian country. Peronto was, then, a trespasser there. On either June 19, 1873, or June 22, 1874, the Indian title was extinguished by treaty with the United States, and Peronto was found upon the land at that time. But on the 26th day of May, 1873, some 25 days before, in any event, the Indian title was extinguished, the Northern Pacific Railroad Company filed with the commissioner of the general land-office a plat of the route of their road as definitely fixed across the country upon such a line as would include the land Peronto had settled upon within its grant. The court held that, notwithstanding this Indian title of occupancy, the grant to plaintiff took effect upon the filing of this plat. As the said Peronto or Buttz had no settlement which could be at all recognized in law, up to this time the grant of the railroad company was prior to any rights that either could claim. There could be no doubt but when that grant gained precision by the definite fixing of the route of plaintiff's road the land in controversy in that case was withdrawn from sale or homestead rights, or any other rights that could attach to the same subsequent to that definite fixing of the line of plaintiff's road—*First*, because it had

already been sold to plaintiff; and, *second*, because at that time, by virtue of the provisions of section 6, it was excluded from sale or pre-emption or homestead settlement because the permanent route of the road had been fixed. It appears, however, that the general route of the road of plaintiff was fixed and a plat thereof filed on the 21st day of February, 1872, some four months after Peronto's settlement. The court proceeds to say that this act withdrew the land from the market. It had not reached that condition when it was in the market at that time. The statute preventing settlement upon it as within the Indian country prevented it. When it had, the definite route of the road had been fixed, and there was no function for the provisions of section 6 to perform before that time, considering that it is liable to the interpretation given it by the court. As to the interpretation of section 6 the very eminent jurist who delivered the opinion said:

"When the general route is thus fixed in good faith, and information thereof given to the land department by filing a map thereof with the secretary of the interior, the law withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side."

It will be seen here that he makes the withdrawal of the land from sale, etc., to depend upon the filing of the map of the general route with the secretary of the interior. The law does not authorize the filing of any such map in plaintiff's grant. It does not say the withdrawal shall take effect upon the filing of any such map. In the act making the grant to the Union and Central Pacific Railway Companies there is a provision for filing such a map, and the withdrawal of all the land from market within the limits of the grant to these companies. The general language of the opinion would also indicate that it was the opinion of the court that section 6 of plaintiff's grant would withdraw all odd sections of land from the market, whether mineral or not, or whether homestead or pre-emption claims had attached to the same or not prior to the designating this general route. That certainly was not contemplated. It would appear that the eminent jurist in writing that opinion had in mind more the bearing of the provisions of the act making grants to the Union Pacific and Central Pacific Railway Companies, with which he was undoubtedly very familiar, than the act making plaintiff's grant, for he makes no difference hardly in the provisions of these two acts, except as to the extent of the grant, while upon this point, as I have shown, they are very dissimilar. I think this is a proper case in which to apply the rule expressed by Chief Justice MARSHALL as to the authority of a decision in the case of *Cohens v. Virginia*, 6 Wheat. 399. In that case, speaking for the supreme court, he said:

"It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which these opinions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for discussion."

See, also, *Barney v. Railroad Co.*, 117 U.S. 228-231, 6 Sup. Ct. Rep. 654. I do not believe there was any demand for a construction of sec-

tion 6 in plaintiff's grant in the case of *Buttz v. Railroad Co.*, in connection with the filing of a map of the general route of its road, and hence the construction made is not binding in this case. In the case of *Denny v. Dodson*, *supra*, the plaintiff brought an action of ejectment, and in setting up his cause of action stated facts sufficient to show the grant of the land in dispute to the Northern Pacific Railroad Company, under whom he claimed; and then undertook to set forth facts to show that the land named in that case did not come within any of the limitations specified in plaintiff's grant, such as that the same was land to which the United States had full title not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of the road was definitely fixed and a plat thereof filed in the office of the commissioner of the general land-office. While it may be doubted whether the plaintiff was required to allege and prove these facts, they being facts the principal purpose of which would be to negative any defense that might be presented to plaintiff's cause of action in that case, nevertheless, if required to be alleged, they should have been alleged directly, and not facts which by inference would show that this was true. It is an established maxim that material issuable facts as they exist should be alleged, and not facts from which such facts may be inferred. Pom. Rem. & Rem. Rights, §§ 517, 532; *Stringer v. Davis*, 30 Cal. 318. But instead of averring the facts which showed that the land was not within any exception to plaintiff's grant directly, plaintiff alleges that at the time of the establishment of the general route on the 13th day of August, 1870, the land was public land not mineral, and not reserved, sold, granted, or occupied by homestead or other settlers, or otherwise disposed of or located upon, and was free from pre-emption or other claims or rights. It seems to have been considered, if the lands were withdrawn from the market at that time, and this land was not then within any of the exceptions in plaintiff's grant, no such claim which could create such an exception could arise after that time; hence this was equivalent to an allegation that no claims creating such an exception could have existed at the time the line of the road was definitely fixed, and a plat thereof filed in the office of the commissioner of the general land-office. I submit that this result is reached only by an inference, or arises from an argument on the facts alleged; and this is not good pleading. But the eminent jurist thought this was equivalent to the other; and stated that, after the date of the establishment of the general route, it precluded any town-site, pre-emption, or entry on such land, and said: "The law thus withdraws the land granted from sale and entry or pre-emption from the time the general route is fixed." To me this decision upon this point is unsatisfactory, and this court is not precluded by it. In looking at section 6 I find no authority for the assertion that any lands were to be withdrawn from market on the sides of the general route of the road of plaintiff when established. The section does not say so. It says the lands granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company. The establishing of the general route of the road could not

determine what were the lands granted. These were determined by the fixed route of the road. The section does not say they shall be withdrawn at the time of the fixing of the general route of the road. If it should be so interpreted, then we have lands withdrawn from market which are not identified, and which may be many miles outside of the 40-mile limit on each side of the general route of the road, for the fixed route of the road may be a long distance from the general route thereof. Such facts have occurred in connection with plaintiff's road in Montana. The general route of plaintiff's road as located in 1872 extended down the Gallatin river up the Jefferson and Big Hole rivers, to a point south of the Deer Lodge pass in the Rocky mountains; thence through that pass and down the Deer Lodge river to its present route at Garrison. At points in this general route upon a north and south line it was near 100 miles south of the fixed route of plaintiff's road near Helena, Mont. There are several places in Montana where the fixed route and the general route of plaintiff's road materially differ. By the terms of plaintiff's grant in section 3 lands in odd sections within 40 miles north of the fixed route of plaintiff's road near said city of Helena, are within it; they are part of the lands granted to the plaintiff, and it has asserted title to the same. Many of them were not within the 40-mile limit on each side of said general route. Yet, if the construction contended for of said section 6 is correct, these lands were withdrawn from market in 1872. Lands which have been sold by the United States upon odd sections were withdrawn because they were upon odd sections granted. It is admitted, and there can be no contention on the point in the light of judicial decisions but that the law withdrew the lands granted from the market, and they were not withdrawn by any order of the secretary of the interior. By his order lands near 150 miles south of the fixed line of plaintiff's road were sought to be withdrawn from market, although it cannot now be contended they were within the limits of plaintiff's grant, or granted to it by any construction of the law. It cannot, I think, be contended that part of the lands on the line of plaintiff's road which were granted to it were withdrawn from market by the provisions of section 6, and part not. In my judgment, if one section granted was withdrawn when the general route of the road was fixed, then all such lands were withdrawn. I think there is enough dispute about the construction of section 6 to drive us to the established rules for construing legislative grants in considering the same. Rights were given plaintiff in this section. In construing legislative grants they are to be construed against the grantee and in favor of the grantor. 3 Washb. Real Prop. (4th Ed.) 190. "The rule of construction in all such cases is now fully established to be this: That any ambiguity in terms of the contract must operate against the adventurers and in favor of the public, and the plaintiff can claim nothing that is not clearly given in the act." *Proprietors v. Wheeley*, 2 Barn. & Adol. 793. This rule is fully approved by the supreme court in the case of *Charles River Bridge v. Warren Bridge*, 11 Pet. 420. In the case of *Railroad Co. v. Litchfield*, 23 How. 66, the supreme court said:

"All grants of this description are construed against the grantee. Nothing passes but what is conveyed in clear and explicit language; and, as the rights here claimed are derived entirely from the act of congress, the donation stands on the same footing as a grant by the public to a private company, the terms of which must be plainly expressed in the statute, and, if not thus expressed, they cannot be implied."

To the same effect are the cases of *Rice v. Railroad Co.*, 1 Black, 360; *Railroad Co. v. U. S.*, 92 U. S. 733. The reason of this rule is thus expressed in *Gildart v. Gladstone*, 11 East, 675:

"The reason of this rule is obvious. Parties seeking grants for private purposes usually draw the bills making them. If they do not make the language explicit and clear to pass everything that is intended to be passed, it is their own fault; while, on the other hand, such a construction has a tendency to prevent parties from inserting ambiguous language for the purpose of taking by ingenious interpretation and insinuation that which cannot be obtained by plain and express terms."

This language was quoted and approved by the supreme court in the case of *Railroad Co. v. Litchfield*, *supra*. If it is said this is a law, and we must be governed by the intention of the law-making power, the answer is that in construing such a law the intention should be formed from the terms used and the subject-matter under consideration, and it should be recognized that it makes a grant of land. In the case of *Railroad Co. v. U. S.*, *supra*, the supreme court, in speaking of a land grant made in 1863 (the year before the plaintiff's grant) to the state of Kansas, said:

"Formerly lands which would probably be affected by a grant were, as soon as it was made, if not in advance of it, withdrawn from market. But experience proved that this practice retarded settlement of the country, and at the date of this act the rule was not to withdraw them until the road should be actually located. In this way the ordinary working of the land system was not disturbed. Private entries, pre-emption, and homestead settlements, and reservations for special uses, continued within the supposed limits of the grant the same as if it had not been made; but they ceased when the routes of the roads were definitely fixed."

We learn from this the state of mind congress was in upon this subject. The great body of the country on the proposed route of plaintiff's road at the time of the grant was Indian country, to which the Indian title of occupancy was not extinguished. But very few of the lands along this route had been surveyed. Yet most of the country was accessible. It could hardly have been contemplated that it would be 18 years after the grant was made before the fixed route of that road would be established in Montana. It was very uncertain from the nature of the country what would be the fixed route of that road. The determination of this fixed route would give precision to the grant made plaintiff, and furnish a *data* for determining what lands had been granted. Can it be supposed that congress intended, 10 years before the fixed route of plaintiff's road was established, to withdraw the lands granted to plaintiff from market, and leave it to subsequent explorations and surveys to determine what would be the lands granted? Upon such lands, during the time of these explorations and surveys, homes might be established

and cities built. But it is said they were notified what these lands were by the establishing of the general route. As I have stated before, there are lands confessedly within plaintiff's grant which were not within the 40-miles limit on the line of the general route of plaintiff's road as established in 1872, and there are lands within it which were not granted to plaintiff. There might have been much more land of that character if some of the routes said to have been examined by that company had been finally adopted. As to what were the lands granted plaintiff, and when the grant attached to specific lands, we have a guide in the case of *Railway Co. v. Dunmeyer*, 113 U. S. 629, 5 Sup. Ct. Rep. 566, which interpreted the third section in the Union Pacific Railroad Company's grant, which is almost identical with the same section in plaintiff's grant. See 12 St. U. S. 492. In that case, speaking through the distinguished Justice MILLER, the court said:

"The land granted by congress was from its very character and surroundings uncertain in many respects until the thing was done which should remove that uncertainty and give precision to the grant. Wherever the road might go the grant was limited originally to five sections, and by the amendment of 1864 to ten sections, on each side of it within the limits of twenty miles. These were to be odd-numbered sections, so that the even-numbered did not pass by the grant; and these odd-numbered were to be those not sold, reserved, disposed of by the United States, and to which a pre-emption or homestead right had not attached at the time the line of said road is definitely fixed. When the line was fixed,—which we have already said was by the act of filing this map of definite location in the general land-office,—then the criterion was established by which the lands to which the road had a right were to be determined. Topographically this determined which were the ten odd sections on each side of that line where the surveys had been made. This filing the map of definite location furnished also the means of determining what lands had previously to that moment been sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim had attached, for by examining the plat of this land in the office of the register and receiver or in the general land-office it could readily have been seen if any of the odd sections within ten miles of the line had been sold or disposed of or reserved or a homestead or pre-emption claim had attached to any of them. In regard to all such sections they were not granted. The express and unequivocal language of the statute is that the odd sections not in this condition are granted. The grant is limited by its clear meaning to the other odd sections, and not these."

We have here a clear assertion that what lands are granted are only determined when the line of the road is definitely fixed. In quite a number of decisions by the supreme court it is said of such grants as the one under consideration they are in the nature of floats. When the route of the road is fixed which the law defines shall fix the grant then it takes precision, and attaches to certain specific lands. *Schulenberg v. Harriman*, 21 Wall. 60; *Railroad Co. v. U. S.*, 92 U. S. 741; *Railroad Co. v. Price Co.*, 133 U. S. 509, 10 Sup. Ct. Rep. 341. Can it be that congress intended to say in the act granting lands to plaintiff that, although it will not be known until plaintiff designates a fixed line for its road and files its map thereof in the office of the commissioner of the general land-office, what specific lands are granted to it, yet these lands

granted, as in this case, are to be withdrawn from market 10 years or more before it is known what they are and where situate? This construction would make the intention of congress unreasonable, which should never be maintained until there is no escape. A reasonable intent should always be presumed. The construction urged would make the statute about as unreasonable as one which doomed a man to capital punishment 10 years before he was born. Taking into consideration all these facts, and I do not think section 6 should be so construed as to withdraw any land from market until the line of plaintiff's road should be definitely fixed opposite the same, and a plat thereof filed with the commissioner of the general land-office, when the situation of such lands would be known.

But let it be admitted that the land granted was withdrawn from market at the time of the filing of the plat of the general route of plaintiff's road. Then the question arises what are the lands granted? The act does not say "every odd section within forty miles of such general route," but "public lands not sold, reserved, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the route is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land-office." This brings us back to the same point as the construction contended for. The land granted must at this time be free from a claim, or it is not land granted. Hence I hold that the premises in dispute were subject to be entered upon and a claim inaugurated at any time before the definite line of plaintiff's road was fixed and the plat thereof filed in the proper office.

The next question is as to whether the claim made upon these lands would avail if not a valid claim. The premises being agricultural, no valid claim of them for mining purposes could be made. The language for consideration here in the act making the grant to plaintiff is: "Shall be free from pre-emption or other claims or rights." What, in effect, the court is asked to do in construing this clause is to insert before "claims" the word "valid," so the clause would read "free from pre-emption or other valid claims or rights." Can the court do this? In the case of *Newhall v. Sanger*, 92 U. S. 761, the supreme court was called upon to construe a statute of the United States in which the words "lands claimed under any foreign grant or title" occurred. The position taken in that case was that the word "lawfully" should be placed before "claimed." But the court said there is no authority to import a word into a statute in order to change its meaning. In the case of *Railroad Co. v. U. S.*, *supra*, the supreme court quoted with approval this language of PATTERSON, J., in *Rex v. Burrell*, 12 Adol. & E. 465:

"I see the necessity of not importing into statutes words which are not found there. Such a mode of interpretation only gives occasion to endless difficulty."

And then said:

"Courts have always treated the subject in the same way when asked to supply words in order to give a statute a particular meaning which it would not bear without them."

The word "valid" or "lawful," placed before "claims," would give the statute a different meaning from what it has without them. If they would not, plaintiff would not ask to have one or the other placed there. Here again the rule applies as to the construction of legislative grants. Nothing passes by such but what is conveyed in the act making the grant in clear and unambiguous terms. Such a grant must be construed most strongly against the grantee. Nothing is supplied by implication. There is another matter in this connection worthy of much consideration. If only lands which are free from valid or lawful claims at the date plaintiff fixed the definite line of its road are to be excluded from the grant, then the question is left open for consideration between plaintiff and any person who may have had a claim upon any odd section of land within its grant, the assertion of claim to which occurred since the act making the grant; for it can hardly be maintained that plaintiff would be bound by any determination as to the validity or lawfulness of a claim made by the land department which is junior to the grant to it. When the route of plaintiff's road was definitely fixed its grant to the lands received by it would relate back to the date of the act making the grant, and take effect as of that date. This, in substance, is the language of many decisions in construing similar grants. Under these conditions plaintiff could inquire into every claim which had its inception subject to the date of its grant, whether patented or not, and have it determined as to whether it was valid or not. The point as to whether a homestead claim had attached to a parcel of land within the limits of the grant to the Kansas & Pacific Railway Company was considered by the supreme court in a case where that company was plaintiff and Dunmeyer was defendant, which was cited *supra*. In that case the court said:

"It is not conceivable that congress intended to place these parties as contestants for the land, with the right in each to require proof from the other of complete performance of its obligation. Least of all is it to be supposed that it was intended to raise up in antagonism to all actual settlers on the soil when it had invited to its occupation this great corporation with an intent to defeat their claims, and to come between them and the government as to the performance of their obligations."

I do not see why this language is not as applicable to a party asserting a right to a mining claim as to one asserting a right to a homestead claim; and, if so, I might say it is inconceivable that congress intended to give to plaintiff the right to test the validity of every mining claim which existed within 40 miles of the line of its road at the time the same was definitely fixed. Under such circumstances, public policy would dictate that the terms of limitation in plaintiff's grant should not be so modified as to permit such a condition of affairs. I think the facts presented show that the assertion of title by the parties who located the ground in dispute as mineral land should be dignified with the appellation of a "claim." I would not say that every assertion of title to land would be entitled to the term "claim." Perhaps acts sufficient should accompany the assertion of title to entitle the claimant to a stand-

ing in a court of justice to contest the right to possession of the premises; but I am not called upon in this case to determine more than that facts sufficient appear to show that the parties who had located this land in dispute as mineral had a claim thereon at the time the route of plaintiff's road was definitely fixed. The fact that it was determined subsequent to the fixing of such route that this claim was invalid would not restore the premises to plaintiff's grant. It was excluded therefrom. This was fully considered in the case of *Railway Co. v. Dunmeyer*, *supra*. For these reasons the demurrer to the answer is overruled.

CAHALAN v. McTAGUE.

(Circuit Court, D. Montana. April 20, 1891.)

1. PUBLIC LANDS—RAILROAD GRANTS.

The fact that public land is in the possession of a settler, who is living on it, without complying with either the pre-emption or the homestead law at the time the land is included in a grant to a railroad company, does not keep it from being public land not reserved, sold, granted, or otherwise appropriated.

2. SAME—PRE-EMPTION.

Right of pre-emption cannot be acquired by forcibly intruding upon land in the possession of one who has settled upon, improved, and inclosed it. *Following Atherton v. Fowler*, 96 U. S. 513.

At Law. On demurrer to answer.

Cullen, Sanders & Shelton, for plaintiff.

Word & Smith, for defendant.

KNOWLES, J. The plaintiff sets forth in his complaint facts sufficient to show that the Northern Pacific Railroad Company received from the United States a grant to the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, and the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 11 in township 13 N., of range 12 W. of the principal meridian for Montana, situate in Deer Lodge county, territory (now state) of Montana; that plaintiff purchased said premises from said railroad company, and was in the actual possession of said premises, when, on the 21st day of March, 1889, defendant entered upon the same, and took possession thereof, without plaintiff's consent, and now withholds possession thereof from plaintiff. Defendant sets forth in his answer to said complaint that in the month of September, 1871, one Louis B. Barthelotte, with his family, settled upon the premises in dispute, and occupied and improved the same as a home, and with his family continued to reside and live upon said land, and to cultivate the same, and on the 13th day of June, 1878, made application at the United States land-office at Helena, Mont., to enter the said land under the laws of the United States; that said application was allowed by the United States land-office; that said Barthelotte and his grantees remained upon, occupied, used, and enjoyed said land as a home, and were in the use, occupation, and enjoyment, and possession of said land on the 6th day of July, 1882, at which time the Northern Pacific Rail-

road Company filed its map and location of its line of its road, as definitely fixed, in the office of the commissioner of the general land-office, and on said date the land was in the absolute possession and under the control of the said Louis B. Barthelotte and his grantees, occupied as a home. But it is further alleged that on the 29th day of July, 1880, the said Barthelotte sold his right, title, and interest in and to the improvements on said land to Pat Cahalan, a citizen of the United States, and the said Cahalan then and there went into the possession of said land and held it until the 21st day of March, 1889, when defendant entered into possession of the same, and filed his declaratory statement, and made his pre-emption entry, upon said land, and that he is using, occupying, and holding possession thereof. It is also alleged that the Northern Pacific Railroad Company filed a map of its general route, in the proper office, in the month of February, 1872, and it would appear that said land was surveyed in 1872. The plaintiff demurred to this answer, on the ground that it did not state facts sufficient to constitute a defense to plaintiff's cause of action as set forth in his complaint. This presents to the court for consideration the question as to whether the premises in dispute under the allegations in the answer were public lands not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of the said Northern Pacific Railroad Company's railroad was definitely fixed and a plat thereof filed in the office of the commissioner of the general land-office, which act, it appears, was performed on the 6th day of July, 1882.

The answer is somewhat confusing in its allegations. In one part of the same it is set forth that the said Barthelotte and his grantees were in possession of said premises on the 6th day of July, 1882, when the line of said railroad was definitely fixed, and the map thereof filed in the proper office; and in another part of the same it sets forth that on the 29th day of July, 1880, said Barthelotte had sold his improvements to plaintiff, who then went into possession of said premises, and the whole thereof. In the first part of the answer the allegations would bear the construction that Barthelotte and his grantees were in the joint occupation of said premises on July 6, 1882; and in the latter part it fully appears that only Cahalan was in the sole possession of them at that time, and that in 1880 Barthelotte had relinquished all claim to pre-empt said land. This presents a very different phase to this contest. I think defendant must be held to the latter allegations; that in this particular the allegations of the answer must be construed most strongly against him. No liberal construction of them could place defendant in any different light. I must consider that Cahalan was in the sole possession of said land on July 6, 1882, and Barthelotte had relinquished all claim to purchase the premises from the United States. It does not appear that Cahalan, after he went into possession of said premises, sought to pre-empt, or make a homestead entry on the same. He was simply occupying the premises at the date of the definite fixing of the line of said company's road, and can be considered nothing but a squatter thereon, with no definite purposes in regard thereto at that time. Subsequently he purchased of said company its right to said

land. The occupation of said land, alone, by Cahalan would not be a pre-emption claim or a homestead claim, and it is not suggested what other claim or right it would be. A person who enters upon the land of the United States without any purpose of obtaining title from the United States in accordance with federal laws has no lawful right to be there. In fact, as against the United States he is a trespasser. And this purpose of obtaining title from the United States should be manifested by some acts, or a reasonable excuse for not proceeding under the statutes of the general government should be presented. As this land was surveyed, and had been for 10 years, there appears to have been no reason why Cahalan did not initiate some proceedings to obtain title to it. It was decided by this court at this term, in the case of *Railroad Co. v. Sanders*, 46 Fed. Rep. 239, that the filing of the plat of the general route of the Northern Pacific Railroad had no bearing upon the question of the grant of land to that company, and that we must look to the condition of the land within the limits of that grant at the time the line of its railroad was definitely fixed in determining what was granted to it. The settlement of Barthelotte upon the land at the time of the establishing of the general route of that road commands no consideration. Looking at the land in dispute when the line of that road was definitely fixed, I cannot see that it appears that said land was otherwise than public land not sold, reserved, or otherwise appropriated, and free from pre-emption or other claims or rights. It was then subject to the grant of said railroad company. Plaintiff is the successor of said company, and has all the right of said company to said land, which would appear to be a title in fee, and was so held to be by this court, at this term, in the case of *Railroad Co. v. Cannon*, 46 Fed. Rep. 237. It appears in plaintiff's complaint that defendant, without plaintiff's consent, entered upon said premises, and took possession thereof. In one part of the answer it is stated that Cahalan, on the 29th day of July, 1880, went into possession of said premises, and used, occupied, enjoyed, and possessed the same, and the whole thereof, up to the 21st day of March, 1889; and in the closing part of said answer there is a denial that plaintiff or the Northern Pacific Railroad Company were either in the possession of said premises, or any part thereof, at any time. These are inconsistent averments; and here again I think the pleading must be construed most strongly against the defendant, and the former of these allegations must be taken as true for the purposes of the demurrer. It is hardly proper, in a sworn answer, as this is, to make such inconsistent allegations. Considering, then, that plaintiff was in possession of the premises, and the defendant without his consent went into the possession of the same, and ousted plaintiff therefrom, and we have a case within the rule expressed in *Atherton v. Fowler*, 96 U. S. 513. In that case the court held that no pre-emption right could be initiated by a settlement and improvement on a tract of public land where the claimant forcibly intruded upon the possession of one who had already settled upon, improved, and inclosed that tract. For the reasons above assigned the demurrer to the answer of defendant is hereby sustained.

NORTHERN PAC. R. CO. v. MEADOWS.

(Circuit Court, D. Montana. April 13, 1891.)

RAILROAD GRANTS—PRE-EMPTION CLAIM—ABANDONMENT.

In an action in the nature of ejectment by a railroad company claiming under a legislative grant on conditions subsequently fulfilled, a complaint, otherwise setting forth a good cause of action, is not rendered demurrable by the allegations that on a certain day, 14 years before the fulfillment of said conditions, one G. filed a declaratory statement, wherein he alleged settlement on and made pre-emption claim to the lands in controversy, but that said G. did not then or at any time make settlement on said lands, and that until subsequent to the time plaintiff claimed to have fulfilled its conditions no other entry or filing was made on the land, as, if these facts showed that a pre-emption claim had existed, it should be considered to have been abandoned.

At Law. Opinion on demurrer to complaint.

F. M. Dudley, Cullen, Sanders & Shelton, for plaintiff.

Adkinson & Miller, for defendant.

KNOWLES, J. This is an action in the nature of ejectment, brought by plaintiff to recover the possession of the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 17, township 10 N., range 3 W. of the principal meridian for Montana, situate in Lewis and Clarke county, said state. Plaintiff sets forth in its complaint facts sufficient to show that it received from the United States a grant of every alternate section of land within 40 miles of the definite line of its railroad on each side thereof; said sections to be odd in number, not mineral, to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road should be definitely fixed, and a plat thereof filed in the office of the commissioner of the general land-office. It also shows that the land in controversy is a portion of an odd section within the limits of said grant, not mineral in character, and that the same was public land, to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of plaintiff's road was definitely fixed, and a plat thereof filed in the proper office; that the date when said line was definitely fixed and the plat thereof filed was on the 6th day of July, 1882. Plaintiff further sets forth that on the 27th day of November, 1868, one Jerome S. Glick filed in the United States district land-office for the district of Helena a declaratory statement under the provisions of the laws of the United States granting pre-emption rights to settlers upon the public domain, wherein he alleged settlement as of said November 27, 1868, upon, and made pre-emption claim to, the W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, and the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, of said section 17. But plaintiff alleges upon information and belief that said Glick did not on said day or at any time make settlement upon said land, or any portion thereof, and did not at any time inhabit or improve the same, or erect a dwelling thereon; and that until subsequent

to said July 6, 1882, no other entry or filing was made upon said land in the United States land-office, but the same remained free and clear upon the records of said land-office, except for the claims of said plaintiff aforesaid. To this complaint the defendant filed a general demurrer, to the effect that the complaint does not state facts sufficient to constitute a cause of action. Much that is set forth in this complaint, it appears to me, was not required by good pleading. The allegations of the filing of a claim to pre-empt said premises in dispute by Glick, and then the facts which it is claimed show that the claim of said Glick was void, appear more as if plaintiff had attempted to set up the supposed defense of defendant, and then facts which show that there is no validity in this defense. What, undoubtedly, plaintiff had in view in these allegations was the showing that the land in dispute was not excepted from plaintiff's grant. There was no objection made to this mode of pleading, but, on the contrary, in the argument of the demurrer it seemed to be admitted that this was a proper mode of presenting the issues involved, and the very statements which appeared to me to be unnecessary to a statement of plaintiff's cause of action were seized upon as material allegations, which showed that plaintiff had no standing in court. I shall, then, consider the case as presented. In the case of *Railroad Co. v. Cannon*, 46 Fed. Rep. 237, (decided by this court at this term,) it was held that the title the plaintiff had to the lands granted it by congress was a legal title. In the case of *Railroad Co. v. Sanders*, 46 Fed. Rep. 239, (decided also by this court at this term,) it was held that plaintiff received title to such lands as were public lands, to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of plaintiff's railroad was definitely fixed, and a plat thereof filed in the office of the commissioner of the general land-office. The question presented in this case is as to whether the facts show that such a pre-emption claim had attached to the land in dispute as to bring it within the exceptions in plaintiff's grant. It should appear that such a claim existed at the time the permanent route was fixed. If any such claim had existed at any time I think at that time it should be considered as abandoned. A person who only files a claim to pre-empt land from the United States, and who for 10 years thereafter fails to make any settlement upon the same, or any improvements thereon, ought to be considered as having relinquished any claim he had ever made upon such property. I may say further I do not think the fact of making a filing alone of an application to pre-empt land, unaccompanied by any other acts, ought to be considered a pre-emption claim at all, as that term is understood in law. As I do not think plaintiff has stated sufficient facts to negative the good cause of action he has undoubtedly stated in other parts of his complaint, the demurrer will be overruled. It is therefore ordered that the demurrer of defendant be, and the same is hereby, overruled.

ARROWSMITH *v.* GLEASON *et al.*

(Circuit Court, N. D. Ohio, W. D. May 1, 1891.)

1. GUARDIAN AND WARD—PROBATE SALE.

Upon a bill in equity to set aside a sale by a guardian of a ward's lands under order of court, on the ground of fraud and collusion between the guardian and the purchaser, the federal court, as a court of equity, cannot sit in review to pass upon errors and irregularities in the proceedings of the probate court, but will confine itself to the issues as to whether the guardian acted fraudulently, and for his own benefit, and whether there was any collusion between him and the purchaser.

2. SAME—VACATING—EVIDENCE OF FRAUD.

Where a guardian, acting at the instance of his ward and of his ward's mother, who had a dower interest in the estate, procured an order of the probate court for the sale of real estate at its appraised value, made a sale, which was necessary to pay the ward's debt for board and lodging, and three years later, there being no further necessity therefor, and no new appraisement, made a further sale, and other sales of the balance later on, when there were still funds of the ward in his hands from the former sales and from other sources, such facts alone, in the absence of evidence of collusion with the purchaser, or of facts sufficient to put him on inquiry, or of any knowledge on his part of the condition of the ward's estate, will be insufficient to justify a court of equity in setting aside such sale, especially if it also appears that the price realized was the fair value of the land.

In Equity.

Henry Newbegin, Benj. B. Kingsbury, and Doyle, Scott & Lewis, for complainants.

Harris & Cameron and William C. Cochran, for defendants.

RICKS, J. On the 27th day of October, 1884, the complainant filed his bill in equity in this court against Edward H. Gleason and the administratrix, widow, and heirs at law of Frederick Harmening, deceased, seeking to have this court declare invalid certain deeds made by Edward H. Gleason, as guardian, to John F. Harmening, and asking an accounting in respect to the rents and profits of the lands so conveyed. A demurrer to said bill was filed by the defendants, which was heard in this court at its June term, 1885, before Judges WELKER and HAMMOND. The demurrer was sustained, and the bill dismissed, from which decree the complainants prayed an appeal to the supreme court of the United States, which appeal was heard at the October term, 1888, of said court. That court reversed the decree of this court, and remanded the case for further proceedings. 129 U. S. 86, 9 Sup. Ct. Rep. 237. In its decision the supreme court state fully and clearly the history of the transactions involved in this controversy, and so much thereof as is necessary to a clear understanding of the decision now about to be made is quoted:

"The case made by the bill is substantially as follows: The lands in controversy formerly belonged to John C. Arrowsmith, who died in 1869; his wife, and the plaintiff, his only child and heir at law, surviving him. On the 15th of July, 1869, Gleason petitioned said probate court to be appointed guardian of the estate of the plaintiff, then but six years of age. He applied to one Henry Hardy, a freeholder, to become surety upon his bond as guardian, in the penalty of \$5,000, which Hardy did, upon the express agreement that, before the bond was delivered, Gleason would procure another surety of equal responsibility. Gleason filed the bond in the probate court without obtaining

the signature of an additional surety. The bond contained no condition, except that, if Gleason 'shall faithfully discharge all his duties as guardian, then the above obligation is to be void; otherwise, to remain in full force.' Upon its being filed, an order was made appointing Gleason guardian of the plaintiff's estate, and letters of guardianship were issued to him. On the 22d of July, 1869, Gleason filed a petition in the probate court of Defiance county, representing that no personal estate of the ward had ever come to his possession or knowledge, and that there was no such estate dependent upon the settlement of the father's estate, or upon the execution of any trust; that his ward was the owner of the fee-simple of certain tracts of land in Defiance county, one being section thirty-six in that county, containing 640 acres, less a small strip, containing 6 25-100 acres, used and occupied by the Wabash, St. Louis & Pacific Railroad Company as way-ground, and others, aggregating 400 acres, and, in addition, a tract of about seven acres in Paulding county; that the ward was, also, the owner of the fee-simple by virtue of tax-titles of certain other described tracts of lands in Defiance county, aggregating nearly one thousand acres, all of which, the petition alleged, were wild lands, yielding no income; that he had received no rents whatever from any of the ward's real estate; that its sale was necessary for the maintenance and education of the ward, who was indebted for boarding and lodging in the sum of \$210; that there are no liens upon it, to his knowledge; and that the widow had a dower interest in said lands. The prayer of the petition was that the infant and widow be made defendants; that dower be set off to the latter; that the guardian be ordered to sell the real estate for the purposes above set forth; and that the petitioner have such other relief as was proper. The court ordered notice to be served upon the widow and infant of the hearing of the petition on the 10th day of August, 1869. Personal notice was given to the former, and the latter was notified by a written copy being left at the residence of his mother.

"The widow filed an answer in the probate court, waiving a formal assignment of dower by metes and bounds, and asking such sum out of the proceeds of sale, in lieu of dower, as was just and reasonable. On the 10th of August, 1869, the cause was heard, the probate court deciding that the real estate named therein should be sold. Thereupon appraisers were appointed to report its fair cash value. On the 17th of August, 1869, the probate court, without having taken any bond from the guardian, except the one above referred to, which was conditioned simply for the faithful discharge of his duties, made this order: 'It is therefore ordered by the court that the same [the report] be, and it is hereby, approved and confirmed; and the said Edward H. Gleason having upon his appointment as such guardian given bond with reference to the value and sale of the said real estate of his said ward, which bond is now adjudged to be sufficient for the purposes hereof, therefore the giving of additional bond is hereby dispensed with.' And on the 10th day of November, 1869, the following order of sale was entered in said cause: 'Said guardian is ordered to proceed to sell said lands, or any parcel thereof, at private sale, but at not less than the appraised value thereof, and upon the following terms: One-third cash in hand on the day of sale, one-third in one year, and one-third in two years, with interest, payable annually, and the deferred payments to be secured by mortgage on the premises sold.' Within a few days after this order was made, Gleason reported to the probate court that he had sold to John Frederick Harmening, at private sale, and for the sum of \$1,537.50, 'that being the full amount of the appraised value thereof,' the south-east quarter of said section thirty-six, excluding the small strip occupied by the railway company. The sale was approved, and the guardian directed to make a conveyance to the purchaser, reserving for the widow, in lieu of dower, the sum of \$400 out of the proceeds. The bill charged that on the 15th of February, 1873,

more than three years after the said order of sale was entered, and without any new or further appraisal of plaintiff's lands, though their value, as he was informed, had greatly advanced, and without any additional bond having been executed, Gleason, 'for the purpose of getting money into his hands for his own private gain, and without reference to the true interest of his ward,' and 'willing to allow the said Harmening to get at a low and under price the lands' of the plaintiff, and 'though there was no necessity whatever for said sale, as he, the said Gleason, and the said Harmening well knew,' sold to the latter at a private sale, for the sum of \$872.10, the east half of the south-west quarter of section thirty-six, in Defiance county, containing eighty acres, and a tract of 7 21-100 acres in Paulding county, which sale, being reported to the probate court, was by it wrongfully approved, and a deed directed to be made, and was made, to the purchaser, the sum of \$200 being reserved out of the proceeds, pursuant to the order of the court, for the dower interest of the widow.

"The plaintiff also alleges that, notwithstanding there was no necessity for any further sale or sacrifice of his estate of inheritance, Gleason, on the 4th day of December, 1874, although having in his hands, unexpended, large sums derived from the sale of the above premises, as well as considerable sums received from the release of tax-titles, all of which was known to Harmening, and without any new appraisal of the plaintiff's lands, though they had risen greatly in value, and without giving an additional bond or obtaining a new order of sale, 'for the purpose of getting money into his hands for his own private gain, without reference to the true interest of your orator in the premises, and willing that the said Harmening should get the lands bought at a low and under price, connived and colluded with him, the said Harmening, to sell the said lands hereinafter described in violation of his duties, and the trust imposed on him, claiming to act on the said order of sale long since entered in said court, sold to the said Harmening the following described lands, situated in Defiance county, aforesaid, viz.: The north half of section thirty-six, in township four north, of range three east, and the west half of the same section, in the same township and range, containing together four hundred acres,—for the sum of six thousand dollars, and reported the sale to the said court on the same day, and the same was, without proper examination, or opportunity for the friends of the said ward, your orator, or his relatives, to examine the same, and advise the said court or the said Gleason in the premises, the court improperly and illegally confirmed the said sale, and ordered the said guardian to make, execute, and deliver a deed for the same to the said Harmening on his compliance with the terms of sale, and further ordered the said guardian to pay out of the proceeds of said sale the sum of fifteen hundred dollars as and for the dower interest therein held by the said Mary Arrowsmith.'

"The bill further charges that the order authorizing said sales to be made, as well as the orders confirming them, were illegal; that the sales made by Gleason were in violation of his trust, and in fraud of his rights, 'as the said Harmening and the said Gleason well knew;' that he has never received from said Gleason, or from any source, to his knowledge, any of the proceeds of such sales, nor, to his knowledge, belief, or information, has any part thereof been applied for his benefit; and that the deeds placed upon record by Harmening so cloud his title to said lands that he cannot sell them, or otherwise enjoy the beneficial use of them. After averring that he has been a non-resident of Ohio since 1869; that Harmening enjoyed, up to his death, all the rents and profits of said lands; that his heirs at law, who are infants, and defendants herein, are in possession of them, claiming to hold them under said pretended sales and deeds; and that Gleason has been for a long time hopelessly insolvent, so that an action at law against him would be unavailing,—

he prayed that a decree be rendered setting aside and vacating the order of sale in the probate court, and all proceedings therein affecting his title to the lands, and declaring the same, as well as the deeds executed by his pretended guardian, to be void and of no effect. He also prayed for the additional relief, specific and general, indicated in the beginning of this opinion."

Under the mandate sent down to this court under the above decision, this cause has proceeded regularly to a final hearing. Answers have been filed by all the defendants, and voluminous testimony has been taken by both parties. The case is now presented upon the bill, answers, replication, and this testimony. As there is still a wide difference of opinion between the counsel as to the powers of this court in this case, it is perhaps important to consider, at the outset, what the supreme court of the United States decided when this case was before it on appeal, as hereinbefore stated. It was contended in that court by the defendants that the complainant, upon his own showing, had a plain, adequate, and complete remedy at law, to-wit, an action of ejectment for the recovery of the lands in controversy. After a careful review of the statutes and decisions of the supreme court of Ohio, the court held that this ground for demurrer was not well taken, and that the complainant had not an adequate remedy by an action of ejectment for the recovery of these lands. The court then proceeded to define very distinctly upon what grounds this court acquired jurisdiction of this case, and the nature of the relief that it might administer if proper proofs in support of the allegations of the bill were made. Inasmuch as it is now contended by the counsel for the complainant that this court in this proceeding is vested with power to review the proceedings of the probate court of Defiance county for error, and, independent of any charge or proof of actual fraud on the part of the guardian, or such knowledge as ought to have put him upon his inquiry on the part of the purchaser, this court has the power to administer the relief prayed for, it becomes all the more important to clearly determine just what the supreme court of the United States outlined and defined the powers of this court to be in this case. After disposing of the contention that the complainant's remedy at law was sufficient, the court said:

"But is the appellant without remedy for the wrong alleged to have been done him? We think not. If all the substantial averments of his bill are true,—and upon demurrer they must be so regarded,—he makes a case of actual fraud upon the part of his guardian, in which Harmening to some extent participated, or of which at the time he either had knowledge or such notice as to put him upon inquiry. According to these averments, there was no necessity whatever for these sales, at least for the sale of the east half of the south-west quarter of section thirty-six, township four north, of range three east, in Defiance county, containing eighty acres, or of the smaller tract in Paulding county, or of the 400 acres in Defiance county that were sold in December, 1874. * * * It is alleged, and by the demurrer it is admitted, that when the last sale was made Gleason had in his hands, unexpended, as Harmening well knew, large sums derived from the previous sales, as well as considerable amounts received from releases of tax-titles on lands held by the appellant; and yet, by collusion with Harmening, and in order that the latter might get the lands for less than their value, he made the sale of the 400 acres."

Assuming that these allegations made in the complainant's bill were to be sustained by the proof, the court held that the circuit court would have jurisdiction to afford a complete remedy by declaring the deeds from Gleason, guardian, to the defendant Harmening null and void, as having been obtained by actual fraud. The court in this opinion clearly marked out the lines upon which the jurisdiction of this court should run, the nature of the relief to be administered, and the exact character of the proof necessary to give jurisdiction. It is very evident from this statement of the supreme court that it did not contemplate that this court should sit in this case with power to simply review the proceedings of the probate court of Defiance county for error. We cannot undertake to disturb the rights acquired by the defendants under and by virtue of any proceedings in that court, unless the allegations of fraud made in the bill are sustained, and such proceedings thereby vitiated. The jurisdiction of this court rests solely and entirely upon the charge of actual fraud, which tainted and made absolutely void all the acts and proceedings of that court relating to the sale of the lands in controversy. If this proof fails to sustain these allegations of fraud, this court has no power to deprive the defendants in this case of any rights acquired by reason of the proceedings of that court. We are therefore now called upon to scrutinize the conduct of the parties in this proceeding. The fraudulent acts to be established, necessary to maintain this bill, it seems to the court, are clearly defined to be in substance as follows, viz.: To show that there was no necessity for the sale of these lands by the guardian, or, at least, of the second sale, made in 1873, and the third sale, made in 1874; that when the last sale was made the guardian had in his hands, unexpended, large balances from the previous sales, as well as from releases of tax-titles on other lands of the ward; that Harmening knew these facts, or had such knowledge of them as to put him upon inquiry; that, through collusion, and in order to aid Harmening to buy said lands for less than their value, the guardian made the last sale of 400 acres; that said sales were confirmed by the probate court without opportunity on the part of the complainant or his friends to examine the same; that said lands were sold for less than their value, as a part of the fraudulent scheme between the guardian and the purchaser; and that the complainant received no advantage or benefit from such sales.

This is an extended statement of the frauds necessary to find in order to entitle the complainant to the relief prayed for. The supreme court epitomizes it by saying that the facts must disclose, "not only imposition upon a court of justice in procuring from it authority to sell an infant's lands when there was no necessity therefor, but actual fraud in the exercise, from time to time, of the authority so obtained." Does the testimony disclose any such imposition upon the court, or any fraud on the part of the guardian in the exercise of the authority to sell conferred upon him? That we may clearly understand the position from which the testimony in this case is to be reviewed, it is proper to note that the answers filed in this case on behalf of Gleason, as guardian, and the widow and heirs of Harmening, the purchaser, fully and squarely

meet all the allegations of fraud made in the bill, and deny every material fact alleged which imputes fraud or fraudulent intent either upon the court, upon the guardian, or upon Harmening, the purchaser of said land. The bill not having waived an answer under oath, and said answers having been sworn to, it devolves upon the complainant to make out the allegations of fraud by the positive testimony of two witnesses, or of one witness and such corroborating circumstances as in the judgment of the court shows the preponderance of proof to be upon the side of the complainant.

Now, what are the facts as fairly to be deduced from the testimony taken and filed in this case? It is fairly established that at the time of his appointment as guardian Gleason was solvent, and a man in every way suitable to be appointed to such a charge. His appointment was satisfactory to the relatives and mother of the ward, and Gleason avers in his answer that he accepted the appointment at their solicitation. The lands of which the ward was possessed were non-productive, and he had no other source from which to obtain the money necessary for his support and education. He lived in a distant state with his mother, who was not capable of advising him as to the renting and management of his landed estate, situated in Ohio. When the guardian was appointed, a bond was given and filed, conditioned for the faithful discharge of his duties. On the 23d of July, 1869, after his qualification and the filing of said bond, the guardian filed his application in court, asking for a sale of a portion of his ward's lands, and reciting in his petition the reasons for such sale. The ward and his mother, who had her dower interest in the lands, were duly notified, and answered, and the sale was ordered to be made after due appraisal. The testimony shows that the prices at which the several tracts of land were sold were fair and just, as compared with sales of similar lands of the same grade in the same neighborhood, and at about the same time. In fact there is a fair preponderance of evidence that, as to the sale of the largest tract, the price was above that obtained for lands of the same class in that locality at that time. The testimony further discloses the fact to be that, before Harmening made the purchase of either of these tracts of land, he consulted with reputable attorneys as to the regularity of proceedings in the probate court, asking their opinion as to the title he would obtain as the purchaser at such a sale. The testimony further shows that these attorneys, after due examination, and after proper inquiries of the guardian, advised Harmening that the proceedings were regular, and that he would obtain good title as purchaser. He owned several tracts of land adjacent to those sold by these probate court proceedings, and desired to purchase these lands because of their proximity to the other tracts so owned by him. The testimony of a large number of witnesses has been taken as to the value of these lands at the time of the three sales in controversy. The decided preponderance of testimony is that the lands were sold for substantially all they were worth; in fact, counsel in argument substantially conceded this fact to be so, as established by the testimony.

It further appears from the records of the probate court, and from other testimony, that each sale was made upon the advice of an uncle of the ward, and at the solicitation of the mother, who desired to secure her dower interest from the proceeds. It is further shown that the widow and mother did receive from each sale her full amount of dower interest.

The charge that the guardian made these sales for his own personal benefit, and to accumulate money in his hands for his private use, is not sustained by the testimony. Even if this were true, there was nothing in the general reputation as to his solvency at about the time of these sales to have put Harmening upon his inquiry. He was generally believed to be perfectly solvent, and the probate court, having found, under the petition, that the statutory reasons to justify the sales of a minor's property existed, Harmening had no cause for suspicion that any fraud was contemplated by the guardian. Gleason positively denies in his answer any collusion or combination or understanding between himself and Harmening of the character charged in the bill. There is no proof to sustain such charge. There are no circumstances which ought to have put Harmening on his inquiry as to any such fact. The facts further show that Harmening paid not only the full price for the land, but he paid the full amount due upon all the notes given by him for such purchase price. He therefore has fully discharged all obligation assumed by him as purchaser under said sales. The probate judge who acted in this matter denies all fraud and collusion on his part, denies all knowledge of any fraud or collusion between the guardian and the purchaser, and there is therefore nothing to show that the court was imposed upon by fraud. This is one of the essential elements of fraud necessary to be established, as intimated by the supreme court, before the complainant can maintain his bill in this case.

Counsel for the complainant dwell with special emphasis upon the claim that the guardian had unexpended balances on hand before the second and third sales of real estate were made; but such a fact, even if established, and brought to the knowledge of Harmening, would not, in itself, be sufficient to make a case of fraud. The statute fixes several proper reasons which would authorize the probate court to sell the lands of a minor. Whenever a sale is necessary for the education or support of the minor, or for the payment of his just debts, or for the discharge of any liens on his real estate, or when such estate is suffering unavoidable waste, or a better investment of the value thereof can be made, all such reasons are proper to be considered by the court in ordering a sale. An unexpended balance in the hands of the guardian would therefore not in itself have been sufficient to have justified a suspicion of fraud. That balance might have been held for the future education or support of the minor, or for a better investment thereof. But there is no evidence to show that Harmening had knowledge of such an unexpended balance, or of such facts connected therewith as should have put him upon his inquiry. The court is therefore compelled to find, from the testimony in the case, that the complainant has utterly failed to sustain the allegations of his bill in any single respect of fraud charged therein.

There being no fraud which imposed upon the probate court in procuring from it the authority to sell the lands in controversy when there was no necessity therefor, and no fraud shown on the part of the guardian in the exercise of his authority to sell the same, the power of this court to grant the relief in this case is wholly wanting. As before stated, I think it a very fair conclusion, from the opinion of the supreme court, that in this case this court cannot sit simply to review the errors of proceedings of the probate court, although it may now be satisfied that such error actually existed. In the absence of fraud in the respects hereinbefore stated, this court has no jurisdiction to give the relief asked. It cannot look back of the order of the probate court finding that there was a necessity for a sale of the ward's lands, unless the allegation of the bill that the court was imposed upon by fraud and collusion is sustained. That court had jurisdiction of the persons and subject-matter. We cannot, therefore, review those proceedings, as upon error, for mere irregularity. The proof of actual fraud is essential to impugn its decrees before this court can acquire jurisdiction to afford relief to the parties.

It was contended by counsel in the supreme court, as it is in this court, that the failure of the guardian to give the bond provided by the statute to cover each sale of the land, and the invalidity of the only bond given, because signed by only one freehold surety, the guardian's breach of faith with that surety, because he filed it without an additional surety, as he promised, and the other specific irregularities in the probate court proceedings, were errors which could be reviewed in this proceeding. But these claims were denied in the supreme court, and cannot now be renewed here. But the claim of superior equities in favor of the complainant is not sustained by the proofs. The facts are that the complainant and his mother did receive the greater part of the proceeds of these sales; all, in fact, except that lost by the guardian's insolvency. And if the ward and his uncle and mother had been as diligent in their efforts to watch the funds after they reached the guardian's control as they had been to procure the sale of the lands, they would not have lost any portion of his inheritance. Their failure to do so was the cause of such loss. There was no legal or moral obligation resting upon Harmening, the purchaser, to guard the purchase price of the lands after he had placed it in the hands of its legal custodian. Its loss after he parted with it cannot affect his title to the lands, or impugn his good faith in the transaction; and having given full value for what he purchased, and having paid the purchase price to the custodian provided by law, and having become the purchaser at the solicitation of the ward's guardian and nearest friends and advisers, and having shown himself free from all collusion and fraud in every stage of the transaction, it now seems to the court that, so far from the equities of the case being with the complainant, as pleaded in the bill, they are unquestionably with the defendants, and the heirs at law of the deceased purchaser hold their title free from any cloud or taint of fraud, so far as it is assailed by these proceedings.

A decree may be prepared accordingly.

JERSEY CITY GAS-LIGHT CO. v. UNITED GAS IMP. CO.

(Circuit Court, D. New Jersey. March 24, 1891.)

CORPORATIONS—LICENSE—TAX ON DIVIDENDS—CONSTRUCTION OF LEASE.

The provision of Act N. J. April 18, 1884, that every gas company shall pay an annual tax of one-half of 1 per cent. upon its gross receipts, and 5 per centum upon dividends earned and declared in excess of 4 per centum, by way of a license for the right to continue and act as a corporate association, and for its failure to do so shall be restrained from the exercise of its corporate franchise until the payment is made, imposes a license fee for the exercise of its corporate franchise, and not a tax upon its property, within the terms of a lease whereby one gas company granted to another its works and property for the term of 20 years, at a certain rental, with the condition that the lessee should pay "all assessments and taxes lawfully assessed or levied upon the real or personal property, franchises, capital stock, or gross receipts" of the lessor during the term.

At Law.

Wallis, Edwards & Bumsted, for plaintiff.

William E. Potter and Joseph D. Bedle, for defendant.

GREEN, J. This is an action of contract brought by the plaintiff, the Jersey City Gas-Light Company, against the defendant, the United Gas Improvement Company, to recover certain sums of money, with arrears of interest, alleged to be due from the defendant, and payable to the plaintiff, under and by virtue of the terms and conditions of a certain contract or lease. The cause was tried before the court without a jury, under a stipulation in writing to that effect. Practically there was no dispute as to the facts, the real question at issue being the true construction of a condition in the lease. The plaintiff is a corporation existing under and by virtue of an act of incorporation of the state of New Jersey, approved February, 1849. By this act it was authorized and empowered to manufacture, make, and sell gas, for the purpose of lighting the streets, buildings, manufactories, and other places situate in Jersey City and vicinity. The defendant is a corporation duly organized and existing under and by virtue of the laws of the state of Pennsylvania. In December, 1884, the plaintiff and defendant entered into a contract, by which the former leased to the latter for a term of 20 years its works and property in Jersey City, at an annual money rental therein reserved. This contract or lease contained this condition:

"The party of the second part [to-wit, the defendant herein] shall also pay all assessments and taxes which may be lawfully assessed or levied upon the real and personal property, franchises, capital stock, or gross receipts of the party of the first part during the continuance of this agreement."

The controversy between the parties litigant has reference solely to this condition or provision of the contract. It is admitted that, pursuant to its terms, the defendant has paid all assessments and taxes levied upon the real and personal property, the capital stock, and the gross receipts of the plaintiff corporation. But a certain assessment or tax has been imposed and levied by the legislature of New Jersey upon the plaintiff by virtue of an act entitled "An act to provide for the imposition of state

taxes upon certain corporations, and for the collection thereof," approved April 18, 1884, which the defendant has refused to pay, although requested so to do, alleging as excuse for such refusal that the tax thus assessed and levied does not fall within the terms of the contract; in other words, that this tax, imposed by virtue of the act referred to, is not an assessment or a tax either upon the real and personal property, franchises, capital stock, or gross receipts of the plaintiff, and hence the defendant is under no obligation to pay it. On the other hand, the contention of the plaintiff is that the tax thus assessed and imposed is clearly a tax upon its franchises, and the defendant, by the strictest construction of the contract, is certainly liable to pay it. This contention practically embraces the whole controversy. The act in question is entitled "An act for the imposition of state taxes upon certain corporations, and for the collection thereof." In its first section it provided that—

"Every telegraph, telephone, cable, or electric light company, every express company not owned by a railroad company, and otherwise taxed, every gas company, palace or parlor or sleeping car company, and every oil or pipeline company, and every fire, life, marine, or accident insurance company, doing business in this state, except mutual fire insurance companies which do not issue policies on the stock plan, shall pay an annual tax, for the use of the state, by way of license for its corporate franchise, as hereinafter mentioned."

The second section provides that it shall be the duty of the president, treasurer, or other proper officer of every corporation specified in the first section to make report to the state board of assessors, stating specifically the following particulars, namely: Each gas company shall state the gross amount of its receipts for business done in the state during the year preceding the 1st day of February in each and every year, and the amount of dividends earned or declared for the same period. The fourth section provides that each gas company shall pay to the state a tax at the rate of one-half of 1 per centum upon the gross receipts so returned or ascertained, and 5 per centum upon the dividends of said company in excess of 4 per centum so earned or declared. The sixth section declares that this tax shall be a debt due from the company to the state, for which an action at law may be maintained, and the seventh section provides for the restraining, by injunction, of delinquent corporations from the exercise of any franchise or the transaction of any business within the state until payment of tax be made. The other sections of the act are without importance in this cause. Provision is thus made for the assessment and collection of an annual tax, for the use of the state, from every company engaged in the manufacture of illuminating gas, by way of license for its corporate franchise. The word "franchise" is used, generally, to designate a right or privilege conferred by law. It may be defined to be a special privilege, conferred by the sovereign authority upon individuals, which does not belong to the citizens of the state generally, of common right. Thus, when the legislature grants a charter of incorporation, it confers upon the grantees of the charter the right or privilege of forming a corporate association, and of acting, within certain limits, in a corporate capacity, and this right or privilege is called the "cor-

porate franchise." 2 Mor. Priv. Corp. § 922. If we read the first section of the New Jersey act of 1884, which we have just quoted, in view of this fundamental definition of a "corporate franchise," its provision will be this, in effect: Every gas company shall pay an annual tax of one-half of 1 per cent. upon its gross receipts, and 5 per centum upon dividends earned or declared in excess of 4 per centum, by way of a license for the right to continue and to act as a corporate association.

It has never been doubted that the legislative authority in making a grant of such franchise can prescribe such terms and such conditions for its acceptance and for its enjoyment as to it shall seem best, not inconsistent with constitutional limitations. The manner of enjoying the franchise, its life, its scope, are all subject to legislative control. It is true that such grants are said to be in the nature of a contract. But if the right to amend or to alter or to repeal the grant be, in the grant itself, reserved to the sovereign, the terms and conditions originally annexed to the grant, although accepted and acted upon by the grantee, do not become irrevocable contracts, but may be altered or revoked or amended at the will of the grantor. When, therefore, a legislature enacts a charter containing a reservation of the power of alteration, it, in effect, authorizes the formation of a corporation only upon condition that the state may thereafter exercise such control over the corporation, and its enjoyment of franchises, as the power reserved implies; and the persons accepting the grant, and under it forming a corporation, must be held to assent to such condition. The act incorporating the plaintiff is of this character. By it the plaintiff corporation is endowed with all the general powers, and is made subject to all the restrictions and liabilities, contained in the act entitled "An act concerning corporations," approved February 14, 1846. One of the restrictive clauses of that act provides that the charter of every corporation which shall hereafter be granted by or created under any of the acts of the legislature shall be subject to alteration, suspension, and repeal, in the discretion of the legislature. This is decisive as to the power of the legislature to alter, suspend, or repeal the charter of the plaintiff. Indeed, without such express subjection to the legislative power, it has been uniformly held by the highest courts of New Jersey that every act of incorporation granted since the adoption of the corporation act of 1846 is subject to alteration, suspension, or repeal at the legislative discretion, although there should be no words in the act of incorporation expressly so declaring. *State v. Person*, 32 N. J. Law, 134, 566; *State v. Douglas*, 34 N. J. Law, 83. Hence the continued enjoyment of corporate franchises granted to the plaintiff is subject to such terms and conditions as the legislature may in its discretion from time to time impose. It has seen fit to exercise this discretion, and to impose upon the plaintiff a new condition, upon compliance with which it can continue to enjoy the franchises heretofore granted. By the act of 1884, referred to, it has declared what that condition is, namely: the payment of an annual tax or charge or impost by way of license. In this connection the meaning of the phrase "by way of" becomes important. It is idio-

matic, and perhaps may be difficult of rendition into exact phraseology, but it may be taken to mean "as for the purpose of," "in character of," "as being." To substitute either one of these synonymous phrases for the one used in the act would make it read as follows: "Certain corporations shall pay an annual tax for the use of the state, 'as for the purpose of' a license, or 'in character of a license,' or 'as being' a license for corporate franchise." Or, to paraphrase the section somewhat: "Every corporation designated in the act shall have and use and enjoy its corporate franchises, heretofore granted, upon the payment, for the benefit of the state, of a license fee, exacted for such use and enjoyment." A brief reference to the seventh section of the act of 1884 makes this construction certain. By that section of the act is provided a penalty—a punishment—for the failure or refusal of the corporations designated to pay this "tax," so-called,—license fee in reality. The punishment is the restraint of the corporations by injunction from making any use of the corporate franchises until the license fee for such use and enjoyment is paid. The failure or refusal to obey the provisions of the law does not work a forfeiture of the corporate franchises. The willful or negligent breach of the newly-imposed condition of the grant is not followed by a revocation of the grant, as a penalty, nor does it render the corporation liable to dissolution. The life of the corporation is wholly unaffected by its lawlessness in this respect. Its franchises are preserved to it, but the use of those franchises is made to depend upon the payment of the license fee. This seems to be a fair and reasonable construction of the act; that while it apparently imposes upon certain corporations, of which the plaintiff is one, a tax, *eo nomine*, its object is to exact a license fee for the use and enjoyment of franchises heretofore granted. It is difficult to imagine any other construction which will preserve the least harmony between the act in question and the constitution of the state; and it is not surprising, therefore, to find that the highest courts in New Jersey have adopted it. Thus in *Cable Co. v. Attorney General*, 46 N. J. Eq. 273, 19 Atl. Rep. 733, Mr. Justice KNAPP, in delivering the opinion of the court of errors and appeals, construing this act, says:

"The law in question imposes a tax on certain corporations by way of a license for exercising corporate franchises. It is declared to be such a tax by the act, and, although it is laid upon this class of corporations with respect to the capital stock, the tax possesses the legal quality of a license. Upon the power of the legislature to impose such a tax there exists no restriction in our constitution."

In *State v. Board of Assessors*, 47 N. J. Law, 36, Mr. Justice DEPUE, construing the same act, says: "By the fourth section of this act a tax in the shape of a yearly license fee was laid upon * * * gas companies." And in *Press Printing Co. v. Board of Assessors*, 51 N. J. Law, 75, 16 Atl. Rep. 173, the same learned judge says of the tax imposed by this act: "The tax imposed by the statute is a license fee to exercise corporate franchises." The construction of a state law by the highest courts in the state ought to have, and justly has, the weightiest influence upon

the judgment of the federal courts, and is by them usually accepted as conclusive. *Elmwood v. Marcy*, 92 U. S. 289; *Fairfield v. Gallatin Co.*, 100 U. S. 47; *Post v. Supervisors*, 105 U. S. 667. As has already been suggested, this construction seems to be the only one which successfully avoids the most serious and palpable contravention of the constitution of the state, and hence it must commend itself to the judgment of a judicial tribunal. If, then, this so-called "tax" or "impost" is a license fee exacted for the enjoyment of corporate franchises, it follows that it cannot be a tax upon franchises as such. In the one case the license fee is exacted without regard to the value of the franchise, and is paid for the use and enjoyment only of the franchise. In the other, as a tax, it must be assessed upon the franchise itself, as a thing of value, whose value can be accurately ascertained, for it is settled in New Jersey that a franchise is property, (*Board of Assessors v. Railroad Co.*, 48 N. J. Law, 283, 4 Atl. Rep. 578,) and as such, when it is to be taxed, its true value must be arrived at in some way, as furnishing the basis of its assessment; for, as it is "property," it falls directly within the protecting clause of the constitution of New Jersey that "property is to be assessed by general laws and uniform rules, according to its true value."

But it is plainly evident that to the legislative mind this act did not in any wise concern itself with the assessment or taxation of any class of property as property, for nowhere within its provisions, by the most thorough scrutiny, can there be discovered any plan or method or scheme or machinery for the ascertainment of the value of anything therein made liable to the exaction of a fee or charge or impost, and enjoyable by the payment of such fee or charge or impost. The ascertainment of the true value of a franchise, as the preliminary condition of taxation, is not hinted at. Nor is the true value of a franchise taken into account in determining the license fee to be paid for its enjoyment. The basis for and determination of such license fee is made arbitrarily by the legislature, without the slightest regard for the value of the franchise, as a franchise, or, in other words, as property. It cannot be pretended that dividends declared by a corporation afford any safe criterion of value of franchises. Possibly gross receipts might bear some comparative relation to the value of corporate franchises; but the declaration of dividends depends, primarily, upon the determination of a board of directors, who may be influenced in their action by various causes wholly foreign to or disconnected with the amount of earnings with which they are dealing. They may increase or diminish the rate as to them seems best. So uncertain a standard cannot be used to ascertain a true value.

To hold, then, as was insisted so ably by the counsel for plaintiff, that this act imposes a tax upon franchises, is to declare that it contravenes the constitution of the state in one of its most important provisions, in that it would tax property arbitrarily, and not according to its ascertained true value. Such construction would destroy the act itself. It was in harmony with this view that the court of errors and appeals, in the case of *Cable Co. v. Attorney General*, (cited *supra*,) declared that the tax imposed by this act was not a tax upon property, but was

exacted by way of license for the exercise of corporate franchises. In this conclusion I concur, and it therefore follows that, as the defendant corporation has not contracted to pay license fees that may be exacted from the plaintiff corporation by the state for the use and enjoyment of corporate franchises, and as such license fees cannot be regarded as taxes either upon real and personal property, franchises, capital stock, or gross receipts, the defendant is not liable as charged in this action, and is entitled to judgment upon the facts and the law applicable thereto. This finding renders it unnecessary to consider the other defenses interposed.

MARSHALL v. WABASH R. Co.

(Circuit Court, S. D. Ohio, W. D. April 9, 1891.)

1. DEATH BY WRONGFUL ACT—PENAL STATUTE—FOREIGN JURISDICTION.

Rev. St. Mo. 1889, § 4425, providing that whenever any person shall die from any injury resulting from or occasioned by negligence, unskillfulness, or criminal intent, the defendant shall forfeit and pay the sum of \$5,000, which may be sued for and recovered, irrespective of the actual damages caused by such death, is a penal statute, and, under the rule that such statutes can be enforced only within the sovereignty of their creation, a federal court in another state will not entertain an action thereunder.

2. SAME—MOTHER OF ILLEGITIMATE CHILD.

Under the further provision of that section, (Rev. St. Mo. 1889, § 4425,) that if the deceased be a minor and unmarried, whether such deceased unmarried minor be a natural born or adopted child, then the father and mother may join in the suit, and each shall have an equal interest in the judgment, extends only to the case of natural born legitimate children, and no action can be maintained by a mother for the death of her bastard child.

At Law.

H. D. Peck, for plaintiff.

Lawrence Maxwell, Jr., and Charles E. Peers, for defendant.

SAGE, J., (*orally*.) This cause is before the court on an objection to the jurisdiction, and to the right of the plaintiff to maintain the action under the statute upon which it is based.

The action is to recover \$5,000 damages by reason of the death of the minor son of the plaintiff, which it is alleged was caused by the negligence and unskillfulness of the employes of the defendant while conducting and managing a train of cars in the state of Missouri, upon which the deceased was a passenger. It is conceded that the deceased was the illegitimate son of the plaintiff. The father is not joined in the action, nor is there any allegation that he is dead.

The objection to the jurisdiction is that the statute (section 4425, Rev. St. Mo. 1889) provides for damages whenever any person shall die from any injury resulting from or occasioned by the negligence, unskillfulness, or criminal intent set forth and described in the section, and that the defendant "shall forfeit and pay for every person or passenger so dying

the sum of \$5,000, which may be sued for and recovered" by the persons named; the section containing the following clauses:

"If such deceased be a minor, and unmarried, whether such deceased unmarried minor be a natural born or adopted child, if such deceased unmarried minor shall have been duly adopted according to the laws of adoption of the state where the person executing the deed of adoption resided at the time of such adoption, then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment; or, if either of them be dead, then by the survivor."

There is also a right of action given to the minor child or children of the deceased, whether they be natural born or adopted. Counsel for the defense urge that this statute is penal. To this counsel for the plaintiff answer that the supreme court of Missouri, in *Coover v. Moore*, 31 Mo. 574, held that the sum which might be recovered under the statute then in force—which, so far as it affects this question, is in no essential different from the statute above quoted—was not intended as a penalty, but as compensatory damages, liquidated by the statute; the fact being that under the act only persons presumed to be interested in the life of the deceased may institute an action under it.

Counsel for the plaintiff refer also to *Philpott v. Railway Co.*, 85 Mo. 164, in which the court, considering the same statute, say:

"The statute is remedial, and is designed to be compensatory in part. But it is more than this. The case at bar demonstrates the fact that it cannot be wholly compensatory, for the amount of the recovery, being fixed, as it is, is altogether out of proportion to the value of the services of the son for the remainder of the period of his minority. The law is also designed to guard and protect persons and the traveling public against the wrongful acts thereby prohibited. Whether the amount awarded is denominated damages, compensatory damages, liquidated, as it was in *Coover v. Moore*, 31 Mo. 574, or a penalty, is not material. The law, as well as being compensatory, is of a penal and police nature, and can without objections subserve both purposes at one and the same time.

"The right to recover is therefore not made to depend upon services which the deceased could have rendered to the persons suing. The emancipation of the son by the parent, if alleged and proved, constitutes no defense."

In that case the action was by husband and wife because of the death of their minor son, between 19 and 20 years of age, occasioned by the collision of two trains of cars on the defendant's road in the state of Missouri. The defendant, among other things, answered that the plaintiffs and their son were residents and citizens of the state of Texas; and, further, that they had emancipated their son from all paternal control and interference. These defenses were, on motion of the plaintiffs, stricken out, and the case was taken up to the supreme court upon assignments of error for that, among other rulings.

Now it is insisted that these decisions settle the proposition that the statute under consideration is not a penal statute, and that this court is bound by those decisions. I do not concur with either proposition. It is true that the court in *Coover v. Moore* say that the damages are compensatory. So they may be in certain cases, and in some cases less than full compensation. But where the plaintiff is not required to offer any

evidence proving damages, and the defendant is not permitted to offer any evidence disproving damages, and the recovery is to be one fixed sum in every case, I cannot understand how the statute under which that is done can be regarded as providing compensation merely, and not penal. In *Philpott's Case*, however, the ruling is that the statute is penal, and that it is also to a certain extent compensatory. I do not understand that this court is bound by the decisions of the supreme court of Missouri upon this point. In *Chicago v. Robbins*, 2 Black, 418, the supreme court of the United States ruled that where private rights are to be determined by the application of common-law rules alone, the supreme court, although entertaining for state tribunals the highest respect, does not feel bound by their decisions; and in *Hollingsworth v. Tensas*, 17 Fed. Rep. 109, it is held that, though a state decision may apply a state statute, yet a national court is not bound to follow it in derogation of established principles of jurisprudence. Thus, a decision administering a statute which allows private property to be taken for public use without compensation is not obligatory on a federal court. In *Mohr v. Manierre*, 7 Biss. 419, it was held that what shall constitute jurisdiction in a court is a general principle of law, within the rules above stated.

It is conceded that if the statute is penal it cannot be enforced, excepting within the jurisdiction of the state of Missouri. It is further urged by counsel for complainants that the statute merely liquidates the damages, which it was within the power of the legislature to do. It has been held that the legislature of a state may by statute provide for double and treble damages, and that such an act is not necessarily penal.

But here is a case where there is provision for a recovery without proof of any damages whatever. Liquidated damages are damages whose amount has been determined by anticipatory agreement between the parties. They are recognized and sustained in two classes of cases: *First*, in cases where the agreement is of such a nature that the damages are uncertain, and not capable of ascertainment by any known and satisfactory rule; and, *second*, in cases where, from the tenor of the agreement or the nature of the case, it appears that the parties have ascertained the amount of the damages by fair calculation and adjustment. In cases not falling within either of these two classes, even if the parties agree to what they term liquidated damages, the court will treat the stipulation as for a penalty or forfeiture, and administer the law accordingly. In cases in which liquidated damages are recognized, the right to recover depends also upon the agreement of the parties, without which the recovery could be only for damages capable of ascertainment and measurement by established rules of law.

I doubt whether the legislature has the power to enact a statutory provision for liquidated damages, even where it has the right to create a cause of action. It may, for reasons of public policy, enact and enforce a penal statute, and provide that the plaintiff shall have the benefit of the penalty; but, if the statutory damages are to be treated as compensatory merely, it strikes me that the attempt of the legislature to fix them by an arbitrary, inflexible rule would be in conflict with the con-

stitutional right of the defendant to a jury trial. This, however, is rather by way of suggestion. It is not necessary to the decision of the question before the court. It was held in *Railway Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. Rep. 110, that the legislature of a state may fix the amount of damages beyond compensation to be awarded to a party injured by the negligence of the railroad company, or prescribe the limit within which the jury in assessing such damages may exercise their discretion, and that the additional damages are by way of punishment to the company for its negligence; and it is not a valid objection that the sufferer, instead of the state, receives them. The court in that case said that the statute only fixes "the amount of the penalty in damages proportionate to the injury inflicted. In actions for the injury the company is afforded every facility for presenting its defense." The court also referred to the fact that the—

"Statutes of nearly every state in the Union provide for the increase of damages where the injury complained of results from the neglect of duties imposed for the better security of life and property, and makes that increase in many cases double, and in some cases treble, and even quadruple, the actual damages."

The court further said that such legislation was not only favored by experience as a most efficient mode of preventing the commission of injuries, but that its validity has been affirmed by decisions of the highest courts. But that case is clearly distinguishable from the case here, in that the provisions referred to were expressly in addition to the damages to be ascertained by the evidence, and were subject to the discretion of the jury. Here the statute fixes the amount for recovery without reference to the injury sustained, and shuts out all evidence as to the actual damage.

I am clear, however, that the amount fixed in the statute cannot be properly regarded as liquidated damages. The fact that sections 4426 and 4427 authorize an action for damages by reason of the death of a person caused by the wrongful act, neglect, or default of another, and that suits therefor may be brought by the same parties, and in the same manner, as provided in section 4425, and that in such actions the recovery shall be for such damages, not exceeding \$5,000, as may be established to the satisfaction of the jury within the rules provided in the section, is strongly confirmatory of the view that section 4425, which relates exclusively to injuries resulting in death by reason of the negligence, etc., of the officers, servants, and employes of railroad companies, is penal in its nature.

I therefore hold that this court has no jurisdiction in this case, upon the well-recognized rule that penal statutes can be enforced only within the sovereignty of their creation, much for the same reason that criminal statutes have no extra-territorial force.

With this conclusion I might dismiss the case, and perhaps should, without considering the question whether this plaintiff has any standing in this court; but, as that has been fully argued, I will express my opinion upon that also.

The general rule is that the expression "natural children" refers exclusively to children born out of lawful wedlock. Plaintiff's counsel claim, therefore, that, as the right is given to the parents of a deceased and unmarried minor, whether such minor be a natural born or adopted child, it includes such a case as this. The answer to this contention is, first, that it has been held that in a statute declaring that adopted children shall have all the rights of natural children the word "natural" was used in the sense of legitimate. *Barns v. Allen*, 9 Amer. Law Reg. 747. Apart from this view, the language of the section is not in my judgment consistent with the proposition that it confers the right claimed here, for the right of action is given to the father and mother, who may join in the suit, and each shall have an equal interest in the judgment, or, if either of them be dead, then by the survivor. That the father has no right to sue is perfectly clear, and yet the only provision authorizing father or mother to sue is that just quoted. They may join if living, and the suit can be by one only in case the other be dead. This clearly, in my mind, refers exclusively to cases where father and mother are joined in lawful wedlock. It is urged, however, that the statute, being remedial, should be liberally construed to effectuate the manifest purpose of the legislature to provide damages for parent or parents of minor unmarried children. The liberal rule of construction might be invoked if this were a statute providing compensatory damages merely. But even in that case, inasmuch as the statute creates a right of action which did not exist at common law, that right can be exercised by those only who come within its provisions, which do not include the mother of an illegitimate child.

The case will be dismissed.

CRANE CREEK SHOOTING CLUB CO. v. CEDAR POINT CLUB CO.

(Circuit Court, N. D. Ohio, W. D. May 1, 1891.)

PUBLIC LANDS—SWAMP LANDS—DECISION OF COMMISSIONER.

By Act Cong. Sept. 28, 1850, the commissioner of the general land-office was constituted a special commissioner for determining the character of lands which, under that act, either passed to the state or were lands subject to sale; and where, in an action of ejectment, it appears that the lands in question were a part of a certain list of lands selected by the state, and claimed by it under the act, but that its claim was rejected by the commissioner in 1852; that again, in 1882, the land was claimed by the state as swamp land, and that the claim was again rejected by the commissioner as having been finally adjudicated by the former rejection thereof; and that the action of the commissioner was sustained by the secretary of the interior on appeal,—such decision of the land department will be regarded as conclusive; and the question whether the lands are really swamp lands, within the meaning of the act, will not be considered by the court.

At Law.

J. H. Tyler and A. Farquarson, for plaintiff.

J. D. Ford and Squires, Sanders & Dempsey, for defendant.

RICKS, J. The petition in this case was filed on the 2d day of September, 1889, in the court of common pleas for Lucas county, Ohio. On the 2d of October, 1889, the defendant filed its original answer, and on the same day filed its petition and bond for removing the cause to this court. The petition avers that the plaintiff is a corporation created under and by the laws of the state of Ohio, and that the defendant is also an Ohio corporation. The plaintiff further avers that it has a legal estate, and is the owner, in fee-simple, of certain swamp lands formerly owned by the state of Ohio, which lands are more particularly described as follows: "Being lots 1 and 6, in town 10, section 11 south of range 10, East Michigan meridian, in Lucas county, state of Ohio;" and that said plaintiff is entitled to the immediate possession of said lands so described. That the said defendant, the Cedar Point Club Company, has ever since on or about the 1st day of June, A. D. 1889, unlawfully kept, and does now unlawfully keep, the said plaintiff out of possession thereof. Wherefore said plaintiff prays that it be decreed by the court to be the owner of said lots 1 and 6, the above-described premises, and that it have judgment for the recovery thereof; that the defendant be ordered to deliver to the plaintiff the immediate possession thereof. The defendant, in its original answer, admits that it is a corporation, and that ever since June 1, 1889, it has kept the plaintiff out of possession of the real estate described in the petition. It avers that it is the owner, in fee-simple, of the real estate described in the petition, and was for many years prior to this suit, and is now, in possession of the same as owner thereof; that it purchased the same from Philip Lacorse, who conveyed the same to the defendant prior to this suit; that said Lacorse derived his title and ownership by entry and patents from the United States. On the same day, the defendant filed its petition for removal to this court on the ground that the controversy between the parties involved the construction of an act of congress, and thereby conferred jurisdiction upon this court. On the 22d of January, 1890, the defendant, by leave first had and obtained, filed its amended answer, in which it admits and reaffirms all the allegations of the original answer, and, further answering, says that on December 19, 1850, under the swamp-land act of congress of September 28, 1850, the state of Ohio selected a list of swamp lands to which it claimed it was entitled under the provisions of said last-named act, embracing in the aggregate 32,438.15 acres, included in which was the land described in the plaintiff's petition herein. On the 19th of December, 1850, the register of the land-office at Defiance, Ohio, reported to the general land-office at Washington:

"That the list above named contained all the swamp or overflowed lands unfit for cultivation in this district, as far as a determination can be formed from the plats and descriptive notes in this office, made out in pursuance of a circular from the commissioner of the general land-office, dated November 21, 1850."

On the list of land thus reported from the Defiance land-office was a large tract of marsh land, among which was included the land described

by the plaintiff's petition, which was designated and marked on said list as follows:

DISPUTED TERRITORY NORTH OF THE OLD STATE LINE.

Deep marsh covered with water, 9 s., 9 e.,	-	-	-	-	2,500
Same, 9 s., 10 e.,	-	-	-	-	1,500
Same, 10 s., 10 e.,	-	-	-	-	2,000
					<hr/> 6,000

Upon full consideration of the facts, including that of the character of the land, the claim of the state of Ohio to all of said 6,000 acres was rejected by the commissioner of the general land-office because said lands were not within the operation of the act of September 28, 1850. Said decision was rendered on the 29th of September, 1852, and said lands, including the lands claimed in the plaintiff's petition, were designated in the general land-office as "List No. 2, Defiance, Ohio." Said rejection was registered in the general land-office on October 8, 1852, and a duly-certified copy thereof was sent to the register at Defiance, Ohio; and on October 7, 1852, a similar copy was sent to the governor of Ohio, and duly received by him. The answer further avers that the authority to determine all questions relating to the lands affected by the act of September 28, 1850, was vested in the secretary of the interior and the commissioner of the general land-office, and that the decision of the commissioner was final, unless an appeal was taken to the secretary of the interior; and the answer avers that no such appeal was taken by the state of Ohio, and that the decision referred to was therefore conclusive as to the character of said land, and as to the title of the plaintiff thereto. The answer further avers that afterwards, on the 11th day of February, 1882, G. H. Foster, a commissioner appointed under the laws of Ohio to represent her in her swamp-land claims against the general government, filed his application with the commissioner of the general land-office to sell the lands within the limits of the Marston survey, which included the 6,000 acres of land heretofore referred to, and including the land claimed in the plaintiff's petition as belonging to the state of Ohio under the swamp grant of September 28, 1850; act of March 3, 1857; and sections 2479, 2481, and 2484 of the Revised Statutes of the United States. The commissioner of the general land-office again rejected said application, for the reason that the state of Ohio had once been heard on said claim, which had been rejected, and from which decision no appeal had been taken, and that thereby said rejection became a final adjudication of the claim. From said decision an appeal was taken by the commissioner for Ohio to the secretary of the interior prior to March 9, 1882, and a request was made at the same time to stay the public sale of said lands, offered in pursuance to the former decision; and on that day the secretary affirmed the decision of the general land-office, and refused to postpone the sale. And thereafter, on application of the state of Ohio, the secretary gave a rehearing on said appeal, and on the 29th of March, 1882, the former decision was re-

affirmed, and it was ordered that said lands be advertised and disposed of as public lands of the United States. The Honorable H. M. Teller having soon thereafter succeeded the Honorable S. J. Kirkwood as secretary of the interior, an application was made to him on behalf of the state of Ohio, and others interested in said land, to have the decision of his predecessor reviewed. Said application was rejected by the new secretary on the 8th day of June, 1882, for the reason that the former decisions were correct and final, and because the lands had been actually sold under his predecessor's orders, and, such sale having been properly and satisfactorily made, the secretary ordered the patents to issue upon the entries made at the public offering. The answer further avers that the land described in the plaintiff's petition was embraced within all the foregoing adjudications and decisions, which the defendant avers are final as to all claims of the state of Ohio; and that, subsequent to said decisions, Philip Lacorse, the defendant's grantor, received from the government of the United States a regular patent for the lands described in the plaintiff's petition. The defendant further avers that it was duly transferred on the tax duplicate of Lucas county, and that since 1882 it has owned and possessed the same, and paid taxes thereon for city and county purposes in said county. Wherefore it asks that it may be decreed to be the owner thereof, and its title thereto be forever quieted as to all claims of the plaintiff. The plaintiff filed its demurrer to the above amended answer, because "the same does not state facts sufficient to constitute a ground of defense."

These pleadings present the question whether, assuming all the facts to be true as pleaded in the answer, the plaintiff is precluded by the decisions set forth therein from further contesting the validity and conclusive character thereof. Under the act of September 28, 1850, the commissioner of the general land-office was constituted a special tribunal for determining the character of lands which, under that act, either passed to the state, or were held to be lands subject to sale under the provisions of law. In this case, by affirmative action on the part of the state of Ohio, through its land commissioner at Defiance, the question was fairly presented to the commissioner of the general land-office as to the character of the 6,000 acres of land specifically described in List 2, as set forth in the amended answer. After satisfactory hearing, the exact nature of which is not disclosed by the answer, and is not material for the purposes of this opinion, the land-office held that the 6,000 acres referred to were not swamp lands, and therefore did not pass to the state of Ohio under the act of congress referred to. Of this decision due notice was given to the state of Ohio, both to its land commissioner and to the governor thereof. Under the acts of congress, the right to an appeal to the secretary of the interior was given to the state. This right was not exercised, for reasons which must have been satisfactory at the time to the authorities of the state. Nearly 30 years after that decision the state of Ohio again appealed to the land-office, through its land commissioner, to sell the lands within the limits of the Marston survey, which included the lands in controversy in this case, as belonging to the state

of Ohio under the swamp-grant act of 1850; the act of March 3, 1857; and sections 2479, 2481, and 2484 of the Revised Statutes of the United States. The commissioner of the land-office again rejected this application. From his decision, an appeal was taken to the secretary of the interior, who affirmed the decision of the land commissioner. A petition for rehearing was filed. That was allowed, and, after consideration, the decision of the secretary was reaffirmed. He was then succeeded by Secretary Teller, to whom application was made to review the decision of his predecessor. This petition was heard, and refused for the reasons stated in the amended answer.

This brief statement of the history of this litigation shows conclusively that the state of Ohio has been diligent in her efforts to recover these swamp lands, and escape from the conclusive character of the decision against her in 1852. It is now insisted on the part of the plaintiffs that, conceding all these facts, the defendant is nevertheless without any legal defense in this case, and that the cause should be allowed to proceed to trial, and the plaintiff be permitted to show that the lands referred to were in fact swamp lands, and passed to the state of Ohio by virtue of the act of 1850. I do not think this claim can be conceded. Congress, by the act referred to, created a tribunal for the purpose of determining the character of the lands claimed by the state to have passed by virtue of that act. An appeal was made to this tribunal, as hereinbefore stated, by the state of Ohio, and the decision of the land-office was that these lands were not swamp lands. They were accordingly held to be lands subject to sale; and, after due and proper notice, the lands were sold, and a patent was issued therefor. The supreme court has said:

"When the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others. That the action of the land-office in issuing the patent for any of the public land subject to sale, by pre-emption or otherwise, is conclusive of the legal title, must be admitted, under the principle above stated; and in all courts, and in all forms of judicial proceedings where this title must control, either by reason of the limited powers of the court or the essential character of the proceedings, no inquiry can be permitted into the circumstances under which it was obtained."

But it is claimed that the decision of the land-office was not *res adjudicata*, because the parties now before this court were not parties to the contention before the land-office. But that decision referred to this particular tract of land in dispute, and it was a well settled principle of law that all parties and their privies must take notice of any decision affecting the title of the land to which they make claim. It will easily be seen that to hold otherwise would make the title to such lands very uncertain. The court might find great difficulty in determining what was the actual condition of these lands in 1850. They may then have been under many feet of water, or they may have been arable lands. Subsequent changes in the water-courses and drainage of the state may affect the character of such lands very materially. The decision of the

land-office in 1852 may have been correct, both as to the law and as to the facts relating to the actual condition of the land, as to being overflowed or not. Their condition may subsequently have changed, and to permit of oral proof now upon this point would lead to endless confusion, and perhaps work great injustice to the parties concerned. The only safe course is to act upon the principle announced by the supreme court, and treat the decision of the tribunal appointed at the time to determine that fact as final. The conclusion must therefore be that the decision of the land-office in 1852, not having been reviewed by the state of Ohio, as the law permitted, became final and conclusive as against the state, and neither the state nor its privies can now be permitted to come and controvert that decision. But the amended answer avers that the particular land for which the plaintiff brings suit was included in the land sold under the direction of the general land-office of the United States. The demurrer concedes that fact. It must therefore follow that, upon the pleadings as they stand, the defendant is entitled to the judgment, and the petition must be dismissed.

GOODYEAR DENTAL VULCANITE Co. v. WHITE, (two cases.)

(Circuit Court, S. D. New York. April 24, 1891.)

ABATEMENT AND REVIVAL—LACHES.

After the lapse of nearly 12 years after the death of a sole defendant in a suit in which issue has never been joined, though the suit was begun 4 years before his death, the suit cannot be revived against his executors.

At Law.

W. H. L. Lee, for petitioner, cited the following cases on the question of delay:

Beach v. Reynolds, 53 N. Y. 1; *Coit v. Campbell*, 82 N. Y. 509, and cases cited; *Bennett v. Cook*, 43 N. Y. 537; *Evans v. Cleveland*, 72 N. Y. 486; *Lyon v. Park*, 111 N. Y. 350, 18 N. E. Rep. 863.

LACOMBE, Circuit Judge. These are motions to revive two actions, the one for maintenance,—the defendant being charged with the malicious defense of and interference in certain suits in which he had no interest,—the other for slander of title to personal property. They were commenced, the former in this court in 1873, the latter in the state court in 1875, in which year it was removed into this court. Issue has never been joined. The sole defendant died on or about December 29, 1879, in Paris, France, and was at the date of his death a resident of Philadelphia, Pa. On December 31, 1879, his will was duly admitted to probate in the city of Philadelphia, and within two months thereafter letters testamentary were duly issued to his executors, who have entered upon the execution of their duties, and are still acting as such. The

defendant left a large amount of personal property in the city of New York, of which his executors have taken possession, when does not appear by the papers, but presumably soon after their appointment. On December 17, 1886, the petitioner was duly appointed receiver of the property of the plaintiff, and on July 21, 1890, filed his petition for a revival of the actions against the executors of the defendant.

A careful examination of the cases cited on the exhaustive brief of the petitioner's counsel (particularly 82 N. Y. 509; 72 N. Y. 486, *Lyon v. Park*, 111 N. Y. 350, 18 N. E. Rep. 863; 53 N. Y. 1) leads to the conclusion that the application for an order of substitution and revival should not be granted. The later cases seem to warrant the proposition that section 757 of the New York Code is not constraining on the court, and that in granting a motion for continuance it should exercise a legal discretion, and refuse the relief when there has been a lapse of time after statement equal to the statute of limitations applicable to the original claims. It is no doubt true that the two later cases were of equitable nature, but there was, at common law, no right to revive such actions as these at all, and it only exists in this state by virtue of an express statute, which, so far as its language is concerned, makes no distinction between legal and equitable actions. Unless the authorities in this state were very clear in support of the proposition, I should not grant a motion to revive where so great a time has elapsed as in this case. The modern doctrine treats the subject of limitations as a matter in which the public is concerned, as well as the individual; and defenses resting upon the lapse of time, which were heretofore deemed unmeritorious, are no longer so considered.

Nor do I find in the fact that the executors have continuously resided in Pennsylvania, and that the petitioner is a resident of New York, and the original plaintiff a New York corporation, sufficient excuse for the delay in making this motion. If an action can be revived against a foreign executor upon the theory that he has taken property which the decedent left within the state, then the executor was not absent from the state for the purposes of this motion. If on that theory the action could be revived now, it could have been revived as soon as the executor took the property.

It is not necessary to consider the effect of the excuses for delay offered by the receiver. Under the view here taken, the right to revive had been lost before the appointment of a receiver.

DE ESTRADA v. SAN FELIPE LAND & WATER CO.*(Circuit Court, S. D. California. May 11, 1891.)***EQUITY—LACHES—LAPSE OF TIME.**

Where a bill in equity discloses that complainant was informed as early as 1876 by her brother that her father, who died in 1848, had left a will devising to her certain land in California; that, after making some inquiries through her husband, she remained quiescent until 1888, when she learned that the land had been conveyed in 1850 to defendant's grantor by one assuming to act as executor of her father's will, and that the title was confirmed by the board of land commissioners under Act Cong. March 3, 1851, and that she did not bring suit until 1890,—her claim will be held to be stale notwithstanding it also appears that she was ignorant, and in great poverty, and a demurrer to the bill sustained.

In Equity. On demurrer to bill.

Lamar & Castle and *W. H. C. Ecker*, for complainant.

Hutton & Swanwick, for defendant.

Ross, J. This is a suit in equity, brought by the complainant to establish her alleged right to an undivided interest in the Rancho Valle de San Felipe, which was granted by the Mexican government on the 30th day of May, 1846, to Felipe Castillo, the father of complainant, and is situated in what is now San Diego county, Cal. The original bill was filed herein on the 29th of January, 1890, and the amended bill, to which the present demurrer is interposed, was filed July 22, 1890. In the amended bill it is alleged that the complainant is the illegitimate daughter of Felipe Castillo, who, it is alleged, died in the city of Los Angeles, Cal., in the year 1848, leaving four children surviving him, namely, the complainant, and Loreto, Manuel, and Refugio Castillo. It is alleged that Felipe Castillo died seized of the rancho in question, and that he left a will, by which he devised it in equal shares to his four named children, and appointed as the executor of the will one Augustine Olivera, a resident of Los Angeles; that Olivera declined to act as such executor, but that on the 25th of May, 1850, he, together with Loreto Castillo, Manuel Garfias, and Juan Foster, "in fraud of the rights of your orator herein, caused to be made and delivered to said Juan Foster a certain instrument in writing, whereby the said Loreto Castillo then and there pretended to and did declare himself to be the executor of the said last will and testament of said Felipe Castillo, and the agent of his said two brothers, said Manuel and Refugio, and empowered to sell said Rancho Valle de San Felipe;" that in and by said written instrument Loreto Castillo pretended to sell and convey to Foster the whole of the rancho; that Loreto was not at the time of the execution of the conveyance the executor of the will, nor had he any power or authority from Manuel or Refugio to sell their interest in the rancho, or in any manner to represent them, all of which, it is alleged, was well known at the time to Loreto, Olivera, Foster, and Garfias; that in the year 1855 Foster presented to the board of land commissioners (created by the act of March 3, 1851, to ascertain and settle the private land claims in California) a petition for the confirmation to him of the title to said rancho,

based upon the aforesaid grant from the Mexican government to Felipe Castillo, and upon the aforesaid conveyance from Loreto Castillo to Foster, in which petition complainant alleges "said Juan Foster knowingly, falsely, and fraudulently averred that he had purchased all the interest of said heirs of Felipe Castillo, deceased, under an order of court from Loreto Castillo, and that said Loreto Castillo was the executor of the last will and testament of said Felipe Castillo, deceased, and that he knew of no interfering claim to said rancho; that at the same time he well knew that your orator was one of the devisees under said will, and was entitled to a one-fourth interest in all of said rancho." It is further alleged that Olivera testified before the board of land commissioners that the heirs of Felipe Castillo consisted only of the three brothers, Loreto, Manuel, and Refugio, although he well knew that complainant was his daughter, and that under the terms of the will she was entitled to a share of the estate, of which will, it is alleged, he failed to inform the board, but, on the contrary, that he suppressed it; that the board of land commissioners, "imposed upon by the false and fraudulent evidence hereinbefore set forth, on the 3d day of December, 1855, granted the petition of said Juan Foster, and confirmed his pretended claim to the said Rancho Valle de San Felipe, declaring in the opinion of said board of land commissioners that the title to said rancho had been conveyed by Loreto Castillo, son and testamentary executor of said Felipe Castillo, deceased, to the claimant Juan Foster;" that thereafter, to-wit, August 6, 1866, letters patent were issued by the government of the United States to Juan Foster for the whole of the rancho. It is alleged that the deed from Loreto Castillo to Foster was recorded on the day of its execution in Los Angeles county, but never was recorded in San Diego county, where the land is situate, and that the defendant corporation, which, it is alleged, has succeeded to the rights of Foster, "at all times well knew all the facts of the fraud herein alleged, and had notice of the invalidity of the said deed or instrument made by said Loreto to said Juan Foster as aforesaid." The complainant alleges that she last saw her father in the city of Hermosillo, Mexico, in the year 1847, and never afterwards had any communication from him or any knowledge of him; that in the year 1851 she removed to Marysville, in this state, and in 1865 to Placer county, where she has since resided; that some time after her arrival in California,—"not earlier than the year 1876,"—she was told by her brother Loreto that her father had made a will, giving her some land in San Diego county, which was the first intimation she received of such devise; that Loreto informed her that he had sold his own interest therein, but that he had not sold hers, and that her interest still remained intact and vested in her; that subsequently complainant's husband "began to make inquiries concerning the reputed legacy of her father, and informed your orator that he had seen Loreto Castillo, who informed him that his sister Elena (your orator) had an interest in some land in San Diego county, willed by her father to her and her brothers, the said four children of Felipe Castillo, deceased; that he, the said Loreto, had sold his interest but had not sold her (your orator's) inter-

est;" that complainant never knew until the month of May, 1888, that the land devised to her by her father was within the Rancho Valle de San Felipe, and did not until then know of the deed from Loreto Castillo to Foster, or of the proceedings before the board of land commissioners, or of the patent issued to Foster. It is further alleged that Loreto Castillo, from the time of the execution of the conveyance to Foster until September 1, 1889, kept in his own possession, and concealed from complainant, the original will of Felipe Castillo, on which last-mentioned day he delivered it to complainant's attorney; that the will was never filed in any court or office, and was never theretofore made public, but was by Loreto Castillo, Olivera, Foster, and Garfias kept concealed for the purpose of defrauding complainant of her rights in the property; that complainant is an ignorant woman, unable to read or write in any language, and has heretofore been too poor to employ counsel or prosecute her rights. While the poverty of the complainant is much to be regretted, it does not constitute any legal or equitable ground for granting her relief which would be denied to her if rich. The legal and equitable rights of parties to controversies before the courts must be administered regardless alike of poverty and riches. Nor is the fact that complainant is ignorant and unable to read or write of itself sufficient to bring into action the aid of a court of equity in behalf of a claim and demand otherwise barred by lapse of time. Every one, not under legal disability, must assert his or her rights within the time prescribed by the rules of law or equity, as the case may be. It is true that the statutes of limitations applicable to actions at law do not apply to suits in equity, but courts of equity are governed by the analogies of such statutes. *Norris v. Haggin*, 136 U. S. 386, 10 Sup. Ct. Rep. 942. "A court of equity," said Lord CAMDEN, "has always refused its aid to stale demands where the party slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting the court is passive, and does nothing. Laches and neglect are always discountenanced; and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court." *Smith v. Clay*, 3 Brown Ch. 639, note. This doctrine has been repeatedly recognized and acted on by the supreme court. *Speidel v. Henrici*, 120 U. S. 377, 7 Sup. Ct. Rep. 610, and cases there cited.

In the present case, the bill as amended shows on its face that as early as 1876 complainant was told by her brother Loreto that her father left a will, by which he devised to her an interest in some land in San Diego county; that he, Loreto, had sold his interest therein, but had not sold complainant's, and that she still retained hers; that subsequently complainant's husband "began to make inquiries concerning" the legacy, and Loreto told him substantially the same thing. There the complainant seems to have been content to rest for a period nearly three times as long as that prescribed by statute in California for the recovery of land in an action at law. In May, 1888, according to the averments of the amended bill, complainant first learned through her present

solicitor of the execution of the conveyance by Loreto to Foster in 1850, of the proceedings before the board of land commissioners under the act of congress of March 3, 1851, culminating in the issuance by the government to Foster of a patent for the entire rancho on the 6th of August, 1866; and yet she still delayed bringing suit until January 28, 1890, — nearly 40 years after the making of the deed by Loreto Castillo to Foster, and more than 23 years after the issuance to the latter of the government patent. At least 14 years before she asked the aid of this court of equity she was informed that her father, who died in California in 1848, left a will, by which he devised to her an interest in land situated in San Diego county, and that her brother had sold his interest in the same land, but not hers. Neither she nor her husband, who received the same information from Loreto, appear to have made another inquiry concerning the property, or to have taken a single step for the protection or enforcement of complainant's rights. Yet complainant must be held to have known that whatever land her father owned in California at the time of his death, and devised to her, was subject to the consideration and adjudication of the board of land commissioners created by congress for the settlement of the private land claims in California, and that a petition for the confirmation thereof was by the law required to be presented to that board. If she had gone there, she would have found from the records of that tribunal, according to the allegations of the amended bill, that Loreto Castillo claimed to act as the executor of the will of Felipe Castillo, and that he pretended to sell to Foster the entire Rancho Valle de San Felipe, of which Felipe Castillo died seised, and that the whole of it was confirmed to Foster, and patented to him, in fraud of her rights under the will; and it was incumbent upon her to assert her rights within a reasonable time thereafter. According to her own averments, her brother Loreto told her of the will and of her rights under it as early as 1876, and subsequently gave the same information to her husband. Instead of enforcing she slept upon them for a period nearly three times as long as the statute of limitations prescribed by the state for the recovery of land in an action at law. Under such circumstances a court of equity will remain passive. An order will be entered sustaining the demurrer and dismissing the bill as amended, at complainant's cost.

UNITED STATES *v.* COVER.

(District Court, W. D. Pennsylvania. May 12, 1891.)

INDICTMENT—VIOLATION OF ELECTION LAWS—REFUSAL TO TESTIFY.

Rev. St. U. S. § 110, provides for the taking of testimony in contests as to the election of a member of the house of representatives before certain officers. Id. § 111, provides for the issue by such officer of his subpoena to the witnesses, and Id. § 114, for the service of the subpoena. *Held*, that an indictment under Id. § 116, for refusing to attend and testify, which avers that defendant, having been duly served with a subpoena, etc., "did refuse and neglect to attend and testify," but which fails to allege special statutory authority for the issue of the subpoena, and the particular official by whom it was issued, is insufficient.

At Law. Motion to quash indictment.

F. J. Kooser, J. R. Scott, and Ed. B. Scull, for defendant.

Walter Lyon, Dist. Atty., *Wm. J. Brennan*, and *A. V. Dively*, for the United States.

REED, J. The indictment in this case is intended to charge an offense under section 116 of the Revised Statutes, which provides that any person, who, having been summoned to testify in a contest relating to the election of a member of the house of representatives of the United States, in the manner provided in section 110, section 111, and section 112 of the Revised Statutes, refuses or neglects to testify, unless prevented by sickness or unavoidable necessity, shall be liable to indictment for misdemeanor. Section 110 provides that any contestant or returned member, desirous of obtaining testimony respecting a contested election, may apply to any of the following officers, who may reside within the congressional district within which the election to be contested was held, viz., a judge of any court of the United States; a chancellor, judge or justice of a court of record of any state; any mayor, recorder, or intendent of any town or city; or any register in bankruptcy or notary public. Section 111 provides that the officer to whom the application authorized by section 110 is made shall thereupon issue his writ of subpoena, directed to all such witnesses as shall be named to him, requiring their attendance before him at some time and place named in the section, in order to be examined respecting the contested election. Section 112 provides that, if none of the officers named in section 110 reside in the congressional district, two justices of the peace may receive the application, and jointly proceed upon it. Provision is made in section 120 that the witnesses are to be examined by the officer issuing the subpoena, or, in case of his absence, by any other officer authorized to issue such subpoena. The subpoena must, as provided in section 114, be duly served on the witness five days at least before the day fixed for the attendance of the witness, and, by section 115, no witness can be required to attend an examination outside of the county in which he may reside, or be served with a subpoena. "It is a general rule that the special matter of the whole offense should be set forth in the indictment with such certainty that the offense may judicially appear to the court. When special facts

are an essential part of the offense, they must be set out." Whart. Crim. Pl. § 151. "Where the act is not in itself necessarily unlawful, but becomes so by its peculiar circumstances and relations, all the matters must be set forth in which its illegality consists." Hence the omission of any fact or circumstances necessary to constitute the offense will be fatal; as in an indictment for obstructing an officer in the execution of process, without showing that he was an officer of the court out of which the prosecution issued, and the nature of the official duty, and the process. Id. § 152. An indictment under the twenty-second section of the act of 1790, making it an offense knowingly and willfully to obstruct, resist, or oppose any officer of the United States in serving any legal process, must show by proper averments that the process was legal, not only in form and purpose, but as emanating from some court or officer empowered by law to issue such process. *U. S. v. Stowell*, 2 Curt. 155, and in that case Justice CURTIS says:

"To constitute an offense under this law, the obstruction must have been of some legal process, and, whatever may have been the form or purpose of this process, it is not legal process, within the meaning of this act, unless it emanated from, and was issued by, some tribunal, judge, or magistrate authorized by the laws of the United States to issue such process. What particular averments are necessary to show this authority to issue the process alleged to be obstructed depends upon the character of the tribunal or officer from whom it came. If, as in this case, the officer who granted the process had by law only a limited and special authority, dependent for its existence upon particular facts, every fact necessary to the existence of that authority must either be averred in the indictment, or appear on the face of the process set out therein."

An indictment for perjury alleged to have been committed on an examination before "a commissioner of the United States duly appointed," but not stating how, or by whom, or under what statute, or for what purpose, such commissioner was appointed, is bad on demurrer. *U. S. v. Wilcox*, 4 Blatchf. 391. The indictment in this case avers that the defendant—

"Being duly served with a subpoena personally, by making known the contents thereof, and by handing him a copy thereof, at least five days before the 31st day of March, A. D. 1891, that being the day his attendance as a witness was required by said subpoena before John A. Doyle, city recorder of the city of Altoona, * * * or some other person or persons duly qualified, * * * unlawfully did refuse and neglect to attend and testify and produce said ballot-box, as required by said subpoena, although not prevented by sickness or unavoidable necessity."

The indictment also avers that the subpoena required the production of the ballot-box by the witness.

The first reason set forth by the counsel for the defendant in support of his motion to quash the indictment is that "the bill of indictment does not charge the defendant with the commission of any offense against the laws of the United States." The second reason set forth in support of the motion is that "the bill of indictment does not aver that the subpoena alleged to have been served upon defendant was issued by any person or tribunal authorized or competent to issue such subpoena, or where or by

whom it was issued." Tested by the rules laid down in the authorities I have cited, I think the indictment clearly insufficient. The foundation of the whole proceeding is the issuing of the subpoena by one of the several officials, authorized, by the sections I have quoted, to issue subpoenas in contested election cases. The authority is special and statutory, and the particular official who issued the subpoena, and the manner in which it was issued, should have been averred in the indictment. This has not been done, and hence it does not appear that the defendant owed such duty, and was under such legal process as to render him liable to the penalties prescribed by the statute. For this reason the indictment should be quashed.

This conclusion renders it unnecessary to pass upon the questions raised by the third and fourth reasons assigned in the motion to quash, or to decide whether an officer of the classes named in the statute may go beyond the county of which, or in which, he is an official under the state laws, and take the depositions of witnesses in other counties in the same congressional district, or whether his subpoena will run beyond the county in which he resides, where, by the state laws, his powers are only exercisable in that county.

MURBARGER *et al.* v. BAKER *et al.*

(Circuit Court, N. D. New York. May 11, 1891.)

PATENTS FOR INVENTIONS—INFRINGEMENT—THILL SPRINGS.

Letters patent No. 344,786, issued June 29, 1886, to William E. Murbarger, for an improved anti-rattler spring for thill couplings, consisting of a spring of V form, having arms provided with reverse curves at their ends, and with convexed portions between the V point and the reverse curves, are not infringed by a spring which, though substantially like the patented device, has no reverse curve and no convex portion; since said patent, being but one in a long series of similar improvements, is restricted to the precise form described in its claim.

In Equity.

William A. Redding, for complainants.

Frederick I. Allen, for defendants.

COXE, J. This is an action in equity based upon letters patent No. 344,786 granted to William E. Murbarger, June 29, 1886, for an improved anti-rattler spring for thill-couplings. The patentee conceived the invention in December, 1883, or January, 1884. His object was to provide an inexpensive spring which can be inserted in, and removed from, the space between the thill and axle without removing the thill; a spring having reverse curves upon its arms to fit the clip of the axle upon one side and the curve of the end of the thill upon the other, so as to be held in place by the tension of the spring. The claims are as follows:

"(1) An anti-rattler spring of V form, having arms provided with reverse curves *e i* at their ends, and with extended or convex portions *x y* between the V point and reverse curves, the space between said convexities being greater than the space between the jack-clip and thill-heel, substantially as described. (2) An anti-rattler spring of V form, provided with two arms having reverse curves *e i* at their free ends, and with its lower end bent abruptly and curved forward, substantially as described."

The defenses are want of invention and non-infringement.

The evidence shows that the patentee was very far from being a pioneer. The field of invention, at best an exceedingly narrow one, was so fully occupied when he entered it, that many who had come with high expectations of being permitted to locate there had been crowded into the adjoining, but less fertile, field of mechanical skill. The prior art shows a great variety of springs designed to accomplish the same results as the spring in controversy. There were U-shaped springs, hook-shaped springs, cup-shaped springs and V-shaped springs. There were springs made of flat metal, wire and rubber. There were lever springs, coiled springs, and leaf springs; springs with their lower ends round, angular and bent abruptly; springs with straight arms and arms having concavities, convexities and reverse curves. It is entirely clear, therefore, in view of the prior art and of the limitations submitted to in the patent-office, that the complainants are not entitled to a broad construction of the claims or to invoke the aid of the doctrine of equivalents. The improvement of the patent is but one in a long series of similar improvements having precisely the same object in view. The rule is well established that in such cases the patentee must be restricted to the form, arrangement and purpose described and claimed. It is thought that the defendants do not infringe the claims construed in the light of this well-known principle of law. It is not pretended that the defendants' spring has all the features of the patented spring, but it is argued that the two structures are "substantially" and "practically" alike and that where the defendants diverge they employ equivalents. Comparing the defendants' spring with the claims, it will be found that there is no reverse curve *i*, no convex portion *y*, and that the space between the convexities is not greater than between the jack-clip and thill-heel. In fact, there are no "convexities," as the side of the spring which engages the thill-heel is substantially straight. Furthermore, there is no "lower end bent abruptly and curved forward," in the sense in which these words are used in the patent. As the defendants do not infringe the bill must be dismissed.

CONSOLIDATED BUNGING APPARATUS CO. v. METROPOLITAN BREWING CO.¹

(Circuit Court, E. D. New York. May 1, 1891.)

PATENTS FOR INVENTIONS—No. 222,975—BEER VESSELS.

Patent No. 222,975, granted to Otto Zwietusch and Edward Heitman for an improvement in automatic pressure relief apparatus for beer vessels, was not anticipated by patent No. 219,057, granted to Emil Zesch for an improvement in relief attachments for beer-fermenting vessels.

In Equity. Suit for injunction and accounting.

Banning, Banning & Payson, (E. & H. A. Banning, of counsel,) for plaintiff.

Edward N. Dickerson, for defendant.

WHEELER, J. This suit is brought upon patent No. 222,975, dated December 23, 1879, and granted to Otto Zwietusch and Edward Heitman for an improvement in automatic pressure relief apparatus for beer vessels. The patent, and particularly the first claim, which is the one now under consideration, was construed and sustained against most of the defenses now made in *Apparatus Co. v. Woerle*, 29 Fed. Rep. 449. The views of Judge BLODGETT are concurred in and followed, and reference to them appears to be sufficient so far as the same questions arise here. Patent No. 219,057, dated August 26, 1879, and granted to Emil Zesch for an improvement in relief attachments for beer-fermenting casks, appears to have been before the court in that case, but without evidence as to the time of the invention or use of the structure. Such evidence has been produced here. But neither this evidence nor any other proof in the case shows with the clearness required for the overthrow of a patent that either Zesch or any one invented or used the combination of the knife-edge mechanical fit valve with surrounding water chamber of this claim prior to its invention by these patentees. The decision of this question in this way, with what was decided in that case and is followed in this, entitles the plaintiff to such a decree here as was had there.

Let a decree be entered for the orator, for an injunction and an account upon the first claim of the patent, with costs.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

WELLMAN & DWIRE TOBACCO Co. v. WARE TOBACCO-WORKS.

(Circuit Court, D. Minnesota, Third Division. June 10, 1891.)

TRADE-MARK—INJUNCTION.

The labels on complainant's tobacco packages had a representation of a shield or banner and an ellipse with a circle, and the words "Smoke and Chew." The colors used were red and yellow. Defendant's labels had the same figures and colors, and the words "Smoke and Chew," and were so much like complainant's that one might easily be mistaken for the other. One was called "Peach Blossom," and the other "Sweet Lotus." *Held*, that defendant's wrappers were a palpable imitation of complainant's, and that their use should be enjoined.

In Equity. Motion for injunction.

Flandrau, Squire & Cutcheon, for the motion.

E. C. Stringer, opposed.

NELSON, J. A motion is made upon a bill filed by the complainant for a preliminary injunction to restrain the defendant from using a label, brand, and wrapper, so closely resembling the complainant's trade-mark and labels and wrappers as to infringe upon the complainant's rights. The complainant, Wellman & Dwire Tobacco Company, is incorporated under the laws of the state of Illinois, and a citizen thereof, engaged in the manufacture of smoking, plug, and fine cut tobacco, and uses a duly-registered trade-mark, in connection with the mode and manner of putting up the packages of its manufacture for sale. The defendant, the Ware Tobacco-Works, is a citizen of the state of Minnesota, and is charged with infringing the complainant's trade-mark, and using wrappers and devices thereon so that the resemblance is calculated to deceive a purchaser having no cause to use more than ordinary caution, and that the defendant has copied from the complainant by design. It is clear to my mind that the method of preparing in packages the tobacco manufactured by the complainant for market is infringed by the Ware Tobacco-Works. The similitude of the wrappers, and of the labels, in connection with the combination of colors used, is apparent. While the name "Peach Blossom" used by the defendant to designate his tobacco is not similar to "Sweet Lotus," the name used by the complainant, the devices on the wrappers make the general effect of the packages the same. The shield or banner used on the wrappers is similar in shape, and of the same general curvature, and, when the tobacco is put up in the wrappers, forms a part of the defendant's package corresponding to that of the complainant. The entire wrappers and labels so closely resemble each other that dealers and purchasers would be readily misled and deceived. The differences, on critical examination, are capable of discernment and description, but to the eye of an ordinary person who knew the complainant's packages of tobacco, and never had seen the defendant's labeled as they are, and not knowing of any such kind of tobacco in the market, would be misled. The methodical imitation of the wrappers and style of labels appear to be intentional, and not accidental. For instance, when the package is put up for the market, in the center of

v.46f.no.4—19

one side of defendant's wrapper is a figure like an ellipse, with a circle in which are the words "Ware Tobacco-Works, St. Paul, Minn." The colors used are yellow, red, and blue. The complainant, on a like side of his wrapper, has an ellipse with a circle in the center in which is a monogram of Wellman & Dwire Tobacco-Works. The colors used are yellow, red, blue, and white; and below the center in each are the words "Smoke and Chew," in letters of the same size and shape. The upper half of the letters used by complainant is red, and the lower half yellow. The upper half of the letters used by defendant is red, and the lower half yellow, except the "or" is all blue, the background of each is black, and both edges of the complainant's wrapper are dark blue, with vine tracings; in the defendant's, light blue, and on one edge two buckles, with words, "Selected Leaf;" on the other two buckles, and the words "Nothing Better." The sides next below on both wrappers are bounded by blue edges inclosed by red bands. While there are variations, the general effect of the wrappers is the same, and they are enough alike to enable the defendant company to deceive the public, who are purchasers, and interfere with complainant. Motion for injunction granted, and it is so ordered.

THE W. F. BROWN.

THE SUNNY SOUTH.

LAWRENCE v. THE W. F. BROWN and THE SUNNY SOUTH, (SMITH,
Intervenor.)

(District Court, E. D. Louisiana. May 9, 1891.)

1. ADMIRALTY—WAGES OF PERFORMERS IN FLOATING CIRCUS.

Libelants were performers in a show given in a float or tow at points on the Mississippi river. The tow was propelled by a former ferry-boat, licensed for the coastwise trade. Libelants' chief duty was to perform before the audience, though they also did subordinately some duties connected with running the vessel. The intervening libelant was engineer on the propelling boat or tug-boat. *Held*, that the service of the original libelants was land service, substantially over which the admiralty courts could not take jurisdiction. *Held, also*, that the service of the engineer was maritime, giving to him a maritime lien which could be enforced in a court of admiralty.

2. SAME—WAGES OF ENGINEER ON TUG-BOAT.

Services rendered by an engineer on the propelling tug-boat were strictly maritime, and his libel must be maintained.

In Admiralty. Libel for wages.

J. Hutchinson, for claimant.

J. D. Grace, for libelants.

BILLINGS, J. This case is submitted upon exceptions to the jurisdiction of the court as a court of admiralty over the cause, both as to the

libelants, and the intervening libelant, who has had a separate admiralty process and seizure. The libelants who joined in the original libel were employed by the claimant, under these circumstances: The claimant owned a floating house, in which was given an exhibition or circus show at points between Evansville, Ind., and New Orleans; the floating house being for the time moored to the shore, and the spectators—patrons—coming from the land. This floating house was a tow propelled by a former ferry-boat,—a stern-wheel steamer licensed for the coastwise trade, described as a ferry-boat. The original libelants were performers in this circus, hired by the claimant to perform in the exhibition, and also to aid in minor matters, as he should direct, in the conduct of the tug. But their substantial and chief employment was as performers in the floating show.

Two questions are presented: (1) Was the propelling boat a vessel engaged in commerce and navigation? I think she was. She went from point to point upon the navigable waters, subject to admiralty jurisdiction, for hundreds of miles. The place of employment was within admiralty jurisdiction. The nature of the employment was for that sort of intercourse, in connection with a business which made it commercial. It was, without doubt, service performed during navigation; so that, so far as the structure of the vessel and the nature of the claimant's business is concerned, the propelling boat was a tug-boat engaged in commerce and navigation. (2) The second question is, were the libelants and intervening libelants sailors,—mariners,—in that they were employed to navigate the vessel? The original libelants were not. Their chief substantive business or service was to perform before an audience, and thereby afford amusement and entertainment. The fact that they did subordinate some duties connected with running the vessel does not affect the character of their service and employment. It must be classed either as maritime or land service, and it is, for the purpose of such classification, land employment. The service of the intervening libelant was that of engineer upon the propelling vessel, and nothing else. He was exclusively a mariner. My conclusion is therefore that the employment and service of the libelants carried with it no admiralty lien, but that the intervening libelant has a lien which he can enforce in a court of admiralty. The libel must therefore be dismissed, and the intervening libel maintained. This can be done, as the intervening libelant prayed for and has a separate admiralty process.

THE PROGRESSO.¹

COFFIN v. THE PROGRESSO OR WELLS CITY.

(District Court, E. D. New York. May 21, 1891.)

ADMIRALTY JURISDICTION—SEAMAN'S WAGES—VESSEL WITHOUT NAME, REGISTER, OR DOCUMENTS.

A British vessel was sunk in the harbor of New York, and abandoned by her owners, and her register closed. She was raised and sold to American citizens, and, while without name or register or documents as a vessel, libellant was employed by her owner as mate. The owner claimed that he was to have been mate when the vessel was ready for sea. In the mean time he served about the wreck as it was being repaired. He was discharged before the vessel was documented, and before she went to sea. On suit brought *in rem* to recover his wages, it was contended that the wreck was not a vessel, in the sense that she could have officers or mariners, that the services were not maritime, and the court had no jurisdiction. *Held*, that the case was within the admiralty and maritime jurisdiction of the United States, and libellant was entitled to recover mate's wages.

In Admiralty. Suit to recover seaman's wages.

James Parker, for claimant.

E. G. Benedict, for libellant.

BENEDICT, J. This is an action *in rem* to enforce a lien for mate's wages against the steamer formerly known as the "Wells City," now known as the "Progresso." It is defended with the object, it is understood, of obtaining a decision upon a question of admiralty jurisdiction. The defense set up in the answer is that the steamer, while a British vessel registered under the name of "Wells City," was sunk in the harbor of New York, and was abandoned by her owner, and her register as a British vessel duly closed; that she was raised by the underwriters, and sold to the claimant, with the purpose to procure for her a register as a vessel of the United States, under the name "Progresso;" that at the time of hiring the libellant the vessel had no name or purpose as a vessel, and was not a vessel in the sense that she could have either officers or mariners, nor could either officers or mariners be shipped or hired as such on board of said hull; that when, on November 28th, the libellant was placed in charge of said hull, it was with the understanding that when said hull should be documented, and not until then, the libellant should be shipped as mate; wherefore it is denied that this is a cause of contract civil and maritime, or that it is a case within the admiralty and maritime jurisdiction of the United States. The proofs show that at the time of the rendition of the services in question the vessel was afloat in the Atlantic basin, undergoing repairs preparatory to a voyage to sea; that she had no American register, and was not in any way documented as an American vessel; and it is assumed, although not proved, that her British register had been closed. Up to the 25th day of November, one Captain McArthur was in charge of the ship, and was to go as first mate of the ship when she obtained her papers. On the 25th of November, McAr-

¹Reported by Edward G. Benedict, Esq., of the New York bar.

thur fell into the hold and was killed. On the 28th of November the libelant was employed by the owner of the ship in McArthur's place. Afterwards a master of the ship was appointed by the name of Faircloth, and under him the libelant served until December 17th, when, owing to a disagreement with Faircloth, the libelant's employment was terminated by mutual consent. Upon the evidence it is not open to the claimant to deny that the libelant served on board the ship in the capacity of mate; for in a written note dated December 17, 1887, the claimant said to the libelant, "You had better resign your position,"—a phrase that would not have been addressed to a mere ship-keeper; and this note was inclosed to the libelant in an envelope addressed: "Mr. Coffin, Chief Officer S. S. Progresso." Furthermore, on December 19th the owner of the ship gave to the libelant a certificate in the following terms:

"NEW YORK, December 19, 1887.

"This is to certify that Captain T. A. Coffin, who has been in our employ as chief officer of our S. S. Progresso, leaves our employ for reasons of his own. We have found him competent, reliable, and one who understands his profession. We commend him to any one needing his services.

"BELLONI & Co."

These facts compel a finding that services rendered by the libelant on board the vessel were rendered in pursuance of a contract for his services in the capacity of chief officer of the ship. Moreover, the character of the services rendered, so far as disclosed by the testimony, was such as pertains to an officer of a ship. The responsibility that attaches to an officer in charge of a ship was upon the libelant, and the compensation agreed on, as testified to by the claimant, was not the compensation of a mere ship-keeper. The contract under which the libelant served was therefore the ordinary maritime contract of hiring on board a ship or vessel, unless the law be as contended in behalf of the claimant, that the fact that the ship was at the time of the rendition of the services without a register, had no documents as a ship, and was without a name, deprived the services of any maritime character. I do not agree to this contention. The services contracted for and rendered were performed on board a ship, and in view of a contemplated voyage of the ship for the purpose of earning freight. The Progresso was no less a ship or vessel because she had no national character and was without a name. She could navigate, indeed had navigated, from the place where she was sunk to the Erie basin; she could be the subject of salvage services. Absence of national character or want of a name would not prevent her from navigating as a ship. She may not have been entitled to the rights and privileges of a vessel of the United States, but she was nevertheless a vessel, capable of being employed in commerce as a ship, and a subject of a maritime service. Such a service was rendered to her by the libelant, and by the maritime law a lien therefor attached to her. Upon the main question of the case, namely, that of jurisdiction, my opinion, therefore, is that the case is one within the admiralty and maritime jurisdiction of the United States. The evidence discloses a difference between the parties as to the rate of wages agreed to be paid the libelant. The libelant

claims for 21½ days, at the rate of \$80 per month, and \$1.50 per day for his board and lodging, there being no cook on board the vessel. The weight of the evidence, however, is that the agreement was that he should be paid at the rate paid the man that was killed, which was \$70 per month, and 50 cents a day for meals. At this rate, and giving credit for \$10 paid him, the amount due the libellant is \$50.59. For this sum he is entitled to a decree, and, inasmuch as no tender is pleaded, he must also recover his costs, to be taxed.

THE VIRGO.¹

DABINOVICH *et al.* v. THE VIRGO. MERRITT WRECKING CO. v. SAME. COSCHINA v. SAME. CHERTIZZA *et al.* v. SAME. PROVINCIAL DRY-DOCK CO. v. SAME. EMPIRE WAREHOUSE CO. v. SAME. STEBBINS v. PROCEEDS OF SAME. LUCKENBACH *et al.* v. SAME.

(District Court, E. D. New York. April 9, 1891.)

MARITIME LIENS—PRIORITY — WAGES — SALVAGE — SUPPLIES — LACHES—BURDEN OF PROOF.

Claims for wages, salvage, and supplies, incurred upon the same voyage, at the port where the salvage service terminated, where the seamen's right of action accrued, and where the supplies were furnished, are concurrent, and the liens for wages and salvage take precedence over the lien of the material-men, where there has been no such laches on the part of the salvors as to deprive them of their right to priority. The burden of showing such laches is on the material-men.

In Admiralty. On application for distribution of the proceeds of the bark Virgo.

Ullo & Ruebsamen, for Dabinovich *et al.*

Hand & Bonney, for Merritt Wrecking Co.

Hobbs & Gifford, for Coschina and Chertizza & Co.

Edwin G. Davis, for Dry-Dock Co.

Fred. W. Hinrichs, for Warehouse Co.

Peter S. Carter, for Stebbins and Luckenbach.

BENEDICT, J. These cases come before the court upon an application for a distribution of the proceeds of the bark Virgo. The facts are not in dispute. The Virgo, an Austrian bark, bound from Buenos Ayres to New York with a cargo of bones, went ashore on Long island on the 15th of November, 1890. She was assisted by the Merritt Wrecking Company, pulled off the beach, and brought to New York in safety, her master and crew remaining on board and in possession. After her arrival in New York negotiations were entered into between the representatives of the vessel, cargo, and freight and the salvors as to the amount of salvage compensation to be paid. Pending these negotiations the ves-

¹Reported by Edward G. Benedict, Esq., of the New York bar.

sel was towed from Staten island to the Erie basin by a tug employed by the master. At the Erie basin her cargo was discharged, and at the request of the master certain boards required for the purposes of discharging the cargo were supplied by one John Chertizza. His bill amounted to \$66.20, and included a few dollars for oakum and planking, and four days' carpenter work furnished the vessel after she was placed upon a dry-dock, to which she was taken when the cargo was discharged. Up to this time it was the understanding of the salvors, as well as the master of the ship, and all concerned, that the vessel was to be repaired, and proceed upon her voyage home. When, however, the vessel was raised upon the dry-dock, it was ascertained that the condition of her bottom was such as to render it inexpedient to repair her. Whereupon she was let off the dry-dock, and the voyage abandoned. She was then libeled for wages by the crew, which had been shipped in Marseilles for the voyage, except two shipped in Buenos Ayres for the term of one year, and had up to that time remained on board, and in the service of the ship. The salvors also libeled the vessel to recover salvage for the service rendered in hauling the vessel off the beach, and then libels were filed by Chertizza & Co. for the boards, etc.; by Frank Coschina for \$274.58, for provisions furnished to feed the crew; by A. R. Stebbins for \$15, towage; by Ed. Luckenbach for \$16, towage; by the Empire Warehouse Company for \$171.66 for wharfage; and by the Provincial Dry-Dock Company for \$84 for the use of the dry-dock. No owner appeared in any of these proceedings. In the suit of the seamen the vessel was condemned, and she was sold by the marshal for the sum of \$2,355. In the suit for the salvage the salvage compensation was fixed by the court at \$500. This was for the salvage due by the vessel alone, and did not include salvage due from the cargo or the freight. The amount of wages due the crew up to the time of filing their libel was ascertained to be the sum of \$979.31. The amounts due the other libelants above mentioned were ascertained to amount in the whole to the sum of \$631.44. The proceeds of the vessel being insufficient to pay these demands and the taxable costs in full, the question of the distribution of the fund in court is presented; the demands being for wages, for salvage, for supplies, and each class insisting upon priority in payment over the other two. Under the circumstances attending the abandonment of the voyage, the rendition of the salvage service, and the incurring of the other debts above mentioned, all these demands must be deemed concurrent. They were incurred upon the same voyage, at the port where the salvage service terminated, where the seamen's right of action accrued, and where the supplies were furnished. The order of their payment out of the proceeds of the ship must therefore be determined by the rules ordinarily applied to demands of this character arising at the same period in the prosecution of a single voyage. By these rules the demands of the salvors and of the seamen take precedence over the demands of material-men.

It is contended that a different rule should be applied here, because the salvors delayed prosecuting their claim for the space of 60 days after

the completion of the salvage service, and permitted the vessel to be subjected meanwhile to the liens of the material-men. The question raised by this contention is not a question of priority, but of laches, and the burden is upon the material-men to show such laches on the part of the salvors as to deprive them of their right to priority. The delay of the salvors to enforce their claim by an immediate seizure of the ship upon her arrival in the port of safety was because of an understanding, in good faith entertained by them, as well as by the master of the ship, that the voyage was not to be abandoned, and that the salvage would be paid without litigation. Acting upon that belief, the salvors delayed instituting a suit for salvage until the 17th day of January, 1891, when the vessel was abandoned by her owners, but in my opinion they did not thereby lose or impair the lien which they had upon the ship. The maritime law gives salvors a lien upon the ship saved in order that it may be unnecessary for salvors to maintain possession of the property saved in order to secure payment of their demand. It assumes a surrender of the property to its owner, and a certain amount of delay in payment, without impairment of the salvors' lien. Of course a salvors' lien may be lost or impaired by improper or unnecessary delay, and when delay gives opportunity to the master of the ship to incur other debts upon the credit of the ship, it might be that the right of priority over such debts would be held to be lost by delay, if the delay could be found unreasonable or unjustifiable. But that cannot be found in this case. The delay on the part of these salvors did not arise from any improper demand of salvage on their part, nor from any unwillingness on the part of the ship to pay a proper salvage; on the contrary, the salvage was agreed on, and would have been paid if the discovery of the condition of the vessel's bottom, up to that time unsuspected, had not forced the owners to abandon the vessel and the voyage. Up to that time all was in good faith and without objection, and, but for that unexpected discovery, doubtless no difficulty would have arisen. To hold that such a delay under such circumstances impaired in any way the salvors' right, would, in effect, require salvors to take immediate proceedings against the vessel, in order to maintain the salvors' lien. Such a rule would, in my opinion, be contrary to the spirit of the maritime law, would tend to increase expenses and litigation, and should not be adopted.

I am of the opinion, therefore, that the wages of the seamen, which are nailed to the last plank of the ship, and which under no circumstances contributed to the general average, as well as the salvage demand, are entitled to priority in payment over the demands of the other libellants, no one of whom, it will be observed, in any degree added by their services to the value of the vessel, or in the slightest degree increased the fund realized from her sale. It is a case of some hardship to the material-men, no doubt, but no greater than in the ordinary case, where the vessel proves insufficient in value to pay her bills. The hardship in this case arises, not from any fault on the part of the salvors or the seamen, but from the fact that the material-men furnished what they did to a vessel so largely incumbered by liens superior in grade to their de-

mands. As the fund is sufficient to pay the seamen and the salvors in full, no question of priority arises between their demands. The wages of the crew and their costs will therefore be first paid, then the demand of the salvors and their costs, and what remains will be distributed among the other libelants, in proportion to their respective demands.

THE ROANOKE.

(District Court, E. D. Wisconsin. June 4, 1891.)

1. GENERAL AVERAGE—DAMAGE BY WATER.

Damage by water poured upon cargo to extinguish fire is the subject of general average. *The Buckeye*, 7 Biss. 23, disapproved.

2. SAME.

Whether so, when the act of flooding was that of municipal authorities, without concurrence or direction of the master, *quære*.

3. SAME—LIABILITY OF SHIP-OWNER.

The statute (Rev. St. § 4282) exempting the ship-owner from liability for damage to cargo by fire, happening without his neglect or design, does not release from liability to contribute towards general average.

(*Syllabus by the Court.*)

In Admiralty.

The libel was filed by certain underwriters against the steamer Roanoke, in a cause of general average, civil and maritime. The libel charges that the Roanoke on the 17th May, 1890, was lying at her dock in the port of Buffalo, bound for Toledo, partly laden with a cargo of merchandise consigned to Toledo, consisting principally of pipe-clay, plaster, cement, jute, cases of envelopes, and spiegel-iron. During the day the steamer was taking on cargo until 7:30 P. M., when fire was discovered in the mid-ship hold, among the jute. Thereupon an alarm was given by the officers of the vessel, promptly responded to by the fire department of Buffalo and the fire-tug City of Buffalo. The lines were cut and the steamer taken to the life-saving station opposite her place of mooring, and water poured upon her to extinguish the fire. The damage to the steamer by fire was confined to her upper works and main deck. Such fire was extinguished by 10:30 P. M. Large quantities of water were necessarily and continuously poured into the hold for the purpose of extinguishing the fire in the cargo, until 6 A. M. the following morning, up to which time the jute continued to burn and smolder. On the morning of the 19th fire was again discovered in the jute, and it became necessary to procure a line of hose from the fire department, and pour a stream of water continually on the jute for over an hour, when the fire appeared to be extinguished. At 3 P. M. of May 19th the steamer departed on her voyage for Toledo. On the trip it was necessary, at intervals of about two hours, to pour water, with the steamer's hose, on the jute, as fire was constantly breaking out, and this was continued until her arrival at Toledo, at 3 P. M. on May 21st. The next day, the

22d, at 4 A. M., while unloading cargo, fire was again discovered in the jute remaining in the after-hold, and was extinguished by pouring water upon it for about one hour, when unloading the steamer was finished. The cargo was damaged by water, as set forth in the general average statement annexed to the libel. The libelants were underwriters, respectively, of certain respective shipments of cargo, and paid to the respective owners, respectively, the amount of damage by water to their respective shipments, respectively insured. The libelants claim that the several amounts paid by them were general average charges, and to be contributed for as declared in the general average adjustment, and claim, by subrogation, to recover from the Roanoke the sum of \$2,505.62, with interest from September 16, 1890, in general average contribution. Exceptions are filed to the libel, asserting that the facts stated are insufficient to support a decree.

John C. Richberg, for libelants.

P. H. Phillips and *Geo. D. Van Dyke*, for respondent.

JENKINS, J., (*after stating the facts as above.*) The record presents the question whether contribution in general average is sanctioned for damage by water poured upon cargo to extinguish fire on board ship. The principle which underlies the whole doctrine of general average is that a loss voluntarily incurred for the sake of all shall be made good by the contribution of all. *Insurance Co. v. Ashby*, 13 Pet. 331; *Hobson v. Lord*, 92 U. S. 397. The maxim of the Rhodian law, the foundation of general average, did not in terms extend further than to cases of jettison; but the principle applies to all other cases of voluntary sacrifice, properly made, for the benefit of all. *Anderson v. Steam-Ship Co.*, L. R. 10 App. Cas. 107, 114. The maxim itself, as suggested by one author, is probably an imperfect statement in writing of the principle known to the common law of the seas, illustrating the general principle by a perfect example. To justify general average contribution three things must concur: (1) A common imminent peril; (2) a voluntary sacrifice; (3) successful avoidance of the danger. *Barnard v. Adams*, 10 How. 270; *The Star of Hope*, 9 Wall. 203. The first and third conditions are confessedly here present. The second condition is said to be wanting, because, as is claimed, the cargo destroyed was not "selected" for sacrifice; or, in other words, that the loss was incidental and unintentional, not primary and designed. There must be, it is true, a deliberate sacrifice to appease the exigency of the crisis, as distinguished from the chance result of the operation of the natural elements. I take it, however, that the term "sacrifice," as known to the maritime law, is used in the sense of giving up or suffering to be lost for the sake of something else, not in the sense of an immolation. Was there not here, within the principle of contribution, such designed injury, such deliberate sacrifice? Both ship and cargo were in the embrace of total destruction. Deliverance was only possible through extinguishment of the fire. There was certainty that pouring water into the hold to drown the fire would destroy cargo not on fire. That was a necessary result of the

act. There was the will of man directing the act working destruction to cargo. There was intentional inundation of cargo. There was design to avert the greater loss of ship and cargo, by incurring the minor loss of part of the cargo. That, in my judgment, is equivalent to a voluntary sacrifice, satisfying the conditions of a general average act. It was a selection by the master for sacrifice of that which by the act must necessarily be destroyed. There was, to be sure, no manual selection, no separation of the "scape-goat" from the remainder of the cargo, no particular design to destroy the particular subject. But that is not essential. It suffices if there exist the general design to sacrifice that which would naturally be lost in consequence of the act rendered imperative by the impending peril. The master must be presumed to have designed the consequences necessarily resulting from the act directed. The cargo so necessarily destroyed by the act is, in every equitable sense, selected for sacrifice. Many losses in the nature of jettison are thus borne in general average. As for example, goods exposed in barges to float a stranded ship, and lost in consequence; goods brought upon deck in order to get at others for the purpose of a *jactus*, and washed overboard, (Benecke, Ins. 213;) damage done to a ship by a tug coming along-side to render salvage service, (Loundes, § 33;) the voluntary stranding of a ship to avoid capture, foundering, or shipwreck, (*Fowler v. Rathbones*, 12 Wall. 102;) damage to cargo, resulting from such stranding, (Loundes, § 16.) In all these cases there is, in a narrow sense of the term, no design to destroy, no selection for sacrifice. The purpose is to save, not destroy; a lesser peril is incurred to avoid certain loss from a greater one. The act, however, is hazardous, resulting in injury. The results are presumed to have been foreseen; that destroyed presumed to have been selected for sacrifice. The loss is compensated in general average as a necessary consequence of the measure taken for the common safety. I am of opinion that the loss here falls within the conditions of general average contribution. This conclusion is, as I think, supported by the decided weight of judicial authority in America, speaking to the precise question. *Nimick v. Holmes*, 25 Pa. St. 366; *Nelson v. Belmont*, 5 Duer, 310, affirmed on appeal, 21 N. Y. 36; *Heye v. North German Lloyd*, 33 Fed. Rep. 60; *Ralli v. Troop*, 37 Fed. Rep. 888. It is the settled law of England. *Stewart v. Steam-Ship Co.*, L. R. 8 Q. B. 88; *Achard v. Ring*, 31 Law T. (N. S.) 647; *Schmidt v. Mail Steam-Ship Co.*, 45 Law J. Q. B. 646; *Pirie v. Dock Co.*, 44 Law T. (N. S.) 426; *Wire, etc., Co. v. Savill*, 8 Q. B. Div. 653. It is the law of France, Belgium, Germany, Italy, Holland, Sweden, Norway, Denmark, and Portugal. (Loundes on General Average, Comparative Table, xxxi. and appendices.) It accords with the York-Antwerp rules of 1877, which, while without the sanction of law, are now generally adopted in marine underwriting, and in foreign bills of lading.

The case of *The Buckeye*, 7 Biss. 23, decided by Mr. Justice DAVIS in 1863, is strongly urged as decisive here. The decision there is certainly counter to the conclusion I have reached. The argument of the opinion is that there must exist a particular intention to destroy, and a particu-

lar selection for destruction. *Barnard v. Adams*, 10 How. 270, 304, cited in support, determines that contribution is not dependent upon any real or presumed intention to destroy, solely upon selection. *The Star of Hope*, 9 Wall. 203, 233, decided in 1869,—while Mr. Justice DAVIS was yet upon the supreme bench, and in the decision of which he participated,—determines that if the will of man in some degree contributed to the sacrifice, that is sufficient to constitute the voluntary act or selection within the meaning of the commercial law. There the ship, in imminent danger of destruction from fire, sought safety in an unknown bay. In attempting to enter she grounded upon a reef or bank, the existence of which was unknown to the master. It was said there that the stranding was not only not intentional, but was involuntary and unexpected. But the court answered that, being aware that such a danger was the chief one to be expected in entering a bay, he deliberately elected to take the hazard rather than subject the common adventure to the imminent peril, and to almost certain destruction if he remained outside; and that it was not possible to hold, under such circumstances, that the will of man did not in some degree contribute to the stranding of the ship. That case goes far beyond the one in hand, and seems to me wholly irreconcilable with the case of *The Buckeye*. There, was only possibility without expectation of loss; here, was certainty. The will of man in some degree contributed to the sacrifice that in the one case was the possible, and in the other the certain, result of the act determined upon for the common safety. It is with diffidence that I venture to dissent from the decision of *The Buckeye*. I have halted in opinion whether it is not my duty to yield personal conviction to the judgment of the distinguished jurist then presiding in this circuit; but, considering that that decision stands opposed, as I believe, to the principle established by the supreme court, and to the law of nearly every maritime nation, I have felt at liberty to follow my own conviction in the interest of that uniformity of decision especially to be desired in maritime law. If therein I err, an appellate tribunal can set me right.

The objection that the act was that of the municipal authorities, without direction or concurrence on the part of the master, is ill sustained in point of fact. The protest discloses that the alarm was given, and the fire department called into action, by the master of the vessel. The action of the firemen was therefore by his procurement. Subsequent flooding was the direct act of master and crew. It becomes unnecessary, therefore, to consider the cases of *Wamsutta Mills v. Steam-Boat Co.*, 137 Mass. 471, and *The Mary Frost*, 2 Woods, 306, to the effect that property sacrificed by direction of others than the master is not a general average loss. The doctrine of these cases is challenged in *Ralli v. Troop*, 37 Fed. Rep. 888, 891.

It is lastly objected that neither ship nor owner is liable in general average for the loss in question. This claim is predicated upon Rev. St. § 4282, exempting the owner of a vessel from liability for loss or damage to cargo by reason or by means of any fire happening to or on board of the vessel without design or neglect of the owner. This provision is first

found in 9 St. 635, and was enacted in 1851, and is said in *Moore v. Transportation Co.*, 24 How. 1, to have been in consequence of the decision in *Navigation Co. v. Bank*, 6 How. 344, applying the common-law liability of common carriers to carriers by water. Its provisions are largely borrowed from similar legislation in England. There ship-owners were first exempted from liability in case of loss or damage by fire by the statute of 26 Geo. III., re-enacted in 17 & 18 Vict. c. 104, § 503. The acts of both nations are essentially alike. The courts of England have ruled that the exemption of the statute corresponds with the ordinary exemption from the accidents of navigation, and does not touch liability to contribute towards a general average. *Schmidt v. Mail Steam-Ship Co.*, 45 Law J. Q. B. 646; *Crooks v. Allan*, 5 Q. B. Div. 38. Considering the previous state of the law, the object to be obtained, and the history of the legislation, there can exist no reasonable doubt of the correctness of these decisions. That in the law of insurance damage by water is attributed to the original peril by fire as a direct and proximate cause does not warrant a construction of the act in question which would seriously unsettle the law of general average, and was clearly without the intendment of congress. Exceptions to libel overruled.

THE IBERIA.¹

FABRE *et al.* v. CUNARD S. S. Co.

(District Court, E. D. New York. May 15, 1891.)

COLLISION—DAMAGES—LOSS OF EXISTING CHARTER.

A vessel, under a charter which ended at New York, was sunk by collision before reaching her port of destination. Awaiting her at New York was a second charter from that port to Cadiz. The commissioner, in assessing damages against the colliding vessel, declined to allow as an item thereof the freight which the vessel would have earned on the second voyage. *Held*, that such freight was a proper item of the damages recoverable against the colliding vessel.

In Admiralty. On exceptions to commissioner's report.

R. D. Benedict, for libelants.

Owen, Gray & Sturges, for respondent.

BENEDICT, J. This case comes before the court upon exceptions taken by each party to the report of the commissioner to whom it was referred to ascertain the damage sustained by the libelants by the sinking of the steamer *Iberia* in a collision with the steam-ship *Umbria*. The principal objection to the report is that taken by the libelants upon the ground

¹Reported by Edward G. Benedict, Esq., of the New York bar.

of the rejection by the commissioner of any allowance for the loss of freight which the steamer would have earned under a charter which had been effected on October 27, 1888, in anticipation of her arrival in New York, upon the completion of the charter, from New York to Aden and back to New York, under which she was sailing to New York at the time she was sunk and became a total loss. Evidence was introduced before the commissioner showing that at the time of the sinking of the *Iberia* by the collision in question there was awaiting her in New York a charter-party, executed October 27, 1888, for a voyage from New York to Cadiz to carry a cargo of tobacco and small stowage. That tobacco and staves had been actually engaged for such a voyage, on which she would have earned a gross freight of \$11,603.53. The commissioner declined to allow the amount of freight that would have been earned by the steamer under the charter from New York to Cadiz, upon the ground that she became a total loss by means of the collision in question, and in such case the liability of the offending party ends with payment of total loss, with interest from the time of loss.

I am unable to agree with the commissioner in this conclusion. The rule of *restitutio ad integrum* is applied to losses caused by collision, as also the rule that nothing can be allowed for damage that is uncertain, speculative, and remote. In this case there is nothing uncertain, speculative, or remote in the claim for the freight that had been actually contracted for the *Iberia* under the charter from New York to Cadiz. The voyage had been determined on, the charter-party had been executed, and the cargo had been engaged; and it is certain that, but for the collision in question, the *Iberia* would have earned for her owners, under the charter to Cadiz, a sum that is capable of computation. If, at the time of her loss, the ship had been engaged in performing a charter from Aden to New York and back to Cadiz, the loss of freight on the voyage to Cadiz would have been recoverable; and it is not seen how any difference arises from the fact that at the time of the loss she was chartered for the same voyage by two charter-parties instead of one. The ship at the time of her destruction was not only performing the charter from New York to Cadiz, but she was also proceeding to New York for the purpose of taking on board the cargo which it had been agreed she should carry to Cadiz, and which was then awaiting her arrival. The freight that the ship would have earned on that voyage seems, therefore, to me to have been actually lost by reason of the collision, and I am unable to discover any ground for rejecting any part of an actual loss which the libellant sustained by reason of the destruction of his ship. Courts of admiralty, which are courts of equity, are not more restricted in the matter of damages than are the courts of common law; and the rule of courts of common law, as stated in Addison on Torts, (volume 2, § 1391,) is as follows:

"Although a plaintiff is not to be compensated for uncertain and doubtful consequences which may never ensue, yet he is entitled to compensation for losses which will almost to a certainty happen."

This case comes within that rule. It seems strange to say that the fact that the ship became a total loss by reason of the defendant's negligence prevents the libelants from recovering of the defendant freight which his ship would have earned but for her loss. I am aware that the adjudged cases are not in entire harmony upon the point under consideration, but I think the following cases, namely, *The Freddie L. Porter*, 5 Fed. Rep. 822; *The Canada*, Lush. 586; *The Consett*, 5 Marit. Law Cas. 34n; *The Star of India*, 1 Prob. Div. 466; *The Mary Steele*, 2 Low. 370; *The Belgenland*, 36 Fed. Rep. 504,—afford support for a decision, which appears to me to be the only just decision in this case, that the loss of the freight which the ship would have earned on the voyage from New York to Cadiz should be included in the recovery. The second exception taken by the libelant is therefore allowed, and the case will be referred back to the commissioner to ascertain and report the amount of loss actually sustained by the libelant by reason of having been prevented from performing the charter from New York to Cadiz, which had been executed on October 24, 1888. The other exceptions taken by the libelants are overruled, as are also the exceptions taken by the respondent.

THE MEDUSA.

THE M. E. STAPLES.

FLANNERY v. THE MEDUSA.

CENTER v. THE M. E. STAPLES.

(District Court, E. D. New York. May 22, 1891.)

COLLISION—STEAM AND SAIL—PLEASURE YACHT—DUTY OF STEAM-VESSEL.

A steam-vessel is under the same obligation to avoid a sailing yacht as any other vessel under sail.

In Admiralty. Suit to recover damages caused by collision.

Hyland & Zabriskie, for the M. E. Staples.

Julian B. Shope, for the Medusa.

BENEDICT, J. At the time of the collision which gave rise to this action the sloop yacht Medusa and the tug M. E. Staples were proceeding down the New York bay above the Narrows, on crossing courses. The yacht, being a sailing vessel, had the right to hold her course, and it was the

¹Reported by Edward G. Benedict, Esq., of the New York bar.

duty of the tug, being a vessel under steam, to avoid her. Both vessels held their courses until collision was imminent, indeed inevitable, without prompt action on the part of the tug. The liability of the tug for the collision is plain, and it is equally plain that the yacht was guilty of no fault. The collision is easily explained by circumstances proved, which go to show that the tug acted upon the idea that because the tug was a vessel engaged in business, while the Medusa was a pleasure yacht, and able to change her course easily, it was the duty of the yacht to give way for the tug. This was a mistaken idea on the part of the tug. Pleasure yachts, while subject to, are also entitled to act upon, the rules of navigation. There was nothing in the situation of these vessels to create an exception to the ordinary rule of navigation by which it is made the duty of a steam-vessel to avoid a vessel under sail. The tug had a single boat in tow on a hawser 100 feet long. She could, by stopping, have given the yacht room to pass without collision. She could by a slight change of her helm have removed all danger of collision. She was in possession of the power to avoid approaching vessels, and that is the basis of the rule of navigation, and I discover nothing in the proofs upon which to pass a decision that she was relieved from the rule. Therefore, by the navigation rules, the yacht had the right to hold her course, and it was the duty of the steam-vessel to avoid her, and this duty was in no way modified by the fact that the vessel she was approaching was a pleasure yacht, able to alter her course without much trouble or loss. The libel of the owner of the tug is therefore dismissed, with costs, and, in the case of the owner of the yacht, a decree will be entered in favor of the libellant, with an order of reference to ascertain the amount of the damage.

McNULTY v. CONNECTICUT MUT. LIFE INS. CO. *et al.**(Circuit Court, N. D. Iowa, E. D. June 11, 1891.)*

1. REMOVAL OF CAUSES—APPLICATION.

Where, in an action on an insurance policy, it appears that the policy was assigned by the insured to a third person, who assigned it to one of the parties to the action, a petition for removal on the ground of diverse citizenship, which fails to show the citizenship of such third person, is not sufficient to warrant removal.

2. SAME—SEPARABLE CONTROVERSY.

In an action brought by an administratrix against an insurance company upon a policy of insurance on the life of her intestate, in which one claiming the policy as assignee is made a party defendant, the controversy between the administratrix and the assignee, on the one side, and the company on the other, is single.

At Law. Motion to remand.

George H. Barnes and Powers, Lacy & Brown, for plaintiff.

Henderson, Hurd, Daniels & Kiesel, for defendants.

SHIRAS, J. From the transcript of the record now on file in this court the following facts are gleaned: On the 16th day of November, 1868, Henry T. McNulty, then a resident of Dubuque, Iowa, took out a policy of insurance on his life in the Connecticut Mutual Life Insurance Company, in the sum of \$10,000, payable to the said McNulty, his executors, administrators, or assigns, in 90 days after due notice of and proof of the death of said assured. On the 9th day of July, 1878, Henry T. McNulty in writing assigned this policy to Duncan & Waller as security. Subsequently, but without date, Duncan & Waller assigned the policy, and all claim under it, to Edward W. Duncan. On the 13th day of April, 1890, said McNulty died, and Mary A. McNulty, his widow, was duly appointed administratrix of his estate by the proper court in Dubuque county, Iowa. The present action was brought by said administratrix to the January term, 1891, of the district court of Dubuque county, the insurance company and Edward W. Duncan being made defendants, the claim against the company being upon the policy of insurance, and, as against the defendant Duncan, it is averred that he claims to hold the policy as security for certain sums advanced to pay the premium on said policy during the life-time of said Henry T. McNulty, the amount of which the administratrix cannot determine; and it is therefore prayed that said Duncan be required to establish what, if any, claim he has for which he holds said policy as security, and that the amount of the respective interests in said policy as between the administratrix and said Duncan be established, and judgment entered accordingly. Section 2547 of the Code of Iowa provides that "any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved in the action, except as otherwise provided by law;" and it was under the provisions of this section that Duncan was made a defendant to the present action. At the January term, 1891, of the state court the defendant company

filed its petition for removal, averring that the company, when the suit was brought and when the removal petition was filed, was a corporation created under the laws of the state of Connecticut; that the plaintiff, Mary A. McNulty, and the defendant Duncan were then and are citizens of the state of Iowa; that the plaintiff and the defendant Edward W. Duncan each demand of the petitioner the payment of the whole sum of \$10,000, mentioned in the policy, and each claims an interest therein exceeding, exclusive of interest and costs, the sum of \$2,000; and that the petitioner, as against each and both of them, refuses to pay any sum whatever, and resists the entire demand and claim. The state court refused to order a removal, and thereupon the petitioner procured a transcript of the record, and filed the same in this court, and plaintiff now moves for an order remanding the cause.

In support of the jurisdiction of this court it is argued that there is in fact involved in the action three several controversies, to-wit, that between the administratrix and the company, that between Edward W. Duncan and the company, and that between the administratrix and the said Duncan; and that the company, having the right to remove the controversy between it and the administratrix, has thereby the right to remove the entire action. Can it be successfully claimed that the controversy between the administratrix and the company is separable and distinct from that between Duncan and the company? The right of the action against the company is based solely upon the liability created by the contract evidenced by the policy of insurance. The theory of the action as brought by the administratrix is that upon the death of Henry T. McNulty the company, by the terms of the policy issued by it, became bound to pay "to the said McNulty, his executors, administrators, and assigns," the sum of \$10,000, and that part of this sum belonged to Duncan in repayment of the amounts due him, and the balance belonged to the administratrix. The question in which the company is interested is whether the policy of insurance was in force when McNulty died, and the controversy over this issue is one and indivisible. According to the theory of the action as set forth in the petition filed therein, both the administratrix and Duncan have an interest in the single claim against the insurance company, and it is proposed to settle the liability of the company on the policy, and then, if such liability is established, to determine the shares or interest belonging to the claimants.

Arranging the parties to the record with reference to their actual relation to the cause of action as disclosed in the petition, the administratrix and Duncan are interested adversely to the insurance company in the controversy over the liability of the company upon the policy of insurance, but there do not exist separable controversies between them and the company touching that issue. Treating the controversy, therefore, as one, and not separable, does the record show that this court can take jurisdiction by removal? Upon the face of the record it appears that the policy of insurance was assigned by Henry T. McNulty to Waller & Duncan, and by them to Edward W. Duncan. The record wholly fails to show the citizenship of said assign-

ors, and therefore it is not made to appear that Duncan could have originally brought this action in the federal court; in other words, had the administratrix and Edward W. Duncan brought this action originally in the federal court, in order to sustain the jurisdiction it would have been necessary to aver the citizenship of the parties under whom Duncan claimed title, and to show that their citizenship was diverse from that of the insurance company. Under the act of 1887, as amended by that of 1888, to justify a removal on the ground of diverse citizenship it must appear that the case is one of which the federal court could take jurisdiction originally under the provisions of the first section of the act. The record fails to show that said Duncan, either alone or conjointly with the administratrix, could have brought suit in the federal court upon the policy of insurance, for the reason stated, to-wit, that Duncan holds the policy as assignee, and the record fails to disclose the citizenship of his assignors. As it does not appear that this court would have had jurisdiction originally over this cause, it cannot take it by removal, and the motion to remand is therefore sustained, at cost of the defendant corporation.

DAVIS v. CHICAGO & N. W. RY. CO.

(Circuit Court, N. D. Iowa, C. D. June 10, 1891.)

REMOVAL OF CAUSES—LOCAL PREJUDICE—TIME OF APPLICATION.

Under the removal act of 1887, as amended in 1888, which provides that a cause may be removed on the ground of local prejudice "at any time before the trial thereof," an application for removal on the ground of local prejudice comes too late when made after a trial on the merits has been entered upon, though the jury were discharged without agreeing on a verdict.

At Law. Motion to remand to state court.

F. W. Pillsbury and *C. H. Clark*, for plaintiff.

J. C. Cook, for defendant.

SHIRAS, J. This cause was commenced in the district court of Wright county, Iowa, and was removed to this court upon the petition of the defendant, alleging the existence of local prejudice and influence. The transcript having been filed in this court, the plaintiff now moves for an order remanding the cause, for the reason, among others, that it appears on the face of the record that the petition for removal on the ground of local prejudice was not filed until after the cause had been once tried in the state court. From the record it appears that on the 25th day of March, 1889, the case came on for trial before a jury in the state court. The evidence was introduced and the case was submitted to the jury on the 28th, and on the 29th the jury, being unable to agree, were discharged from further consideration of the cause, and the same was continued to the May term; and thence to the October term, of said court.

The petition for removal into the federal court was filed therein on the 10th of September, 1889.

Thus the question is presented whether, under the act of 1887 as amended by that of 1888, a cause can be removed on the ground of local prejudice or influence after a trial has been entered upon in the state court, but which, for any reason, did not become a final trial, so that the cause was pending for trial when the petition for removal was filed in the proper court. The decisions in the several circuits are not in accord upon this question, and it cannot be questioned that a strong argument can be made in support of either side of the proposition. The act of 1866 provided that the petition for removal might be filed "at any time before the trial or final hearing of the cause." The act of 1867 provided that the petition might be filed "at any time before the final hearing or trial of the suit." In cases arising under these statutes it has been held that the word "final" qualified both "hearing" and "trial," and that therefore, if a case was pending awaiting a trial, it could be removed, regardless of the number of previous trials or mistrials that might have taken place. These decisions of the supreme court are based upon the force given to the word "final" as qualifying the words "trial," as applicable to law actions, and "hearing," as applicable to suits in equity. *Insurance Co. v. Dunn*, 19 Wall. 214; *Vannevar v. Bryant*, 21 Wall. 41. In the act of 1875 the language used is that the petition for removal must be filed "before or at the term at which said cause could first be tried, and before the trial thereof." In construing this act it has been repeatedly held by the supreme court that the submission of a demurrer presenting an issue of law affecting the merits is a trial, within the meaning of the act, and that, even though after the ruling upon demurrer leave is granted or the right exists by the statute to amend, and the case is pending for final trial upon such amendment, the right of removal does not exist, because not applied for before the trial. *Alley v. Nott*, 111 U. S. 472, 4 Sup. Ct. Rep. 495; *Scharff v. Levy*, 112 U. S. 711, 5 Sup. Ct. Rep. 360; *Gregory v. Hartley*, 113 U. S. 742, 5 Sup. Ct. Rep. 743. When, therefore, the act of 1887 was enacted, it had been settled by repeated decisions of the supreme court that when the statute regulating removals used the term "before final trial or hearing," or the equivalent thereof, it meant that the removal might be had at any time when the cause was pending in the trial court awaiting trial, regardless of the number of previous trials or mistrials that had been had, for the reason that none of these could be deemed to be the final trial or hearing; but that if the language used in the statute was the equivalent of that found in the act of 1875, to-wit, "before the trial thereof," then the meaning was that the removal must be petitioned for before the judgment of the state court had been invoked upon any question of law or fact affecting the merits of the case, as upon a demurrer to the petition or plea, although such demurrer or plea might have been overruled, and the cause be pending for trial and final disposition. In the light of the interpretations given to these phrases, congress enacted in the act of 1887 and the amendatory act of 1888 that, on the ground of local prejudice

or influence, a cause may be removed by the defendant "at any time before the trial thereof." It is a settled principle that when, through judicial interpretation, certain words have acquired a well-understood meaning, and they are used in a subsequent statute touching the same subject, the presumption is that the legislature intended them in the sense already given them by previous interpretation. *The Abbotsford*, 98 U. S. 440; *Clafin v. Insurance Co.*, 110 U. S. 81, 3 Sup. Ct. Rep. 507. Is it not, therefore, the fair inference that when congress, in adopting the act of 1887, changed the phraseology from that used in the act of 1867 to that used in the act of 1875, it was intended that the words "before the trial thereof," found in the act of 1887, should bear the same construction that had been given them in the act of 1875?

This, it seems to me, is the fair inference from the change made in the words used; and, while it cannot be denied that there is much force in the reasoning found in the cases which hold the contrary view, yet, on the whole, to my mind the weight of the argument is with the cases that hold that, under the present statute, a removal on ground of local prejudices or influence cannot be had after a trial has once been had in the state court, or, in other words, that in this particular the present statute must bear the same construction as that of 1875, and hence, that after a trial upon the merits has been actually entered upon in the state court, it is too late to seek a removal to the federal court upon the ground of local prejudice or influence.

The motion to remand is therefore sustained, at the cost of defendant.

KENYON v. KNIPE *et al.* SAME v. SQUIRE. SAME v. SQUIRE *et al.*

(Circuit Court, D. Washington, N. D. June, 1891.)

1. FEDERAL COURTS—JURISDICTION—TRANSFER OF CAUSES.

The Washington, Dakotas, and Montana enabling act, §§ 22, 23, provide for the transfer to those courts, upon the written request of the proper party, of those cases pending in the territorial supreme court of which the circuit and district courts would have had jurisdiction under the laws of the United States, had they been in existence at the commencement of the actions. *Held*, that the facts necessary to give the federal courts jurisdiction are properly shown in the petition for transfer, or in affidavits accompanying it.

2. SAME—RIPARIAN RIGHTS—LOCAL LAW—FEDERAL QUESTION.

Riparian or littoral rights are not an appurtenance of the land, but a mere incident of its ownership, arising out of the local or common law; and a grant by the United States of the land is not such a conveyance of the riparian rights as will give jurisdiction to a federal court of a contest over such rights, as involving a federal question.

3. SAME—TITLE OF LAND BELOW HIGH WATER.

Whether the grantee of land on the shores of a navigable bay, under a grant by the United States, takes such an interest in the soil below high-water mark as will enable him to make a valid conveyance thereof, depends upon the local law of the state where the land is situated, and is not a federal question, giving jurisdiction to the federal courts.

4. SAME—NUISANCE IN NAVIGABLE WATERS.

In the absence of a federal statute assuming police jurisdiction of the navigable waters within the limits of a state, a contest as to whether certain erections therein are a public nuisance presents no federal question.

5. SAME—JURISDICTIONAL AMOUNT.

But where a cause so transferred seeks to abate a nuisance caused by obstructions in navigable waters, and the petition fails to show that the plaintiff has suffered damages to the jurisdictional amount, the federal court cannot take jurisdiction, and the case must be remanded.

On Motion to Remand.

Howe & Corson, for plaintiff.

Thos. Burke and J. C. Haines, for defendants.

KNOWLES, J. These cases were all argued at the same time, and submitted together. Except in one particular, the same legal points are presented in each; and what I have to say upon them will, except on this one point, apply to all of them.

These cases were tried in the territorial district court of the third judicial district of the territory of Washington. From the several judgments rendered in these cases against him, the plaintiff appealed to the supreme court of said territory. Pending said appeal, Washington Territory ceased to exist, and the state of Washington was organized and admitted into the Union. By virtue of the provisions of sections 22 and 23 of the enabling act of congress, providing for the formation of constitutions for the states of North and South Dakota, Montana, and Washington, and for the admission of such new states into the Union, and by virtue of the constitution of the state of Washington, the supreme court of the state of Washington became the successor of the supreme court of the territory of Washington as to all cases pending therein, except those of which the United States district or circuit courts created for said state of Washington by said enabling act might have had jurisdiction, under the laws of the United States, had they existed at the time of the commencement of such causes. As to these causes, the above-named United States courts became the successor of said supreme court. In section 23 of the said enabling act, it is provided that, in all civil actions, causes, and proceedings in which the United States is not a party, transfers shall not be made to the circuit and district courts of the United States except upon the written request of one of the parties to such action or proceeding filed in the proper court, and in the absence of such request such cases should be proceeded with in the proper state court. This proviso limits the transfer of all civil cases, in which the United States is not a party, to the United States courts, to those in which a written request is made; excepting, perhaps, certain civil cases of which the state court could not receive jurisdiction, even though the same might be conferred by an act of congress. Without this written request, except in the cases named, there can be no transfer from a state to the United States courts in civil actions. The written request is to be made to the proper court. There might be some doubt as to what is the proper court, were it not provided that, in the absence of such request, such causes should be proceeded with in the proper state courts. It must be understood that, until such written request is made, the cause is pending in the proper state court, and to this the request must be made, and this must order the transfer.

The next question presented is, how must it appear that the cause sought to be transferred is one of which either of the United States courts for Washington would have had jurisdiction at the time the cause was commenced, had they existed? It is urged in this case that it must have so appeared in the record as filed in the supreme court. There was no law which required such facts to appear in the record in the territorial district or supreme court. They were courts of general, not special, jurisdiction, such as are the courts of the United States. It is not usual to allege citizenship of the parties in a court of general jurisdiction. Such allegations, as a rule, in the courts, are treated as surplusage. To make a construction of the statute under consideration which would prevent a citizen of another state from having his cause transferred to the United States court, unless his citizenship and that of his adversary appeared in the record as filed in the supreme court of the state, would in a great measure render the same valueless, and of no practical benefit to the parties intended to be benefited by its provisions. The more just and reasonable rule, and the one which has been followed to some extent elsewhere, is to allow the facts to be shown in the petition for removal, which would give the United States court jurisdiction, or by an affidavit accompanying the petition or written request or motion for a transfer. If these facts are disputed, there can be an issue made in the court to which the cause is transferred, and their truth determined in that tribunal. In this case the appellant filed a petition setting forth the facts which he conceived gave jurisdiction to this court. These facts are not controverted. In the motion to remand now presented for determination, it is urged that these facts are not sufficient. In this petition the appellant bases the jurisdiction of this court upon these propositions or groups of facts: (1) That the grant of the United States to A. A. Denny, bordering upon Elliott bay, conveyed also to him certain riparian or littoral rights, which are disputed by the appellees. (2) That it is urged by the appellees as a defense that this grant, conveying to said Denny the land bordering on the premises named in the grant, also conveyed the land below high-water mark in said Elliott bay, a portion of which has been conveyed to the appellees. (3) That the obstructions complained of by appellant in said bay are a public nuisance in the navigable waters of said bay, and also a private nuisance to appellant.

After a careful examination of the records, I am unable to find wherein it presents any dispute as to whether or not the patent to Denny of his land bordering on Elliott bay conveyed to him littoral or riparian rights. It is true that the answer does deny appellant's littoral rights, not because the grant to Denny does not give them, but because the appellees have a conveyance to the soil under the bay from the said Denny which give them these rights. Both are claiming their rights from the same source. Under the following authorities, this would exclude the jurisdiction of this court: *Ronie v. Casanova*, 91 U. S. 379; *McStay v. Friedman*, 92 U. S. 723. But it may be urged that, under the issues presented, the appellees might raise the question that the grant to Denny

did not convey to him littoral rights. It is not enough for a record to show that a federal question might be raised in deciding the cause. It must show that a federal question was in fact raised, or that the decision of a federal question was in fact raised, which it would be necessary to decide in rendering judgment in the cause. *Bolling v. Lersner*, 91 U. S. 594; *Brown v. Atwell*, 92 U. S. 327. I am unable to see up to this time why it is necessary to decide in this case whether or not the grant to Denny did convey to him any littoral rights in Elliott bay. But let it be admitted that this issue is presented; that the appellant asserts, and the appellee denies, this right. Does this issue present a federal question? I am satisfied it does not. The grant to Denny of the premises which include the lots claimed by appellant did not grant to Denny any littoral rights, although said land touches upon the waters of Elliott bay. Littoral rights do not come to the owner of land bordering upon navigable waters as a part of his grant. He owns such rights by virtue of his ownership of the land. These rights come to him by the local or common law of the land, and not as a grant. That I may be fully understood, let me illustrate. At one time, in some of the states, a citizen was an elector only when he owned property worth a stated amount. The conveyance of property worth this amount to a citizen who possessed no property resulted in his becoming an elector. The conveyance did not make him an elector, but the law, on account of the value of property. So, in this case, the conveyance to Denny did not give him littoral rights, but the law, on account of his becoming the owner of the premises granted. In *Gould on Waters* (section 179) that author says upon this subject:

"Riparian owners upon navigable fresh rivers and lakes may construct in the shoal waters, in front of their land, wharves, piers, landings, and booms in aid of, and not obstructing, the navigation. This is a riparian right, being dependent upon title to the bank, and not upon title to the river-bed. Its exercise may be regulated or prohibited by the state; but, so long as it is not prohibited, it is a private right, derived from a passive or implied license by the public. As it does not depend upon title to the soil under water, it is equally valued in those states in which the river-beds are held to be public property, and in those in which they are held to belong to the riparian proprietors *usque ad filum aquæ*. This right is a mere franchise in those localities where navigable fresh waters are public property."

There is no difference between tide-waters and navigable fresh waters, as to the littoral rights here discussed. *Id.* § 148. In some states this right is property, and, if valued, cannot be taken by the public from the owner without just compensation. In other states no compensation is allowed to an owner deprived of such rights for a public use. If the right can be termed a "license by the public," or a "franchise," it can hardly be said to be an appurtenance to land granted. While the term "appurtenance" may be found applied to this right, I am sure, upon a review of all the authorities, it will be found that it is not an appurtenance granted with land upon the margin of navigable waters. The views here expressed may be in conflict with the views expressed in the case of *Case v. Toftus*, 39 Fed. Rep. 730. The very eminent judge,

DEADY, who delivered the opinion in that case, did not seem to consider the jurisdiction of the court, but seemed to have treated the case as though this was admitted from the fact that the title of the littoral proprietor to his land on the margin of Yaquina bay was derived from the United States. All that is said upon the subject of jurisdiction is: "The suit was brought in the circuit court of the state for the county of Barton, and removed here on the ground that the defense to the same arises under the laws of the United States." Wherein the defense raises a question under the laws of the United States is not stated. As to the general conclusions reached upon the subject of littoral rights in that case, I do not suppose there can be much doubt.

The next point urged—that the appellees claim the soil below high-water mark in front of appellant's land by virtue of a conveyance from the common grantor, Denny—raises no federal question. Whether Denny was entitled to such lands depends upon the local law. Certainly, the United States never pretended to convey such lands by virtue of a patent to lands bordering on Elliott bay. *Pollard v. Hagan*, 3 How. 212. If any such right is recognized, it must be by virtue of the local law. In the case of *Barney v. City of Keokuk*, 94 U. S. 324, after speaking of the fact that for many years there had been a confusion of navigable waters with tide-waters, and that for two generations erroneous views as to admiralty jurisdiction had been held by the United States courts, Justice BRADLEY, speaking for the court, says:

"And under like influences it laid the foundation in many states of doctrines with regard to the ownership of the soil in navigable waters above tide-water at variance with sound principles of public policy. Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several states themselves to determine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject, the correct principles were laid down in *Martin v. Waddell*, 16 Pet. 367; *Pollard v. Hagan*, 3 How. 213; *Goodtitle v. Kibbe*, 9 How. 471. These cases related to tide-waters, it is true; but they enunciate principles which are applicable to all navigable waters. And since this court, in the case of *Genesee Chief v. Fitzhugh*, 12 How. 443, has declared that the great lakes, and other navigable waters of the country above as well as below the flow of the tide, are in the strictest sense entitled to the denomination of 'navigable waters,' and amenable to the admiralty jurisdiction, there seems to be no reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the states, by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its surveys and grants beyond the limits of high water. The cases in which this court has seemed to hold a contrary view depended, as most cases must depend, on the local laws of the state in which the lands were situated."

In these remarks it most clearly appears that as to what are the rights of riparian proprietors to lands below high water is a matter for the states. Where there is no conflict between the states and national government or its laws, what are the rights of a sovereign state in respect, at least, to property within its borders, is for the state itself to determine. *Mayor*,

etc., v. *Miln*, 11 Pet. 102. Whatever rule it chooses to establish as to the ownership of lands beneath the navigable waters within its boundaries, the United States courts in a proper case will enforce. It is not within the province of the United States courts to establish that rule for a state. Whether or not the appellees acquired any right to any of the land in Elliott bay below high-water mark is peculiarly a matter for the state courts to determine, and one of great importance in Washington. If, as said above, the state chooses to abandon its right to such lands in favor of the riparian proprietors, no one outside of the state has a right to object.

It may be argued that this cause originated when Washington was a territory, and that the United States courts might determine this question in a territory. Let it be admitted. But the jurisdiction of this court is now under consideration. As to whether or not it would have jurisdiction depends upon a supposition. If Washington had been a state in the Union, and this court had been in existence when this cause was commenced, would it have had jurisdiction of it? With this view in question, it must be that there can be no greater right in this court to hear and determine this case than as though commenced since the state was admitted into the Union. *Dorne v. Mining Co.*, (S. D.) 44 N. W. Rep. 1021. As soon as the state was admitted into the Union, this matter became a state question.

The last point which it is urged gives this court jurisdiction is this: Appellant urges that the obstructions put in Elliott bay by appellees is a public nuisance, which interferes with navigation. There has been found no statute of the United States which assumes police power over the navigable waters of the state of Washington. Until there shall be enacted by the congress of the United States some statute assuming such jurisdiction, this court has no jurisdiction to determine as to whether or not an erection in the waters of Elliott bay is a nuisance. This is again a matter within the jurisdiction of the state court. In the case of *Bridge Co. v. Hatch*, 125 U. S. 1, 8 Sup. Ct. Rep. 811, this point was fully determined; and it was there held that as to whether or not an obstruction placed in navigable waters was a nuisance, in the absence of the congressional statute upon the subject, did not present a federal question. The fact that the obstructions complained of were a private nuisance certainly raises no such question.

Kenyon v. Knipe et al. In this case the complaint shows that the appellant claims that he has been damaged in the sum of \$1,000. This would be sufficient to show that, as to amount, this court would have had jurisdiction had it existed at the time the suit was commenced. But in the cases of *J. Gardner Kenyon v. Watson C. Squire*, and *J. Gardner Kenyon v. Watson C. Squire and John R. Williams*, the complaints fail to show that the appellant had been damaged to any amount by the nuisance complained of. The petition filed in each of these cases shows that the injuries complained of are private nuisances, causing special and irreparable injury and damage to appellant, exceeding in money the sum of \$5,000, exclusive of interest and costs. The issue presented is, would

this court have had jurisdiction at the time the suit was instituted? The above statement in the petition does not refer to this time. The amount of damages stated must be considered the damages suffered by the appellant at the date that petition was filed,—January 13, 1890. It must be considered as a statement of the damage suffered by appellant at that date, and not the date of the commencement of the suit. It is a settled rule in the federal courts that their jurisdiction must appear affirmatively in the record. No amount in dispute sufficiently appears in the record in the two cases named to give this court jurisdiction. If I should be mistaken as to the views I have presented as to there being a federal question presented in these cases, there appears to me no doubt but that the causes last named should be remanded, because the damage for the injuries complained of do not appear to be sufficient to have given this court jurisdiction at the time the suits were commenced. All of the cases submitted are remanded to the supreme court of Washington for its consideration.

BOUND v. SOUTH CAROLINA RY. CO. *et al.*, (MAYFIELD, Intervenor.)

(Circuit Court, D. South Carolina. May 20, 1891.)

1. RAILROAD MORTGAGE—FORECLOSURE—PRIVATE SALE OF PROPERTY.

In proceedings to foreclose the liens of the state on railway property as the guarantor of the railroad's bonds, and also the mortgages thereon, the court will refuse to authorize the sale of land, free from such liens, at private sale, unless fully informed as to its selling value. The opinion of one person not shown to be an expert, and who must derive his knowledge from the opinion of others, is not sufficient.

2. SAME—POWER OF SALE—CONSENT.

On foreclosure proceedings, where a receiver has been appointed, but the relative rights of the various parties have not been established, the fact that the mortgages authorize the sale of lands not needed for corporate purposes, and the application of the proceeds by the trustees to the extinguishment of the oldest liens, will not justify such sale by the court, in the absence of consent by all the parties, and the mere absence of counsel from the hearing of a motion for that purpose will not amount to consent.

In Equity.

Samuel Lord, for Mayfield.

Mitchell & Smith, for Bound.

SIMONTON, J. This is an application for leave to purchase a tract of land in Barnwell county, the property of the South Carolina Railway Company. The land is not necessary for any of the corporate purposes of the company. Mr. De Caradeuc, who has for many years been at the head of the civil engineer department of the railway and its land agent, has testified that, in his opinion, the price offered for the land is fair and reasonable. The petition was filed in this cause, and was referred to the special masters heretofore appointed, who have reported the facts connected with it. Notices of the motion to grant the prayer of the

petition have been served on the counsel who represent the several parties. Only the attorneys for the plaintiff appear. They resist the motion. This land is covered by the liens created by statute in favor of the state of South Carolina, guarantor of bonds of the old Louisville, Cincinnati & Charleston Railroad Company and of the South Carolina Railroad Company, its successor. It is also covered by the first mortgage executed by the South Carolina Railroad Company and by mortgages of the South Carolina Railway Company. All these interests are represented in this case. It would not be expedient to sell the land at private sale at a valuation fixed by the opinion of a single witness. When the court departs from the general rule of selling property at public auction, it should be fully informed as to its probable value. This can scarcely be derived from the opinion of one person, who, by the way, as in this case, is not an expert in the selling of land, and who derives his own opinion from the statements of others. Apart from this, however, there is another controlling consideration. This is a bill for foreclosure of the liens on the entire railroad property, brought by the holder of second mortgage bonds. A receiver has been placed in charge of the property. But not a single right has been established by decree. I can find no authority for selling, by piecemeal, *pendente lite*, parcels of the property covered by liens, except by the consent of all persons interested, expressed either in open court or in writing. See, in this connection, *Kneeland v. Trust Co.*, 136 U. S. 89, 10 Sup. Ct. Rep. 950. It is said that each of the mortgages permits the trustees to exchange or sell any lands which prove to be of no use for the corporate purposes of the company, and in such case they free the parcel exchanged or sold from the liens, and that, in case of a sale, the proceeds are to be applied to the extinguishment of the oldest liens. For the present, no opinion is expressed whether the court can execute this power in the trustees by its own order, or by directing the trustees to do so. At this stage of the case, it has no judicial information as to the sufficiency of the mortgaged premises to pay off the first mortgage and the older liens. It is impossible to ascertain now what charges, if any, may be imposed on the holders of these liens for their share of the burdens of this case. So, if the receiver be directed to sell property in parcels, and with the proceeds take up any bond covered by such liens for the purpose of canceling it, the holder may, by this act, get an undue preference of his claim. This should not be done without the consent of all the lienholders. In this connection, and as a matter of practice, the mere absence of counsel at the hearing of a motion, for a purpose like this, will not be accepted as equivalent to consent thereto.

SIMON *et al.* v. HOUSE *et al.*

(Circuit Court, W. D. Texas, San Antonio Division. May 4, 1891.)

1. FEDERAL COURTS—JURISDICTIONAL AMOUNT.

In a proceeding to set aside certain conveyances as fraudulent and a cloud upon the plaintiffs' title, the "matter in dispute," within the meaning of Act Cong. Aug. 13, 1888, (25 St. p. 484, § 1.) limiting the jurisdiction of the United States circuit court, is the value of the land.

2. SAME—EVIDENCE.

Where, in such a case, the plaintiffs allege that the value of the land is more than \$2,000, but it appears by undisputed testimony in support of a plea to the jurisdiction that it was much less, an order of dismissal must be entered in accordance with the provisions of Act Cong. March 3, 1875, § 5, 18 St. p. 472.

In Equity. On plea to the jurisdiction.

Green & Green, for plaintiffs.

McLeary & Fleming, for defendants.

MAXEY, J. The plaintiffs, Joseph Simon and Joseph Kohn, claiming to be the purchasers at execution sale of a tract of land containing 177 acres, and alleged to be worth the sum of \$2,500, filed their bill of complaint, April 23, 1889, against Alfred House, Fly & Davidson, and H. W. Nott, praying for the cancellation of certain alleged fraudulent conveyances of said land executed by House to Fly & Davidson, and from Fly & Davidson to Nott. The bill also alleges that the deeds referred to operate as a cloud upon the title of plaintiffs, and further prays that the cloud may be removed. A plea to the jurisdiction was interposed by the defendants, June 29, 1889, in which it is, in substance, averred that the valuation placed upon the land by the plaintiffs in their bill is excessive; that the true value of the land is, and was at the time of the institution of the suit, far below \$2,000, and that it does not now, nor did it then, exceed in value \$1,200; that plaintiffs well knew that the matter in dispute, to-wit, the said tract of land, did not exceed in value \$2,000; and that the allegation of value, as contained in the bill, is false, and was fraudulently made, for the purpose of conferring jurisdiction upon this court. On August 1, 1889, replication was filed by the plaintiffs, and issue joined on the plea. In support of the averments of their plea touching the value of the land, the defendants took the depositions of five witnesses, four of whom estimate the value at \$1,062, inclusive of improvements, and the fifth at not exceeding \$1,416, with improvements included. The testimony was published and delivered to the attorney of plaintiffs, October 18, 1889, but no testimony was taken by the plaintiffs to sustain the allegations of the bill. At the November term, 1890, the cause was submitted to the court on the pleadings and proofs, and a ruling requested upon the jurisdictional question thus appearing of record. It is provided by the act of August 13, 1888, "that the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, * * * in which

there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid;" that is, \$2,000. 25 St. at Large, p. 434, § 1. "By matter in dispute," says the supreme court, "is meant the subject of litigation; the matter for which the suit is brought, and upon which issue is joined, and in relation to which jurors are called and witnesses examined." *Lee v. Watson*, 1 Wall. 339. To ascertain the value of the matter in dispute, in cases where jurisdiction is sought on the ground of the amount in controversy, resort must be had to the character of the action. Thus in a suit upon a money demand, where the general issue is pleaded, the matter in dispute is the debt claimed. *Lee v. Watson, supra*; *Schacker v. Insurance Co.*, 93 U. S. 241; *Gray v. Blanchard*, 97 U. S. 565. In suits sounding in damages, the damages claimed give the jurisdiction. *Barry v. Edmunds*, 116 U. S. 550, 6 Sup. Ct. Rep. 501; *Smith v. Greenhow*, 109 U. S. 669, 3 Sup. Ct. Rep. 421; *Dwyer v. Bassett*, 63 Tex. 276. In a case impeaching the right to an office, it is held that the amount of the salary attached to it is considered as determining the value of the matter in dispute. *Smith v. Adams*, 130 U. S. 175, 9 Sup. Ct. Rep. 566, citing *Smith v. Whitney*, 116 U. S. 167, 6 Sup. Ct. Rep. 570. The value of the interest or estate claimed in ejectment suits determines the jurisdiction. *Crawford v. Burnham*, 1 Flip. 117; *Lanning v. Dolph*, 4 Wash. C. C. 624; *Green v. Liler*, 8 Cranch, 242; *Railway Co. v. Smith*, 135 U. S. 195, 10 Sup. Ct. Rep. 728; *Grant v. McKee*, 1 Pet. 248. And it is ruled by the supreme court that "a suit to quiet the title to parcels of real property, or to remove a cloud therefrom, by which their use and enjoyment by the owner are impaired, is brought within the cognizance of the court, under the statute, only by the value of the property affected." *Smith v. Adams, supra*; *Parker v. Morrill*, 106 U. S. 1, 1 Sup. Ct. Rep. 14. See *Fuller v. Grand Rapids*, 40 Mich. 395. It follows that the matter in dispute here is the tract of real estate described in the bill, and its value must therefore be looked to in order to ascertain whether the court has jurisdiction of the suit. Where the jurisdiction is dependent upon the value of the matter in dispute, it is not less necessary that the jurisdictional facts should appear than in those cases where jurisdiction is invoked on the ground of diverse citizenship; for the one is as essentially a ground of jurisdiction as the other. 4 Wash. C. C., *supra*; 1 Flip., *supra*. And in all cases the facts on which the jurisdiction of the circuit courts depend must, in some form, appear on the face of the record. *Insurance Co. v. Rhoads*, 119 U. S. 237, 7 Sup. Ct. Rep. 193; *Holsted v. Buster*, 119 U. S. 341, 7 Sup. Ct. Rep. 276; *Railway Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. Rep. 510; *Bors v. Preston*, 111 U. S. 252, 4 Sup. Ct. Rep. 407; *Morris v. Gilmer*, 129 U. S. 315, 9 Sup. Ct. Rep. 289; *Menard v. Goggan*, 121 U. S. 253, 7 Sup. Ct. Rep. 873; *Everhart v. College*, 120 U. S. 223, 7 Sup. Ct. Rep. 555. The reason given for the rule is expressed in the following language of the supreme court:

"As the jurisdiction of the circuit court is limited, in the sense that it has no other jurisdiction than that conferred by the constitution and laws of the United States, the presumption is that a cause is without its jurisdiction, un-

less the contrary affirmatively appears." *Grace v. Insurance Co.*, 109 U. S. 283, 3 Sup. Ct. Rep. 207; *Bors v. Preston*, *supra*; *Railway Co. v. Swan*, *supra*.

Where a suit is not within its jurisdiction, it is the duty of the court, enjoined by the fifth section of the act of March 3, 1875, (18 St. at Large, 472,) which is not repealed by the act of August 13, 1888, to enter an order of dismissal. That section provides—

"That if, in any suit commenced in a circuit court, * * * it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought, * * * that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable * * * under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit, * * * and shall make such order as to costs as shall be just."

Referring to the foregoing section of the act of 1875, in *Williams v. Nottawa*, 104 U. S. 212, the supreme court says:

"In this connection we deem it proper to say that this provision of the act of 1875 is a salutary one, and that it is the duty of the circuit courts to exercise their power under it in proper cases." *Farmington v. Pillsbury*, 114 U. S. 144, 5 Sup. Ct. Rep. 807; *Little v. Giles*, 118 U. S. 603, 604, 7 Sup. Ct. Rep. 32.

From an examination of the authorities, it will be seen that, while the effect of all the provisions of the act of 1875 taken together was to greatly enlarge the jurisdiction of the circuit court, the purpose of the fifth section was to confine the jurisdiction to cases clearly within its cognizance; and, to emphasize that purpose, provision is made for a summary dismissal, if it shall appear to the satisfaction of the court, at any time after the suit is brought, that it does not really and substantially involve a dispute or controversy properly within the jurisdiction of the court. That section of the act goes further, and relaxes the strictness of the old rule in regard to the manner in which certain jurisdictional questions were required to be raised. For example, it was formerly held that, when the pleadings properly averred the citizenship of the parties, the defendant could only dispute the allegation of citizenship in the declaration by a plea in abatement filed in the due order of pleading. *Jones v. League*, 18 How. 81; *Wickliffe v. Owings*, 17 How. 47; *Sheppard v. Graves*, 14 How. 505; *Livingston v. Story*, 11 Pet. 351; *De Sobry v. Nicholson*, 3 Wall. 423. See *Farmington v. Pillsbury*, *supra*. Now, however, that rule does not obtain. It is said by the court in *Morris v. Gilmer*, which explains and limits *Hartog v. Memory*, 116 U. S. 588, 6 Sup. Ct. Rep. 521, that—

"While, under the judiciary act of 1789, an issue as to the fact of citizenship could only be made by a plea in abatement, when the pleadings properly averred the citizenship of the parties, the act of 1875 imposes upon the circuit court the duty of dismissing a suit, if it appears at any time after it is brought, and before it is finally disposed of, that it does not really and substantially involve a controversy of which it may properly take cognizance. * * * And the statute does not prescribe any particular mode in which such fact may be

brought to the attention of the court. It may be done by affidavits, or the depositions taken in the cause may be used for that purpose. However done, it should be upon due notice to the parties to be affected by the dismissal." 129 U. S. 326, 9 Sup. Ct. Rep. 289.

The mode of procedure in this suit is not subject to criticism. A plea to the jurisdiction was seasonably interposed, controverting the value placed upon the land by the plaintiffs, and that issue is properly before the court. The question is presented, does it appear to the satisfaction of the court that the suit does not really and substantially involve a dispute or controversy properly within its jurisdiction? By the terms of the act, the amount to confer jurisdiction must be in excess of \$2,000, exclusive of interest and costs. The plaintiffs' allegation of value places the amount within the jurisdictional limit. But the proof clearly shows that the real value of the property is far below \$2,000, and does not exceed, in any event, \$1,416.

In *Bennett v. Butterworth* it is said by the court that—

"The averment of value, when he [the plaintiff] sues for property, shows the value of the thing in controversy, as much as the averment of debt or damage, when he sues for money." 8 How. 128, 129.

But in *Hilton v. Dickinson*, cited with approval in *Barry v. Edmunds*, *supra*, the court uses this language:

"It is undoubtedly true that, until it is in some way shown by the record that the sum demanded is not the matter in dispute, that sum will govern in all questions of jurisdiction; but it is equally true that, when it is shown that the sum demanded is not the real matter in dispute, the sum shown, and not the sum demanded, will prevail." 108 U. S. 174, 2 Sup. Ct. Rep. 424.

Tested by the rule declared in *Hilton v. Dickinson*, it would appear that the court is without jurisdiction in the present case, as the defendants have overthrown the *prima facie* case of jurisdiction arising out of the allegations of the bill by proving indisputably the falsity of the plaintiffs' averments.

But it is insisted by counsel for the plaintiffs that, to authorize a dismissal of the suit, the defendants should be required to show affirmatively, not only that the land is of less value than the amount essential to confer jurisdiction, but that the allegation of value in the bill was fraudulently made for the purpose of creating a case of which the court could not lawfully take cognizance. In support of his contention, *Barry v. Edmunds*, *supra*, is relied upon. The court in that case (116 U. S. 560, 561, 6 Sup. Ct. Rep. 501) says:

"Where the law gives no rule, the demand of the plaintiff must furnish one; but where the law gives the rule, the legal cause of action, and not the plaintiff's demand, must be regarded. The amount of damages laid in the declaration, however, in cases where the law gives no rule, is not conclusive upon the question of jurisdiction; but if upon the case stated there could legally be a recovery for the amount necessary to the jurisdiction, and that amount is claimed, it would be necessary, in order to defeat the jurisdiction since the passage of the act of March 3, 1875, for the court to find, as matter of fact, upon evidence legally sufficient, 'that the amount of damages stated in the declaration was colorable, and had been laid beyond the amount of a reasonable expectation of recovery, for the purpose of creating a case' within the ju-

risdiction of the court. Then it would appear to the satisfaction of the court that the suit 'did not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court.' "

A careful examination of that and kindred cases makes it apparent that they are plainly distinguishable from the suit before the court. In *Barry v. Edmunds* the plaintiff brought an action of trespass, alleging the commission by defendant of certain wrongful acts with malice, and claiming damages largely in excess of \$2,000. To the declaration the defendant filed a plea to the jurisdiction, on the ground that the parties plaintiff and defendant were citizens of the same state. The value of the matter in dispute was not called in question by the plea. Upon motion made by the plaintiff to set a day for argument of the demurrer to the plea, the court dismissed the cause for want of jurisdiction. In reviewing the case, the supreme court held that the declaration, upon its face, disclosed a case in which exemplary or punitive damages might properly be awarded; that in such cases, where no precise rule of law fixed the recoverable damages, it was the peculiar function of the jury to determine the amount. Evidently reversal of the judgment rested on the ground that, in that class of suits, the amount of damages claimed in the declaration presented the only criterion to which resort could be had in settling the question of jurisdiction. The suit was one where the law gave no rule for estimating the damages, and "the demand of the plaintiff must furnish one." And in cases of that character it was said that the amount of damages laid in the declaration was not conclusive, but that the jurisdiction would be defeated if the court found that the amount of damages thus stated was colorable. But this case is of that class where the law gives the rule for determining the value of the matter in dispute. It is, as has already been shown, the value of the land, which is easily ascertainable according to fixed rules of law. It is therefore, to say the least, questionable whether the observations of the court are applicable to a case like the present one. In reaching a conclusion, however, upon the uncontroverted facts of this case, it is not necessary to do violence to any principle enunciated by the court in *Barry v. Edmunds*. The proof here is positive, direct, and undisputed that the land in controversy is worth not exceeding \$1,416, including improvements. Thus the falsity of plaintiffs' allegation fixing the value is clearly established. Notwithstanding a period of 12 months intervened between the publication of the testimony and submission of the cause, the plaintiffs took no steps to prove the value of the land, nor to procure testimony to show they had the slightest knowledge or information of its value. They rest their case upon the assertion of value in the bill, and make no effort to repel the effect of the testimony adduced against them. The value of the land was stated either with knowledge of its overestimate, or in inexcusable ignorance, resulting from carelessness and indifference, as to its real worth. In either event, the result should be the same,—to preclude plaintiffs from reaping advantage from their own wrong on the one hand, and to deprive them of benefit arising from their indifference and careless conduct on the other. The presumption would obtain in such

cases that the allegation of value was improperly and colorably made, for the purpose of creating a cause within the jurisdiction of the court. If it were otherwise held, mere averments of the pleader would outweigh the force of sworn testimony, and that clause of the judiciary act, regulating jurisdiction by the amount in controversy, would have little vital force when property, real or personal, is the subject-matter of suit. The statute should be construed according to its spirit and intent. Suits properly coming within the jurisdiction of the court should be retained; others not embraced in that category should be rejected. It has been held that, in cases where the testimony leaves the value of the matter in dispute in doubt, all intendments will be in favor of the jurisdiction. *Dwyer v. Bassett*, *supra*, and authorities cited. But, as already shown, such is not the case here. The court is of opinion that the material averments of the plea are sustained by the proof, and that the bill should be dismissed for want of jurisdiction. *Farley v. Kittson*, 120 U. S. 303, 7 Sup. Ct. Rep. 534. It is accordingly so ordered.

SPOKANE ST. RY. CO. v. CITY OF SPOKANE FALLS *et al.*

(Circuit Court, D. Washington, E. D. April 23, 1891.)

INJUNCTION—STREET RAILWAY—PLEADING.

Where, in proceedings for injunction to prevent the destruction of plaintiff's street railway track, situated in one of the public streets of defendant city, it was denied by the answer that the track in question was constructed in accordance with the requirements either of the city ordinance or of the contract with the defendant transit company pursuant to which it was built, and the imperfections and deficiencies thereof were specified, the burden of showing a compliance therewith is on the plaintiff; and, if no evidence is taken, but the case is heard on the pleadings, the allegations of the answer must be taken as true; and, as it shows the construction of plaintiff's track to be in violation of the very law under which it claims, the injunction will be denied.

In Equity. On bill for injunction.

Turner & Graves and *F. T. Post*, for plaintiff.

W. C. Jones, for defendants.

HANFORD, J. The time for taking evidence having expired, and no evidence having been taken by either party, this cause was by the court set down for final hearing on the bill and answers, and it has been brought on for hearing and finally submitted accordingly. The complainant's professed object in bringing the suit was to prevent the destruction of a street railway track situated in one of the public streets in the city of Spokane. In the bill it is averred that the track was so constructed in all respects as to meet the requirements and fulfill the conditions of an ordinance of the city whereby it was granted a franchise for a street railway in said street; and also the requirements and conditions of a contract between it and the defendant "The City Park Transit Company." Upon the part of the complainant it is claimed that, by reason of having

constructed said track and being the owner thereof, and by virtue of its franchise granted by the city, and of said contract, said property cannot be removed from the street or destroyed by or under authority of the city government, without those clauses of the constitution of the United States which declare, "No state shall * * * pass any * * * law impairing the obligation of contracts," "nor shall any state deprive any person of life, liberty, or property without due process of law," being violated. Jurisdiction of the case in this court rests upon this claim alone. The separate answers of the defendants, without evasion or qualification, deny that the track which is the subject of the controversy has been constructed in conformity to the requirements of either the ordinance of the city or the contract with the City Park Transit Company, and they specify the imperfections of the track, and failures of the plaintiff to meet the requirements of the ordinance and contract aforesaid, in the following allegations:

"At some points the said tracks are laid high above the grade of the street, and at other points are laid below the grade of the street; that, from Bernard to Division street, said street is, as laid out, about three feet lower on the north side than it is on the south side; that, totally disregarding the rights of the city and the public in said street, the said complainant, in building said tracks, laid the same on a level from the south side of the street to the north side of said tracks, and caused the street to be level, thus throwing the entire slope of the street into a space of about 15 feet in width, and materially injuring that part of the said street lying north of the north side of said track, and in some places rendering the same, by the manner in which said tracks are laid, absolutely useless for the public travel, and materially injuring property lying on the north side of said street."

"That, in violation of the terms of said agreement, said plaintiff used, in the construction of said road, rails which were old, and had been used and worn for a considerable time, many of which were battered and twisted by usage, and were not first-class in any respect, and were manufactured of iron, and not of steel, and that it used in the construction of said road an insufficient number of ties to make the same safe or proper to be used as an electric railway, and many less ties to the mile than is used in the construction of the Ross Park Electric Railway; * * * and defendant further avers that the said line, as constructed by plaintiff on said Sprague street, as aforesaid, was wholly inferior, and in no respect equal, either in the character of the rails or the ties used in its construction, the manner of its finish or workmanship, to the said Ross Park Electric Railway. Defendant further avers that, at the time the said common council of the city of Spokane Falls passed the resolution set forth in the complainant's bill, the said track, by reason of the defective construction thereof, and the inferior and defective material used in the construction thereof, and by reason of the negligence of the plaintiff in caring therefor, became so crooked, rough, and uneven, and otherwise defective, that it could not have been safely used as an electric railway."

These several allegations of the defendants, although in form affirmative, are directly responsive to the bill, and, by controverting the same, raise material issues, whereby the burden was laid upon the plaintiff of proving this part of its case by sufficient evidence. Having failed to introduce such proof, the allegations of the defendants must be accepted for the purpose of the case as being strictly true, and they present an insurmountable obstacle to the granting of equitable relief to the plaintiff.

As the case is now presented to view, this plaintiff obtained a valuable franchise from the city upon specified terms and conditions. By accepting the franchise, it became obligated to comply with and fulfill those terms and conditions in the exercise of the powers and enjoyment of the rights so granted. These terms and conditions are matters of prime importance to the people of the city generally, and by so disregarding its obligations as to such conditions in the construction of its railway as to obstruct travel in the street, and create a nuisance therein, the plaintiff became a violator of the very law upon which the rights which it is seeking to protect by an injunction from this court must be predicated; and, being thus a violator of the law under which it is a beneficiary, it cannot, by reason of having been permitted to construct its track in a faulty manner by any principle of estoppel, come into a court of equity, and ask to have the maker of the law prohibited from enforcing the provisions thereof, made for the protection and preservation of the common rights of all the people. On the face of the plaintiff's bill it appears that the city government is invested with the control of the public streets of the city, and burdened with the duty of keeping the streets unobstructed and in safe condition for travel,—a duty the performance of which necessitates the removal from Sprague street of the obstruction placed there by plaintiff,—and it is to prevent the performance of such duty that this court is asked to exercise its power by issuing a writ of injunction. The plaintiff, while thus admitting and showing the powers and duties of the city respecting its streets, charges that the destruction of its tracks by the officers of the city, pursuant to a mere resolution of the city council, constitutes a wrongful use of force, and is therefore unlawful; and claims that, without judicial process authorizing it, the nuisance created by placing valuable property in the public street, thereby obstructing travel, cannot be lawfully abated; and in the argument the court is urged to grant an injunction to prevent such unlawful use of force and destruction of property. This appeal, however, is made to a court of equity, and the only answer it merits is that the plaintiff, who makes the appeal, is not entitled to any consideration from the court, because it does not come into equity offering, on its part, to do equity, and its hands are not clean. The contract between the plaintiff and the City Park Transit Company, as I construe it, provides for the building of such a railway in Sprague street as can be operated by the latter company in conformity with the provisions of its charter, by whatever motive power it may see fit to adopt. The plaintiff having undertaken to build a track, under the contract obligated itself to build such a track as could be operated by the defendant company. I do not mean by this that it was necessary to complete and fully equip the road for operation by electric power, but it was necessary that so much of the road as complainant did construct should be proper and suitable for the defendant's use. The rails and ties should be of suitable material, sufficient in number, and so constructed as to be available for use as an electric road, and the plaintiff could not, without violating the contract on its part, place in the street a track unsuitable to the defendant's use, and not capable of being operated by it, and thereby

excluding it from the use of the street to which it was entitled under its franchise, as well as under said contract. The City Park Transit Company does not appear, by any admitted allegations of the bill, to have ever approved of the manner in which the track was constructed, or to have accepted it as being built in performance of the contract, and it is not bound, by the law of estoppel, to accept as performance of the contract a structure which does not answer its requirements, but which is in fact a violation of the contract. The laws of this state make ample provision for preventing and punishing breaches of the peace, the unlawful use of force, and the malicious destruction of property, and afford ample remedies for all injuries inflicted by such wrongful conduct, and equity will leave a party, in the situation of this complainant, to obtain such relief or redress as the laws of the land may afford. In granting a temporary injunction, this court deprecated the use of force, and held that it was the duty of the court, pending the adjustment of the rights of the parties by the final decree, after a full hearing of the cause upon its merits, to use its power by issuing an injunction to prevent the destruction of the property involved in the controversy; and there is no intention on the part of the court to swerve from the principles upon which that decision was founded, but the case is now presented for final determination, after the parties have had ample time to make a full presentation of the cause upon its merits, and upon this hearing, as the want of equity on the part of the plaintiff has been made apparent, no part of the relief prayed for in the bill can be granted. Neither can any affirmative relief be afforded to the defendants. The decree will therefore be entered dismissing the suit, at the plaintiff's costs.

COWLEY v. NORTHERN PAC. R. Co.

(Circuit Court, D. Washington, E. D. April 15, 1891.)

EQUITY—ADEQUATE REMEDY AT LAW—VACATION OF JUDGMENT.

Where, in a suit in the territorial district court of Washington, judgment is rendered upon a stipulation of counsel made in contravention of defendant's instructions to his attorney, he has a proper and adequate remedy by a motion to vacate under the Code, and equity will not take jurisdiction of a bill to annul and enjoin the execution of the judgment filed before the time within which a motion to vacate could have been made had expired.

In Equity. Bill for injunction.

George Turner, for plaintiff.

J. H. Mitchell, Jr., for defendant

HANFORD, J. This case was commenced in the district court of the territory of Washington for the fourth judicial district, and, according to the practice in such cases under a statute of the territory, it was tried before a referee, who reported to that court the evidence introduced by.

the parties, and also his findings of fact and conclusions of law. Objections to the report of the referee were filed, but before a hearing could be had thereon the admission of the state into the Union, and the consequent reorganization of the courts, intervened, and the case has been in due course transferred to this court. The plaintiff has moved against the report to set aside the findings of fact as a whole, and also to set aside the conclusions of law. The objections to the findings of fact in their entirety will be denied for the reason that a general objection is not good. It is necessary for a party complaining of error to specify the error. The plaintiff also moves to set aside the findings contained in the 7th, 8th, 11th, 19th, 20th, and 21st paragraphs of the findings of fact as not being supported by sufficient evidence, and as embodying legal conclusions, rather than conclusions of fact. I deny the motion as to the 7th, 8th, 11th, and 20th, and sustain it as to the 19th and 21st. The 19th is a finding with relation to a power of attorney executed by the plaintiffs to Mr. Albert Hagan. I think the whole of the controversy relating to the power of attorney is irrelevant in this case. The power of attorney was not pleaded in the defendant's answer as a matter on which the defendant relied, and the testimony in the case shows that in all the proceedings and transactions between the parties affecting the material issues in the case this power of attorney was ignored,—was not acted upon. There was no attempt to compromise the controversy between the parties through the medium of the attorney in fact by virtue of that power, and I think that the claim now asserted by the defendant in relation to the power of attorney is an after-thought. The twenty-first paragraph is unnecessary, in so far as it relates to mere facts; and in so far as it is a conclusion of law it is improper, if not erroneous; so that will be stricken out. The defendant has also filed exceptions to certain findings of fact that are specified, which exceptions are all overruled by the court; and the court now adopts the findings reported by the referee, excepting the nineteenth and twenty-first paragraphs, as the basis of this decision. They are as follows:

"First. That the Northern Pacific Railroad Company, [the defendant in this case,] on the 29th day of June, 1886, commenced an action in the district court, fourth judicial district, Washington Territory, sitting in and for Spokane county, against H. T. Cowley, plaintiff in this case, to recover possession of certain lands in the complaint in that case described.

"Second. That said H. T. Cowley, [plaintiff in this case,] for answer to the complaint in the above-described suit, filed his answer, claiming equitable relief thereby, to-wit, specific performance of a contract to convey to him the land described in the complaint.

"Third. That on or about the —— day of April, 1887, the firm of Ganahl & Hagan, a law firm composed of Frank Ganahl and A. Hagan, were employed by Cowley to represent him in his defense in the case of *N. P. R. R. Co. vs. Cowley*, under a contract whereby they were to receive one-fourth of all money or land recovered by Cowley.

"Fourth. That at the November, 1887, term of the district court Emma Thomson was appointed referee to take evidence in the case, and as such referee caused the parties to appear before her at her office in the city of Spokane Falls on the 10th day of May, 1888, to take said testimony. The N. P.

R. R. Co. appeared by its attorney, J. H. Mitchell, Jr., and the defendant, Cowley, by Ganahl & Hagan, his attorneys. Upon agreement of parties, taking of testimony was postponed until May 11th, the same being the next day.

"*Fifth.* That upon the said 10th day of May, 1888, Paul Schulze, general land agent of the N. P. R. R. Co., and its duly-authorized agent, upon behalf of the company, made a proposition of settlement to Ganahl & Hagan, attorneys for Cowley, of the differences concerning the land in dispute in case of *N. P. R. R. Co. vs. Cowley*, the proposition being this: The railroad company would give Cowley \$8,000 cash, and convey to him a tract of land upon which Cowley's improvements were, and comprising about seven and one-half acres; the company to retain the balance of the land.

"*Sixth.* That Ganahl & Hagan thereupon informed Cowley of the proposition, and what it was, and advised him to accept it, as there was an estoppel in his case that would prevent him from recovering the land, in their judgment.

"*Seventh.* That upon the evening of said 10th day of May, 1888, said Schulze, Hagan, and Mitchell went to the residence of Cowley in the city of Spokane Falls, and met there Cowley and Mrs. Cowley, his wife. The proposition above referred to was discussed by them, and an oral agreement of settlement, settling their differences, was entered into, which agreement was in substance as follows, to-wit: The R. R. Co. was to give Cowley \$8,000 and a tract of land upon which Cowley's improvements were, embracing about seven and one-half acres. The R. R. Co. was to retain the balance of the land. Schulze further agreed to give Mrs. Cowley, or any person she might designate, two lots of land for church purposes; these two lots were to be given by Schulze personally. The R. R. Co. was to pay all costs that had been incurred in the case. The respective attorneys in the case were to prepare all necessary papers for settlement, but nothing was said as to the kind and character of papers necessary. The \$8,000 and papers were to be sent to J. N. Glover, president of the First National Bank, Spokane Falls, W. T., who should deliver the same to Cowley or his attorneys; and it was calculated that the money and these papers would arrive about the 16th day of May following. Nothing was said as to the manner in which the case of the *N. P. R. R. Co. vs. Cowley* should be disposed, further than that a disposition of the same should be made by the attorneys.

"*Eighth.* That on Monday, the 14th day of May, 1888, Schulze secured a draft for \$8,000, payable to the order of J. N. Glover; also had prepared a certificate of sale from the N. P. R. R. Co. to Cowley, duly executed by the company, conveying to Cowley the seven and one-half acres mentioned in the agreement of settlement; also a plat of said land; and also a quitclaim deed from Cowley and wife to the R. R. Co. for all land claimed by the company in the complaint; placed these all in an envelope, and sent the same to J. N. Glover. In said envelope was also a letter of instructions to Glover, directing him to see Cowley and his attorneys, and, upon Cowley signing and executing the quitclaim deed, he should turn over and deliver to them the money, certificate of sale, and plat. All of said documents and money were received by said Glover on the 16th day of May.

"*Ninth.* On the 15th day of May, 1888, Cowley went to the office of one of his attorneys, to-wit, Hagan, and informed him that he was dissatisfied with the settlement, and that he desired to employ associate counsel to assist them, (Ganahl & Hagan,) to which Hagan objected, except they (Ganahl & Hagan) should be paid the amount due them for their fees; whereupon negotiations for settlement of fees were entered into between them.

"*Tenth.* That on the 15th day of May Cowley also sent a telegram to Schulze to the effect that he must have additional time to consider proposition of settlement, which was received by Schulze upon same date, and was answered by

him to the effect that there was nothing to consider; settlement had been made, papers and money had been sent.

"*Eleventh.* That upon receipt of money and papers on the 16th day of May Glover at once took all papers to the office of Ganahl & Hagan, where he found both members of the firm; also Cowley. Glover informed them that he had received all the papers and money. He gave one of the attorneys the papers, and also exhibited to them his letter of instructions. He informed them that the money would be paid as soon as Cowley and wife would execute and deliver the quitclaim deed. He was informed that the matter would be attended to that day, and he would be called upon to pay the money. After Glover left, and upon same day, Cowley and wife refused to execute the quitclaim deed, and have so refused ever since said time. The money is now and has ever since said time been in Glover's hands, and ready to be turned over to Cowley upon delivery of quitclaim deed duly executed.

"*Twelfth.* That on the 17th day of May Cowley wrote and sent Mitchell and Schulze each a letter to the effect that the proposition of compromise had not been accepted; that Ganahl & Hagan had been discharged as his attorneys, and were not authorized to represent him, and all further communications should be made through his attorneys, Blake & Ridpath; which letters were received by them about the 19th day of May, and upon that day they each wrote Cowley to the effect that they would recognize no other attorneys in the case without the charges of former counsel were paid, and the names of other attorneys substituted by order of the court.

"*Thirteenth.* That on the said 17th day of May Cowley wrote a letter to Ganahl & Hagan, and had the same delivered to them, to the effect that he discharged them as his attorneys, and had employed other counsel to represent him. Upon same date Ganahl & Hagan wrote and had delivered to Cowley a letter to the effect that they demanded \$4,000 for their fee, and would consider no less sum, and also that they had on motion set case down for taking testimony to commence on Monday, May 21st.

"*Fourteenth.* That upon the 18th day of May the referee, Emma Thomson, issued a citation to Mitchell, as attorney for the R. R. Co., and Ganahl & Hagan, as attorneys for Cowley, to the effect that on the 21st day of May she would proceed to take testimony in the case of the *R. R. Co. vs. Cowley*, one of which notices is filed herewith, and made a part hereof, and marked 'Exhibit —.' Thereupon, upon the same day, to-wit, May 18, 1888, said Cowley telegraphed said Mitchell, as such attorney, that he could not take testimony on Monday, as he had changed attorneys. On the same day, in answer thereto, said Mitchell telegraphed said Cowley that he had never arranged for taking testimony on Monday, or any time subsequent to May 10th, when, as he said, counsel gave them to understand no taking of testimony would be necessary; and saying that Mr. Schulze, his principal witness, relying on Cowley's word since broken, had made engagements making it impossible for him to go to Spokane Falls in said case for several weeks, and that the case would not go on until Schulze could go, and he (Cowley) could depend on that; and he added: 'If you must have a fight, you shall have it.' Said telegram is filed herewith, and made a part hereof, and marked 'Exhibit —.'

"*Fifteenth.* That the 21st day of May, 1888, was the first day of the May, 1888, term of the district court, upon which date a stipulation was entered into by Mitchell, as attorney for the N. P. R. R. Co., and Ganahl & Hagan, as attorneys for Cowley, to the effect that the case of *N. P. R. R. Co. vs. Cowley* had been settled and compromised, and upon payment to defendant, H. T. Cowley, or his attorneys for said Cowley, of the sum of \$8,000 and the delivery to him or his attorneys of a certificate or deed duly executed for seven and one-half acres of land at or near defendant Cowley's house, as agreed upon, judgment for plaintiff then to be entered for the restitution of the premises mentioned in plain-

tiff's complaint as therein prayed for, and denying the relief prayed for in defendant's answer or cross-bill, at plaintiff's costs; which stipulation was filed in court with the papers in the case of *R. R. Co. vs. Cowley*.

"*Sixteenth.* That Ganahl & Hagan executed and signed a receipt as follows, to-wit:

" 'We hereby acknowledge receipt from the Northern Pacific Railroad Company of a certificate of sale in nature of contract to convey to the said H. T. Cowley the land described in the stipulation heretofore made herein as being about seven and one-half acres of land at or near defendant's house, and of the receipt this day from said company of the sum of eight thousand dollars, placed in the First National Bank of Spokane Falls, subject to our order for said Cowley as agreed upon, and hereby acknowledge the terms of said stipulation and the settlement therein mentioned to have been fully complied with and full satisfaction made thereof.

" 'GANAHL & HAGAN, Attorneys for defendant, H. T. Cowley.

" 'Dated May 21, 1888.'

"Ganahl & Hagan have never received the \$8,000. That money is the same heretofore mentioned as being in the possession of J. N. Glover, and subject to the order of Ganahl & Hagan, under certain restrictions mentioned.

"*Seventeenth.* That upon the said 21st day of May, 1888, upon filing the stipulation and receipt above described, judgment was rendered for the plaintiff and against Cowley for possession of all the land except the seven and one-half acres previously described herein, and the relief prayed for by Cowley was denied.

"*Eighteenth.* That Cowley did not know that the above-described stipulation had been entered into by the attorneys, nor that the receipt set forth had been given, nor that the judgment had been rendered and entered until all had been done; and upon hearing of the same he at once made known his objections to such stipulation and judgment, and protested against it, and has so protested ever since said time. This action was instituted to set aside that judgment and decree.

"*Twentieth.* That upon the 21st day of May, 1888, Ganahl & Hagan were the duly-authorized and acting attorneys for Cowley in the case of *N. P. R. Co. vs. Cowley*, and had full power to act as such."

Upon this state of facts it becomes a question as to what the rights of the parties are as regards the case which, as claimed by the defendant, was compromised and finally adjudicated in the district court. The plaintiff is in a court of equity, seeking purely equitable relief, and he does not stand in a very good light. It appears that he is not only seeking to annul the action of the court by which he claims important rights of his have been unjustly cut off, but the object of this suit is to reach beyond and cancel an agreement which he voluntarily made to compromise that case. Admitting that he was acting under the advice of his counsel, and that the advice given upon the questions of law involved was predicated upon an erroneous and unsound opinion, still, as I view the matter, considering the delays and uncertainty of litigation, no good lawyer would probably do less than Mr. Hagan did in advising Mr. Cowley as to the propriety and wisdom of accepting the proposition then made; and I cannot find that there was any bad faith on the part of the plaintiff's attorneys that would justify him in attempting to recede from his agreement made after deliberation and with a full understanding of the facts. However, there was only an understanding be-

tween the parties as to the terms upon which the compromise would be concluded. The terms of the compromise were agreed to, but the agreement was not of itself operative to effect a compromise or authorize the court to render a judgment to enforce any of its provisions. The agreement, even if it were binding in law and equity upon Mr. Cowley, has never been executed, never has been carried into effect. It has never been performed on the defendant's part, so as to entitle it to any judgment in the district court in the original case; and it is not by virtue of any executed agreement between the parties that the railroad company can claim that the judgment was properly entered. The stipulation that was signed by Ganahl & Hagan as attorneys for Mr. Cowley was not only unauthorized, but it was made in defiance of his known wishes in the matter. The judgment rendered on that stipulation was therefore improperly rendered, and it was unjust. I have no hesitation in saying that if the judgment were moved against in any proper way it should as a matter of right be vacated. But is the plaintiff entitled to such relief in this separate suit in equity? This I find to be the serious and difficult question in the case. It is a fundamental principle of chancery practice that relief is granted only when necessary to protect a right, or prevent the doing of irreparable mischief; and necessity for such relief cannot be claimed unless the party asking for it is without a remedy at law. The court will be careful to not encroach upon another jurisdiction, and it will not in any case revise or attempt to correct errors in proceedings of other courts. In harmony with these principles, the court must decline to interfere by annulling or enjoining the execution of an unjust judgment, if the same result can as well be obtained by a motion or petition in the original case, and only when the court which rendered the unjust judgment is closed to an application, or powerless to grant relief, can a court of equity in a distinct suit exert its extraordinary power. In this state the statutes contain provisions affording specific and ample relief to all persons having cause of complaint similar to that of this plaintiff. He could, under the statute, upon the showing which he has made in this suit, have successfully urged a motion to vacate the judgment complained of. The time allowed by the statute for making such motion did not expire until after this suit was commenced. The remedy at law was adequate. This suit was unnecessary, and therefore the court will refuse to aid the plaintiff. This rule is better stated in section 362 of Black on Judgments, (volume 1):

"The liberal practice of the courts in granting new trials and entertaining motions to vacate or open their own judgments, and the enactment of statutes in many of the states authorizing the setting aside of judgments taken against a defendant through his mistake, inadvertence, surprise, or excusable neglect, have considerably abridged the province of equity in giving relief by injunction; and the rule is generally adhered to, as the more safe and conservative principle, that equity will not grant relief against an execution if the party can equally well be relieved, on motion, in the court which issued the execution or has control of it. It is true that some cases maintain a different view, holding that, although the judgment might be vacated or set aside on motion, and although the time for so moving has not yet expired,

still equity may enjoin the enforcement of the judgment. But in so holding they depart from the fundamental principles of equity, and are not to be commended."

I have examined the following authorities, cited by this author, and find that they support the doctrine of the text: *Imlay v. Carpentier*, 14 Cal. 173; *Bibend v. Kreutz*, 20 Cal. 109; *Logan v. Hillegass*, 16 Cal. 201; *Hintrager v. Sumbargo*, 54 Iowa, 604, 7 N. W. Rep. 92; *Simson v. Hart*, 14 Johns. 63. In the case reported in 20 Cal. the court, in its opinion, states the reason for the interference of equity in cases similar to this one in a quotation from Story's Equity Jurisprudence as follows:

"It may be stated that in all cases where by accident, or mistake, or fraud, or otherwise, a party has an unfair advantage in proceedings in a court of law, which must necessarily make that court an instrument of injustice, and it is therefore against conscience that he should use that advantage, a court of equity will interfere, and restrain him from using the advantage which he has thus improperly gained."

And in the same connection the opinion states the general rule as follows:

"The assistance of equity cannot be invoked so long as the remedy by motion exists."

But one other argument remains to be considered. This suit was commenced in the court that rendered the judgment sought to be vacated. The bill—denominated a "complaint" under the practice in the territorial court—contains all the matter required by the statute to be set forth in a motion or petition to vacate a judgment, and it is urged that this independent suit may therefore be regarded as in effect the same thing as a proceeding under the statute to vacate a judgment by an order of the court which rendered it. I consider, however, that this suit is not the same as a proceeding under the Code. The rights of the parties and the limitations of their rights in such a statutory proceeding are quite different from the rights and limitations, and the rules which must govern the decision of a suit in equity. It would be contrary to the principles of equity, after a cause has been conducted as this case has, through all the stages of a regular suit to a final hearing, to now transform it into a summary proceeding under the statute. The plaintiff has, in my opinion, mistaken his remedy, and for that reason his suit must be dismissed.

ON REHEARING.

(May 19, 1891.)

After carefully considering the arguments and authorities cited on the motion for a rehearing of this cause, I still feel constrained to adhere to the decision already given, and to rest the decision of the case on the grounds stated in the opinion on file. There is something more than a difference of mere form between a suit in equity by an original bill to vacate a judgment or decree and a proceeding under the Code,—a difference which is made plain by the following extracts from the opinion of the supreme court of the United States in the case of *Barrow v. Hunton*, 99 U. S. 82, 83:

"The question presented with regard to the jurisdiction of the circuit court is whether the proceeding to procure a nullity of a former judgment in such a case as the present is or is not in its nature a separate suit, or whether it is a supplementary proceeding, so connected with the original suit as to form an incident to it, and substantially a continuation of it."

"The distinction between the two classes of cases may be somewhat nice, but it may be affirmed to exist. In the one class there would be a mere revision of errors and irregularities, or of the legality and the correctness of the judgments and decrees of the state courts; and in the other class the investigation of a new case arising upon new facts, although having relation to the validity of an actual judgment or decree, or of the party's right to claim any benefit by reason thereof."

This court has not acquired jurisdiction of the original case. To effect a transfer thereof from the territorial district court and invest this court with jurisdiction it is essential that a request in writing by one of the parties be filed in the "proper court." 25 U. S. St. 683, § 23. This has not been done, and no part of the record of that case has come into the custody of this court. The parties have not even seen fit to offer either the original record or a copy as evidence on the trial. Therefore, if we are dealing with a statutory proceeding supplementary to the judgment assailed, and not with a new and distinct suit, the court can do nothing else than dismiss it for want of jurisdiction. As to the question whether the right to sue in equity remains, notwithstanding the statutory provisions for proceeding in the original case to obtain the vacation of a decree or judgment improvidently rendered, or obtained by fraud, there is said to be a conflict of authorities, and a number of cases have been cited, including decisions of the supreme court, containing *dicta* to this effect. I think, however, that the rules given in the authorities which I have heretofore cited are founded in reason and the elementary principles of equity jurisprudence, and the court is not required to disregard them by reason of any authorities to which my attention has been directed. In the argument for a rehearing it has been urged, however, that by the removal of the cause into a United States court, in which the modern practice of mingling law and equity in one form of proceeding is not permissible, the parties have acquired new rights, and are entitled in this court to have a decision according to equity unaffected by local legislation; and the plaintiff claims that he is entitled to the same relief, and that the court should proceed in this cause in the same manner, as if it had been originally commenced in this court, and had proceeded therein from its inception, according to the true equity practice; and it is urged that the court cannot now say to this plaintiff that because he could have obtained relief in a different form of proceeding, and in another forum, this court will not entertain his cause, or grant him the relief to which he is in equity entitled, for to thus hold would be equivalent to saying that a statute of the state has intervened as a bar to obtaining equitable relief in this court, and to that extent has abridged the equity power and jurisdiction of a national court. I think, however, that the rights of the parties involved in this case were fixed by existing laws prior to the time of the creation of this court, and that

the case should be decided so as to give each party all, but no greater, rights than he could obtain under the laws existing at the time the suit was commenced.

GILMER v. MORRIS *et al.*

(Circuit Court, M. D. Alabama. May, 1891)

JUDGMENT—RES ADJUDICATA—DISMISSAL ON DEMURRER.

Plaintiff filed his bill in the state court to redeem certain stock pledged by him with defendant in 1871. On demurrer the court sustained the plea of the statute of limitations, and dismissed the bill. In the present suit for the same stock plaintiff stated the original transaction of 1871, and further set forth a new and different pledge, in 1875, of the same stock for other debts and for future advances which were made. *Held*, that the last suit is not barred by dismissal of the bill in the first suit, since the dismissal was on demurrer for insufficiency of the allegations of the bill, and not on the merits.

In Equity.

W. A. Gunter, H. C. Semple, and R. C. Brickell, for complainant.
Tompkins & Troy, for respondents.

BRUCE, J. The facts appear in the opinion of the court. There was a previous bill between the same parties, which was dismissed by the supreme court of the United States upon a question of jurisdiction, as will be seen in case of *Morris v. Gilmer*, 129 U. S. 315, 9 Sup. Ct. Rep. 289. A new bill was filed, and we have for consideration the sufficiency of the plea of *res adjudicata*, which was considered and determined in the former case, reported in 30 Fed. Rep. 476. The bill in this case and the plea are the same as in the former case, and the question has been again heard upon argument and brief of counsel on both sides. It is conceded that the original suit in the state court was brought to recover the same shares of stock for which this suit is brought; that it was by the same complainant against the same defendants; and, as the bill was dismissed absolutely and the decree affirmed on appeal, the defendants insist that the cause of action set up in the suit was adjudicated between the parties in the suit in the state court, and that the facts set up in the plea constitute a bar to the present suit. It will be observed from the record in the state court set up in the plea that the original bill after amendment, and as it stood when the trial was had, stated a pledge of 120 shares of stock in 1871 for \$6,000, the original cost of the same, and that this sum on the 30th day of March, 1871, was paid by a sale of one-half of the stock, and the remainder, 60 shares, was left to secure the balance of interest due to Morris. The bill did not allege acts of recognition on the part of Morris from that time to the filing of the bill in the state court, on the 7th day of July, 1884. The answer of the defendants admitted certain facts, but denied, by way of conclusion, the ownership of the stock by the complainant, and coupled with the answer as a part

thereof, under the state practice, five different grounds of demurrer, viz.: (1) The facts alleged show that the demand is stale; (2) that it is barred by the statute of limitations; (3) the claimant has an adequate remedy at law; (4) the bill as amended makes an entirely different case from that made by the original bill; (5) there is no tender alleged in the bill of the amount admitted to be due, and said amount is not brought into court. Testimony was taken, and the case was submitted upon the pleadings and evidence without a previous ruling upon the demurrers, and the chancellor, in vacation, rendered a decree dismissing the bill absolutely, which decree was on appeal affirmed by the supreme court of the state. 80 Ala. 78. The present bill states the original transaction of 1871 by way of inducement, and goes on to state a new and different pledge in 1875 of the same stock for other debts and for future advances which were from time to time made; and the question is, can the *res adjudicata* in the state court be held to apply to the case now made by the bill in this court?

If a new pledge of the same stock was made in 1875, and if by that it (the stock) was to be held as security for advances to be made, and which were afterwards made, then what is there in the record of the suit in the state court that operates as a bar to this suit? The opinion of the chancellor in the state court in the former suit shows that he rested his decision on the statute of limitations. His language is: "The statute of limitations is therefore a bar to the rights of the complainant in this cause." That was a point in the demurrer, and clearly the point decided was that the case made by the bill was barred by the statute of limitations. The issue was not whether there were acknowledgments that took the case out of the operation of the statute, or whether anything of that sort was proved or not, but only this: whether a case without such acknowledgment was made by the bill; and the question of a new and different pledge in 1875 was not before the court by any averment in the bill, and the judgment of the court was not invoked upon the case as it is now made in this court. The sustaining of the demurrer to the bill in the state court put the complainant out of court, and the suggestion of the counsel for the defendants is that he could have sought leave to amend his bill, and state the matter which he now claims took the case out of the operation of the statute of limitations. Conceding now that he might have done so, yet was he obliged to do so, and did he not have the option to confess the demurrer, and state new matter by way of amendment, or bring a new suit, and state new matter which would avoid the demurrer? The allowance of amendments in pleading was certainly not intended to prevent a party from filing a new suit, if he deems that the better course. Wells, Res. Adj. § 440; *Shields v. Barrow*, 17 How. 144; *Marsh v. Masterton*, 101 N. Y. 406, 5 N. E. Rep. 59.

The very idea of amendment has in it that of other and new matter, and the estoppel of the judgment of a court can operate only upon the case made and presented for the judgment of the court. If a party fails to state a case in his bill of complaint, and goes out of court on demurrer, the rule of *res adjudicata* operates as to the case made by his bill, and

only as to that case. *Gould v. Railroad Co.*, 91 U. S. 533; *Bigelow, Estop.* pp. 152-155. The question, then, is whether a defendant who has been defeated on demurrer, because he has not made a case by the allegations in his bill, can bring a new suit to recover the same property from the same party, upon supplying the defects in his first bill.

The statement of the proposition would seem to carry its own answer, for how can the merits of a different cause, as set up in a bill in a second suit, be heard and decided on a different bill in a former suit, even when it is between the same parties and for the same property, or how, in such case, can the estoppel of a judgment in a former case operate as an estoppel in the second case? The judgment rendered in a cause must be held to the issues made by the pleadings, and the estoppel will operate only as to the issue, and whatever was necessarily involved in that issue. Presumption will never be indulged in favor of an estoppel beyond what is necessary to sustain the judgment rendered. *Russell v. Place*, 94 U. S. 606; *Bigelow, Estop.* pp. 152-155; *Barnes v. Railroad Co.*, 122 U. S. 14, 7 Sup. Ct. Rep. 1043; *Black, Judgm.* § 242. In *Aurora City v. West*, 7 Wall. 82, it is said: The essential conditions under which the exception of *res adjudicata* become applicable are "the identity of the thing demanded, the identity of the cause of the demand, and of the parties in the character in which they are litigants." Can it be maintained that the cause of the demand in the case in this court is the identical cause of demand in the state court in the former suit? The theory of the bill in the state court seems to be a claim to the property upon an acknowledged pledge and trust relation subsisting between the parties in 1871. The theory of the bill in this case is that of another pledge at a subsequent time, and with different conditions, not only for indebtedness then existing, but to exist,—that is, a continuing pledge, which in its nature was inconsistent with the running of the statute of limitations; and that in fact there was no act of repudiation of the pledge on the part of Morris prior to June, 1884. It is claimed, however, that the question is not simply what point was decided in the former suit, but what was necessarily involved in the issue in the former suit, and that, as the right to the stock in question was in issue, the matter now sought to be litigated is *res adjudicata* in the former suit. True, the same property is claimed here that was claimed in the former suit, but on a different ground, as we have seen; and as the judgment in the former suit was on demurrer to the bill and did not necessarily involve the question of property except as there stated, and as an estoppel must be certain to every intent, and cannot be extended, in the case of judgments, by implication, beyond matters essential to uphold them, the former judgment in this case cannot be held to conclude the right of property to the stock in question, which is involved alike in both cases. *Bigelow, Estop.* pp. 80, 81, 152, 154; *Moss v. Anglo-Egyptian, etc., Co.*, L. R. 1 Ch. 113-116.

The questions in this case have already been considered, and although upon a reargument some views have been presented and some authorities cited in addition to what was presented in the former case, yet the con-

clusions reached do not differ from those expressed in former opinion, reported 30 Fed. Rep. 476, and it is not deemed necessary to go over the same ground again.

BELMONT NAIL CO. v. COLUMBIA IRON & STEEL CO.

(Circuit Court, W. D. Pennsylvania. May 7, 1891.)

1. CREDITORS' BILL—JOINDER OF COMPLAINANTS.

Where a creditor files a bill for himself and such other creditors as may join as complainants, any other creditor of the defendant should be permitted, on petition, to join in the suit as co-complainant.

2. SAME—EQUITY PRACTICE—DISMISSAL.

After a receiver has been appointed in such suit, and other creditors have joined as co-complainants, the original complainant cannot dismiss the suit without their consent.

3. SAME—JURISDICTION OF FEDERAL COURT.

The fact that such co-complainants were citizens of the same state as the defendant will not deprive the circuit courts of jurisdiction where the defendant and the original complainant are citizens of different states.

In Equity. Motion to dismiss bill.

P. C. Knox, for complainant, and the motion.

A. M. Imbrie, for Huckenstein.

Geo. Shiras, Jr., for Totten & Hogg Iron & Steel Foundry Company, opposed.

Before ACHESON, C. J., and REED, J.

REED, J. The receiver was appointed April 9, 1891, upon the motion of the plaintiff, who had filed the bill for itself and such others of the creditors of the defendant company who might join as plaintiffs. The second prayer of the bill is that the property of the defendant be decreed to be a trust fund for the benefit of all its creditors; that an account be taken of all the debts of the defendant and the assets of the corporation; that the assets be applied in payment of the indebtedness of the defendant in proportion to the whole thereof; that the defendant be enjoined from disposing of its assets; that a receiver may be appointed to take the trust fund, and distribute it among the several creditors who shall come in and prove their claims under the decree to be obtained, with power to hold, operate, and sell the said property of the defendant under the decree of the court. On April 14, 1891, John Huckenstein, claiming to be a creditor of the defendant, presented his petition, praying to be permitted to become a party to the proceedings, and joined as a plaintiff. To this petition an answer was filed by the defendant, in which he is admitted to be a creditor, but not to the amount claimed by him. Pending a decision on his petition, the plaintiff, on May 1, 1891, made a motion for leave to dismiss his bill, to which defendant's counsel consents, but which is opposed by Mr. Huckenstein. Subsequent to that motion, but prior to its argument, the Totten & Hogg Iron

& Steel Foundry Company presented a petition, alleging that they are creditors of the defendant, and asking to be joined as plaintiffs. To this no answer has been filed. This creditor also opposed the dismissal of the bill. Both John Huckenstein and the foundry company should be permitted to join as plaintiffs. The bill having been filed as a bill for the benefit of creditors generally, the relief demanded being for the benefit of all, any creditor has a right to become a party plaintiff upon application to the court. *Fost. Fed. Pr.* pp. 88, 290; *Forbes v. Railroad Co.*, 2 Woods, 334; *Campbell v. Railroad Co.*, 1 Woods, 368. The question then remains whether the original plaintiff can move for and obtain leave to dismiss the bill, the defendant consenting, but the other creditors, who have asked leave to join, objecting. The rights of John Huckenstein should date back to the filing of his petition, which was before the motion to dismiss was made by the original plaintiff, and therefore, as co-plaintiff, his consent is requisite before dismissal of the bill solely upon the ground of consent of parties. But it is doubtful whether the original plaintiff could dismiss the bill, after the appointment of the receiver, without the consent of the other creditors. "After a decree has been made of such a kind that other persons besides the parties on the record are interested in the prosecution of it, neither the plaintiff, nor defendant, on the consent of the other, can obtain an order for the dismissal of the bill. Thus, where a plaintiff sues on behalf of himself and all other persons of the same class, although he acts on his own mere motion, and retains the absolute dominion of the suit until the decree, and may dismiss the bill at his pleasure, yet after a decree he cannot by his conduct deprive others of the same class of the benefit of a decree, if they think fit to prosecute it." 1 Daniell, Ch. Pr. 794. "After decree made establishing right of legatees to recover on a bill filed by one of several legatees, the complainant cannot after such decree dismiss his bill to the prejudice of the other legatees." *Collins v. Taylor's Ex'rs*, 4 N. J. Eq. 163. A bill filed by one creditor, for the benefit of himself and others, for the appointment of a receiver of an insolvent bank is substantially a proceeding in behalf of all the creditors, and the suit being once instituted as a statute remedy for all, the plaintiff has no power to discontinue the bill. *Atlas Bank v. Nahant Bank*, 23 Pick. 480. Where an individual creditor had filed his bill against a moneyed corporation, obtained an injunction and appointment of a receiver, and the receiver had taken upon himself the trust, and other creditors had filed their claims, it was held that the creditor who had filed his bill, obtained the injunction and the appointment of a receiver, was not entitled, as a matter of right, upon being paid his demand, to dissolve the injunction, dismiss his bill, and discharge the receiver. *Fay v. Bank*, Har. (Mich.) 194. The appointment of the receiver in this case was, in pursuance of the prayer of the bill, for the benefit of all the creditors, and was the first step towards an administration of the assets of the defendant corporation in the interest of all its creditors. No reason had been given, or change of circumstances from those existing at the time of the appointment of the receiver shown, in support of the motion, except

v.46F.no.5—22

that in some way the defendant corporation has satisfied the claim of the plaintiff. The court doubtless has the power, upon proper cause shown, and upon being satisfied that the interests of all parties, including all the creditors, would be advanced by the dismissal of the bill, to permit its dismissal, even against the objection of one or more of the creditors; but no such cause has been shown. *Fay v. Bank, supra*.

It was suggested on argument that the possible effect of the joinder of Mr. Huckenstein and the foundry company as plaintiffs would be to oust the jurisdiction of the court, as they were citizens of Pennsylvania, the defendant being a corporation of Pennsylvania. That such would not be the effect was ruled in *Stewart v. Dunham*, 115 U. S. 61, 5 Sup. Ct. Rep. 1163, where it was held that, when a creditors' bill is properly removed from a state court to a circuit court of the United States on the ground that the controversy is wholly between citizens of different states, the jurisdiction of the latter court is not ousted by admitting in the circuit court as co-plaintiffs other creditors who are citizens of the same state as the defendant.

MARVIN v. C. AULTMAN & Co.

(Circuit Court, N. D. Ohio, E. D. June, 1891.)

FEDERAL COURTS—PRACTICE.

Inasmuch as the circuit court of the United States is vested with exclusive jurisdiction to try cases involving the validity of patents issued by the United States, the rule that the pleadings and practice shall conform to the practice in like cases in the state court does not apply, and in such a case the plaintiff cannot avail himself of the provisions of the Ohio statute (Code Ohio, §§ 5099-5101) by attaching to his petition interrogatories to be answered by defendant on pain of being defaulted, and thereby compel him to disclose testimony which is important in the trial of the cause.

At Law. On motion for judgment.

Marvin & Cook and *Charles S. Cairns*, for plaintiff.

Wm. A. Lynch and *Charles R. Miller*, for defendant.

JACKSON and RICKS, JJ. This is a motion for judgment herein against the defendant by default for failure to answer the interrogatories annexed to the petition of the plaintiff filed herein, as required by law. This is an action on the case under section 4919 of the Revised Statutes of the United States. The petition filed in this case is prepared in accordance with the Code of Ohio. Section 5099 of the Revised Statutes of Ohio provides that "a party may annex to his pleading, other than a demurrer, interrogatories pertinent to the issue made in the pleadings; which interrogatories, if not demurred to, shall be plainly and fully answered under oath, by the party to whom they are propounded, or, if such party is a corporation, by the president, secretary, or other officer thereof, as the party propounding requires." Section 5100 provides:

"When annexed to the petition, the interrogatories shall be answered within the time limited for answer to the petition." Section 5101 provides: "Answers to interrogatories may be enforced by nonsuit, judgment by default, or by attachment, as the justice of the case may require; and, on the trial, such answers, so far as they contain competent testimony on the issue or issues made, may be used by either party." The interrogatories propounded and annexed to the petition call for facts from the officers of the defendant corporation as to the number of patented devices made under the letters patent attached to the petition; how many were sold during the period from 1883 to 1890, the period covered by the alleged infringement; and other matters relating to their manufacture and sale pertinent to the issue made by the pleadings in this case. The defendant declines to answer said interrogatories, and claims that, under the practice of the courts of the United States in such cases, it cannot be compelled to make answers thereto. This presents the question as to whether the pleadings in an action of this kind, and the trial of the cause, shall conform to the pleadings and practice in law cases under the Ohio Code, or whether such pleadings and practice are specially provided for by the Revised Statutes of the United States. We think that, inasmuch as the circuit court of the United States is vested with exclusive jurisdiction to try cases involving the validity of patents issued by the United States, it cannot be said that there are "like causes" in the courts of the several states to which the practice, pleadings, forms, and mode of proceedings shall conform. It is not material whether the declaration is called a "petition" or a "declaration," nor is it very important as to the precise form in which it is expressed; but it should contain all the essential averments that are prescribed for a declaration in an action on the case under the common-law form of pleading, because that was supposed to be in the mind of congress when section 4919 was enacted. The petition in this case contains all such essential averments, and is therefore a good petition; but we do not think the plaintiff has the right to avail himself of the provisions of the Ohio statute in attaching to his petition interrogatories, and thereby compel the defendant to disclose testimony which is important in the trial of the cause. The statutes of the United States specifically provide how testimony in actions of this kind may be secured and offered in the courts of the United States. Those provisions of the statute are ample, and give the plaintiff the benefit of all the evidence which he seeks to obtain by the interrogatories attached to his petition. The motion for judgment is denied, but an order may be entered allowing the plaintiff a *sub-pœna duces tecum* requiring the defendant to produce the correspondence, books, and records of the corporation, as provided by the statutes of the United States. The case of *Myers v. Cunningham*, 44 Fed. Rep. 346, (decided by the district judge for this district at the June term of this court, 1890, held in Toledo,) has been examined, and is approved by the circuit judge.

SMITH v. BOARD OF COUNTY COMMISSIONERS OF CARLTON COUNTY.

(Circuit Court, D. Minnesota, Fifth Division. May 12, 1891.)

COUNTIES—LIABILITY FOR TORTS.

Plaintiff, the employe of an independent contractor, engaged in building a bridge on a county road, was injured by the negligent explosion of a charge of dynamite by the agents of defendant county while blasting and building an approach to the bridge. *Held*, in an action for damages, that counties are not liable for the torts of their officers acting within the line of their authority, unless made so by statute.

At Law. On demurrer to complaint.

Arctander & Arctander, for plaintiff.

Alpheus Woodward, Co. Atty., for defendant.

NELSON, J. The complaint in substance charges that on January 24, 1889, the plaintiff was an employe of an independent contractor of defendant, then engaged in building a bridge in Carlton county; that it was plaintiff's duty to carry lumber on to the bridge, and, while so engaged, the defendant fired a charge of dynamite while blasting and building an approach to said bridge, without notice or warning, and in such dangerous and careless manner, as, by reason thereof, to cause a rock to fly from such blast, and injure the plaintiff. The complaint is predicated upon a negligent affirmative act on the part of the defendant in making a careless blast while engaged in building a bridge or the approaches thereto on a county road in Carlton county, whereby plaintiff was injured without his fault. The weight of authority is against the position taken by the plaintiff in bringing this suit. While the cases are conflicting, and there are difficulties in the way of maintaining the distinctions made, the prevailing rule is that counties are under no liability in respect to torts except as imposed by statute, and are not liable for damages occasioned by reason of the negligence of the county commissioners themselves, or the negligence of persons employed by them to aid in the discharge of official duties. The supreme court of Minnesota is emphatic in sustaining the rule that the counties are subordinate political subdivisions of the state, and the county officers public officials performing their duties under the authority of the state; and, being subdivisions of the state, created for certain political and administrative purposes, are not liable for tort of their officers acting within the line of their authority, unless made so by statute. *Dosdall v. Olmsted Co.*, 30 Minn. 96, 14 N. W. Rep. 458. There is no state law imposing liability, as claimed by the plaintiff. In the state of Ohio the same view is entertained in an able and elaborate opinion by the supreme court. *Hamilton Co. v. Mighels*, 7 Ohio St. 109. The injury complained of was the result of the negligence of the county commissioners in the discharge of a public duty. Demurrer sustained.

HYER v. CHAMBERLAIN.

(Circuit Court, D. South Carolina. May 22, 1891.)

RAILROAD—STOCK-KILLING—EVIDENCE.

It is not negligence for a railroad company to leave a train of freight-cars standing on a siding near a crossing, provided the crossing itself is kept unobstructed, and the fact that a mule wandering up the track from the crossing was concealed by the freight-cars from the engineer of a rapidly approaching train until it came around the end of the freight-cars onto the main track at so little distance that it was impossible to stop the train before the mule was struck, will not render the company liable therefor.

At Law.

Simeon Hyde, for plaintiff.

Brawley & Barnwell, for defendant.

SIMONTON, J. This is a claim against the receiver, for the value of a mule killed upon the track of the South Carolina Railway by one of its locomotives. Both parties submit the matter to the court. The mule was killed about 290 feet from Sineaths station. At this station are four tracks, laid on lands owned by the railway company in fee. The residence of the plaintiff, consisting of a tract of land, dwelling-house, and store, is to the west of the track. From it leads a public road crossing the railroad track at Sineaths. On the day of the accident there was on each of the side tracks nearest to plaintiff's premises a train of box-cars. They were below the crossing, which had been left entirely unobstructed. The locomotive which killed the mule was on the main track. Between it and the box-cars on the side track was a space of four or five feet. As the mule was killed by the locomotive of defendant, the law presumes negligence, and this presumption must be rebutted. *Danner v. Railroad Co.*, 4 Rich. Law, 329; *Fuller v. Railway Co.*, 24 S. C. 133. The only eye-witness of the accident was the engineer in charge of the locomotive. He had been in service for 30 years. He says that he was in charge of the passenger train, about an hour behind time, running at the rate of 35 miles an hour, with 4 coaches, including the baggage-car; that after he had passed the crossing at Sineaths he saw the mule coming from behind the train of cars on the siding, and on the track, about 35 feet ahead of him; that he could not possibly have stopped his train, nor do anything except open his connections with the whistle and blow; that he struck the mule, and no doubt killed it. He admits that his engine had become disabled on one side, but swears that with every appliance in order he could not have stopped under 250 yards, at the rate of speed he was under, and with such a train. If the disabled condition of the engine did not contribute to the accident, the defendant cannot be held liable for that. *Simms v. Railroad Co.*, 26 S. C. 495, 2 S. E. Rep. 486. To rebut this testimony the plaintiff proved that there were seen tracks of the mule from the premises of plaintiff to the railroad crossing, and from the crossing, between the main track and the siding, up to the point where it was killed. The plaintiff claims that under these circum-

stances defendant is liable. His position is this: The defendant suffered a train of cars to remain on the siding, very close to the main track, along which this train came; that the mule, wandering, got on the track, and, having been caught in between the two trains in its effort to escape, was killed; that, if the engineer did not see the mule in time to avoid the accident, he was prevented from doing so by this obstruction of the train of box-cars placed there by agents of defendant. *Murray v. Railroad Co.*, 10 Rich. Law, 227, is relied upon for this position. In this case a horse had been hitched at a point not far from a railroad crossing, at night. A train of cars had been left on the railroad track, obstructing the crossing, and some distance above and below it. The horse broke loose, and, attempting to cross, wandered up and down the track until the train came up at 11 P. M., and killed it. There was a deep cut on both sides of the crossing. The defense relied upon the fact that the killing was at night, and so unavoidable. The court held that this was not enough to rebut the presumption of negligence, and, beyond this, held that the obstruction of the crossing was an unlawful act, which contributed to the accident, and made defendant responsible. In the present case the crossing was not obstructed. True, a train was on the siding; but this siding was on lands held in fee by the company, and its use by the company was lawful. In *Murray's Case* this is distinctly recognized:

"Either the turn-out should have been large enough for the trains which stopped there to have stood above or below the crossing, or else the cars of a train at rest should have been detached so as to give a free passage." Page 232.

See, also, *Adkins v. Railway Co.*, 27 S. C. 71, 2 S. E. Rep. 849; *Guess v. Railway Co.*, 30 S. C. 163, 9 S. E. Rep. 18.

If the train was lawfully there, then defendant cannot be held responsible simply because it was there. Indeed, the defendant is protected because it was there. If the mule came from behind this train, and it was therefore not seen until it was only 35 feet off,—a distance within which the train could not have been stopped,—the grounds for excuse laid down in *Murray's Case* would apply. Page 232. The claim is disallowed.

McCLARY v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court, W. D. Missouri, W. D. March 16, 1891.)

RAILROAD COMPANIES—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.

Plaintiff's intestate attempted to cross a street on which were two railroad tracks, about nine feet apart. Just as he reached the second track, a train on it came up, and, in order to avoid it, he stepped back upon the first track, and was struck by an engine that was backing up on that track. Held, that the railroad company was not responsible for the accident.

At Law.

This was an action by plaintiff for the killing of her husband, Frank McClary, on March 12, 1889, by a switch-engine of defendant. The accident occurred at Twentieth and Harrison streets, in Kansas City, Mo. The trains of defendant used the tracks of the Kansas City Belt Line, which were laid on Twentieth street. There were two tracks running east and west. The distance between the two tracks was nine feet. About the time of the accident a passenger train of the defendant was going east on the south track, and a switch-engine was backing west on the north track. The switch-engine struck and killed McClary. There was evidence tending to show that the switch-engine was running faster than authorized by ordinance; that deceased was going south on Harrison street; that he walked across the north track, and was about stepping on the south track, when he glanced up and saw the passenger train, consisting of three or four cars, within a very few feet of him; that to get out of the way of that train he stepped backward, never looking eastward, till he reached the north track, and stood on one of the rails thereof. Just as the rear end of the passenger coach got by him, the switch-engine going east struck him, causing his death. The defendant demurred to the evidence.

Hollis & Latshaw, for plaintiff.

Pratt, Ferry & Hagerman, for defendant.

Before CALDWELL and PHILIPS, JJ.

CALDWELL, J., (*orally, after stating the facts as above.*) This, in my opinion, is what would be called a simultaneous transaction. The deceased for the moment seems to have been utterly absent-minded. He went upon those railroad tracks, not looking to the right or to the left, at a time when there were two trains approaching. It is a case that is remarkable. He proceeded to cross one track onto the second track, and had just reached that, when he was in the attitude of being run down by that train, and barely discovered it in time to escape being killed there. He must have been somewhat agitated and confused by the great peril which he had just escaped. All plaintiff's witnesses have testified that he had walked forward and then backward onto the other track, and I think it is perfectly obvious, taking this testimony all into consideration, that the man traversed that space of nine feet between the two tracks, and had just reached the other track, when he was killed; he

getting there, however, not in time to give any one an opportunity to take order for his safety. His neighbor, who stood upon the side of the track, had not time to recover his breath, and halloo to him between the time he was in the act of being run down by the train on the south track, and the instant he was struck by the other. There was no time for any one to take order for his safety. There was no time when that engineer and fireman, if both looked in the direction of the deceased, could have taken order for his safety, and saved him, in my judgment, upon this testimony; nor do I think it is open to reasonable doubt. I think it is so clear that the court could not uphold a verdict found upon any other hypothesis, that while he was passing from the south track to the north track, over that space of nine feet, that by the time he had got onto the second track, the other train was there,—the switch-engine was there.

There is no rule of law applying to this state of facts to warrant a verdict supported by the evidence. It is not a case that may be called near the line. It is not a case like the colors of the rainbow, where you cannot tell where one begins and another ends, and which must be left to the jury to say on which side of the line it falls; but this is obviously and palpably on one side of the line, and so clearly so that the duty of the court is clear. Of course this is a deplorable accident, but upon this state of the case the railroad company is not answerable or liable in damages for the misfortune that befell this man from his own absent-mindedness, that led him into this peril, by which he lost his life.

Demurrer sustained.

PHILIPS, J., concurs.

RENNER v. NORTHERN PAC. RY. CO.

(Circuit Court, D. Washington, E. D. April 20, 1891.)

CONTRIBUTORY NEGLIGENCE.

A person traveling in a public street, and finding it obstructed by a freight train at full stop, to which a locomotive is attached, who, relying upon the assurance of a brakeman that he can safely climb over the bumpers, and pass between the cars, as the train will remain stationary for some time, attempts to do so, and while in the act suffers an injury by the train being started suddenly, without warning by ringing the bell or sounding the whistle, is guilty of such contributory negligence as will prevent his recovery for the injury.

At Law.

Turner & Graves, for plaintiff.

J. M. Ashton, for defendant.

HANFORD, J. Is a person traveling in a public street, and finding it obstructed by a freight train at a full stop, to which a locomotive is attached, and being informed by a brakeman on the train that he can

safely climb over the bumpers, and pass between the connected cars, as the train will remain stationary for a considerable time, who, relying upon such assurance, does attempt to so climb over the train, and while in the act suffers an injury by reason of the train being started suddenly, and without previous warning being given either by ringing of the bell or sounding the whistle, guilty of such contributory negligence as to preclude him from recovering damages for such injury, in an action against the company to which the train belongs? This question is raised by a demurrer to the complaint in this action. It is a question upon which there is a conflict of authority. The following decisions cited by the defendant's counsel sustain them in maintaining the affirmative: *Railroad Co. v. Pinchin*, 112 Ind. 592, 13 N. E. Rep. 677, 35 Amer. & Eng. R. Cas. 383; *O'Mara v. Canal Co.*, 18 Hun, 192; 2 Lacey, Dig. R. Dec. 770; and *Andrews v. Railroad Co.*, (Ga.) 12 S. E. Rep. 213. There are also other cases similar in character, though not based upon the identical facts in this case, which, by analogy, support their position. Among others, the following may be cited: *Smith v. Railroad Co.*, 55 Iowa, 33, 7 N. W. Rep. 398; *Dahlstrom v. Railroad Co.*, (Mo.) 8 S. W. Rep. 777; and *Lewis v. Railroad Co.*, 38 Md. 588. The contrary view is supported by the following text-books and decisions: 2 Shear. & R. Neg. § 479; *Nichols v. Railroad Co.*, (Va.) 5 S. E. Rep. 171; *Railroad Co. v. Sykes*, 96 Ill. 162; and *McIntyre v. Railroad Co.*, 37 N. Y. 287.

I find the question difficult to determine, not only by reason of the conflicting precedents, but because, in the light of reason, the case seems to be located exactly on the boundary line separating questions of law proper for the court to decide from the province of the jury as judges of all questions of fact. The plaintiff shows very clearly by the statements of his complaint that he must have been conscious at the time of attempting to climb over the train that he was thereby exposing himself to danger, and he voluntarily exposed himself to the danger of which he was thus conscious. The information given by the brakeman could not have been an assurance to him upon which he could prudently depend, for it was certainly apparent that the brakeman did not have such control of the train as warranted him in giving a positive assurance. I do not consider the rule that a person who voluntarily places himself in a position known to be dangerous is to be deemed to have assumed the ordinary risks incident to such position as applicable to this case, there being no contract relation between the parties. The defendant was a wrong-doer in suffering its train to obstruct the street, but that wrong was not necessarily productive of the injury to the plaintiff, of which he now complains. He would have no cause of action if this were the only wrong or negligent act chargeable against the defendant. The starting of the train suddenly, and without previous warning, at such a place, was a further wrong, and something which the plaintiff was not bound to anticipate when he attempted to climb over the train. Although he knew that in doing so he was incurring danger, he was not bound to anticipate the particular negligent act which caused his injury. It was not certain that the train would not remain stationary a sufficient time to en-

able him to go across it, and he had a right to assume that a warning would be given before it did start, because it was the duty of the men in charge to give such warning. *Owen v. Railroad Co.*, 35 N. Y. 518.

The authorities cited are not only irreconcilable, but unsatisfactory in themselves. In Shearman and Redfield's work there is no candid or full discussion of the subject. The allusions made to it in the text and notes are too sarcastic and captious to have much weight; and the case of *Rauch v. Lloyd*, 31 Pa. St. 358, is cited in support of the rule, stated broadly in the text, that "it is not deemed negligence for the plaintiff to cross by the only path left open to him, whether by climbing over a platform, or walking between two separated cars." The opinion of the court in that case does not state or affirm any such general rule. On the other hand, the case of *Railroad Co. v. Pinchin*, cited by the defendant, could not have been as well considered by the court as a casual reader of the opinion might infer. Numerous authorities are there cited, and seem to have been relied upon to support the several propositions maintained; among them this: "A person who has knowledge that a train of cars is stopping temporarily at a way station has no right to assume the risk of passing between the cars. It is a danger so immediate and so great that he must not incur it." And the first case in the list of those cited to this point in the case as printed in 112 Indiana is *Rauch v. Lloyd*, 31 Pa. St.,—the very case cited by Shearman and Redfield in support of their general rule above quoted. And in the case as printed in 35 Amer. & Eng. R. Cas. 383, the Pennsylvania case is omitted entirely, and in its place is cited *Owen v. Railroad Co.*, 35 N. Y. 516,—a case which I have read without being able to discover even a suggestion of the doctrine of the Indiana decision. These considerations cause me to doubt the soundness of the proposition, when regarded as one of law purely, that the plaintiff's conduct was so negligent, and so contributed towards his own injury, as to preclude him from recovering; and yet I am unable to positively deny it. The question in this present situation of the case seems to resolve itself into one of expediency. Undoubtedly the opinion of the court of last resort will be required by whichever party may suffer defeat in this court. Now, is it better to sustain the demurrer, and send the case at once to a higher court for a decision of this vital question, with the probability of a second appeal being taken should the appellate court return the case here for a trial, or, by overruling the demurrer, subject the parties to the labor and expense of a trial which will be fruitless if the appellate court should reverse such ruling of this court? The case cannot be tried at this term, and it will be possible for the plaintiff to obtain a decision of the circuit court of appeals in time to have a trial, if a trial shall be ordered at the September term here. I deem that the best course for the case to take, and therefore sustain the demurrer.

JOHNSON v. NORTHERN PAC. RY. CO.

(Circuit Court, D. Washington, E. D. April 15, 1891.)

1. CARRIERS OF PASSENGERS—EJECTION FROM CARS.

Plaintiff purchased a ticket for an extended journey, the latter part of which was over defendant's road. By mistake the agent punched the ticket so as to indicate that it expired on the day on which it was issued. The mistake was not discovered until she was on the first division of defendant's road, when the conductor, upon telegraphing to the head office, received orders to honor the ticket until further instructions. At the end of his division, when he left the train, he delivered her the telegram. The conductor of the next division, notwithstanding the telegram, and the evidence on the face of the ticket that it had been honored, telegraphed to the division superintendent, and received no answer, and meanwhile, from time to time, for several hours, worried plaintiff by making remarks calculated to disturb her, and make her realize the disadvantages of her situation, and showing a desire to be unduly familiar. Finally, about midnight, after she had been carried a great distance, he put her off the train. She had explained in her first conversation that she was far from home, her means were exhausted, and she was not able to pay her fare. *Held*, that plaintiff was entitled to recover damages for the expulsion and ill treatment, in an action on the contract represented by the ticket.

2. SAME—VERDICT—MEASURE OF DAMAGES.

A verdict for \$1,000 having been set aside, and a new trial granted, a second verdict for \$500 was rendered. That, too, was set aside, and on the third trial another verdict for \$1,000 was rendered. *Held*, that the limits of the court's discretion had been reached, and the verdict would not be disturbed as excessive.

3. SAME—MISCONDUCT OF JURY.

Where it appears that the jury arrived at a verdict by each juror writing the amount which he was willing to give, adding the several amounts together, and dividing the total by 12, the verdict will not be aside for that reason, where it further appears that no agreement was made to abide the result, and where the amount agreed upon is much less than the quotient so obtained.

At Law. On motion for new trial.

L. H. Prather and *R. J. Danson*, for plaintiff.

J. H. Mitchell, Jr., for defendant.

HANFORD, J. The first trial of this case was had in the territorial district court, resulting in a verdict in favor of the plaintiff for \$1,000, which was set aside, and a new trial granted, on motion of the defendant. Upon a second trial the jury returned a verdict for \$500. That verdict was also set aside by the court. The third trial of the case was had in this court, and resulted in a verdict in favor of the plaintiff for \$1,000, and the defendant for the third time asks for a new trial. Three principal grounds are urged in the argument. The first is that the plaintiff is not entitled to recover damages in this action. The decision of that question necessitates consideration of the pleadings and the evidence, and a review of the whole case.

The action, as I construe the pleadings, is based upon a contract to recover damages resulting from personal injuries caused by a tortious breach of the contract, and it is therefore to be distinguished from numerous decisions holding that where in his complaint the plaintiff pleads only a wrongful and forcible expulsion from a passenger train, and the defendant justifies by showing the failure of the plaintiff to present, when called upon, a proper ticket, pay fare, or leave the train. In such an action the complaint is for a tort, pure and simple, and, as it is the

duty of a passenger to present a ticket, pay fare, or leave the train, when called upon, his failure to do either is wrongful, and no tort is committed by the officers of the train in using reasonable and sufficient force to eject him. The complaint and the evidence shows that the plaintiff applied to an agent of defendant for a ticket entitling her to transportation to a specified point, to which she wished to make a journey. The agent could not furnish exactly such a ticket as she asked for, but he then made a proposition to sell her a second-class limited ticket to a place near the point to which she wished to go, which proposition the plaintiff accepted. She paid the stipulated price, and received a ticket, which she supposed to be good for the intended journey. The transaction took place at a railroad station, and was concluded hurriedly, during a short interval between the opening of the ticket-office and the departure of the train upon which the plaintiff commenced her journey. If the plaintiff had taken the pains to carefully examine her ticket before accepting and paying for it, she probably would not have been able to have discovered the error committed by the agent in punching it, which in part caused the trouble eventuating in this lawsuit; but she relied upon the agent to perform his duty in issuing to her a proper ticket, conformable to his instructions and the requirements of the railroad company. I hold that in issuing that ticket the company contracted to furnish her transportation and protection from abuse and insult while on her journey, and also warranted that the ticket issued was good for the trip. It was a coupon ticket, and the coupons were accepted by the conductors of the connecting road over which the plaintiff made the first part of her journey. At St. Paul she was admitted to the train of the defendant after exhibiting her ticket to the gate-keeper at the depot, and she had been carried a portion of the way on the defendant's road before discovery of the mistake made by the agent who sold her the ticket in punching it so as to make it indicate that the time limited within which it should be good had expired, the date of expiration as punched being the very day on which it was issued; but, as the date of its issue was not stamped or written, the mistake was not apparent from the ticket itself. Upon discovery of the mistake, the conductor of the train, instead of requiring the plaintiff to pay fare or leave the train at once, made inquiry by telegraphing to the defendant's head office at St. Paul, and in response to his inquiry received a telegraphic order to honor the ticket until further instructions, and no other or different instructions or notice was afterwards sent from that office. The plaintiff was permitted to continue on her journey to the end of the division at which this conductor left the train, and on leaving he delivered to her the telegram which he had received from St. Paul. The conductor of the next division, when the ticket was presented to him, received with it the telegram from the head office, but instead of obeying it, or applying for further instructions, or requiring her to pay fare or leave the train at once, he telegraphed for instructions to the division superintendent, but received no response. Then, as the testimony on the part of the plaintiff tends to prove, he commenced worrying the plaintiff, and making

remarks to her which, if not intended to be insulting, were certainly suggestive of a desire on his part to disturb her, by making her realize the disadvantage of her situation, and to be unduly familiar. He continued, with frequent repetitions, during several hours, to thus torment the plaintiff, and she was meanwhile carried a great many miles on the train. Finally, at about midnight, the conductor, with the assistance of a police officer found at Missoula station, removed the plaintiff from the train. A fellow-passenger then purchased a ticket for her, and she was permitted to re-enter the car, and continue her journey. The plaintiff explained in her first conversation with this conductor that she was unable to pay her fare, as she was far from home, and from her destination, and her means were exhausted. The ticket itself bore evidence that it had been honored by other conductors, and that fact, in connection with the telegram from head-quarters, was sufficient evidence of the validity of the ticket, and, under the rules of the company, it was the conductor's duty to have accepted it. By forcibly expelling the plaintiff from the train, and its failure to protect her from ill-treatment, the defendant's contract was broken, and the plaintiff suffered an injury, thereby entitling her to recover damages in an action on the contract.

The next question is as to the measure of damages. The testimony in the case which went to the jury had a tendency to prove that the plaintiff was damaged, not only by reason of mental and physical suffering at the time, but for months afterwards, by reason of nervousness brought on by the ordeal through which she passed, her health was impaired, and she was partially incapacitated for doing her usual work. There is then in the testimony, as well as in the allegations of the complaint, a showing of peculiar injuries to the plaintiff, giving her a claim to special damages by reason of the tortious manner in which the contract was broken. The court instructed the jury, in effect, that if, according to the decision of the jury, the plaintiff should be entitled to recover, the measure of damages would be reasonable compensation for the injury actually sustained by the plaintiff, and that exemplary damages could not be awarded. There is no ground for supposing that the jury were actuated by passion or prejudice, or that they intended to disregard this instruction. Even if my opinion of the case would warrant me in regarding the sum awarded by the verdict as excessive, still, being the result of the third trial, and being the sum twice fixed upon by successive juries, I think the limit of the court's discretionary power in granting new trials for this particular cause has been reached.

The third and last ground for the motion is alleged misconduct of the jury, in this: that the verdict was arrived at by each juror writing the amount which he was willing to fix as the amount of damages recoverable, and adding the several amounts so given, and dividing the total by 12. From affidavits on file I find the facts to be that, for the purpose of coming to an agreement, if possible, the jury did resort to the above method of addition and division of numbers, but the verdict was not arrived at in that way. There was no agreement made to abide the result. The amount of the damages awarded is much less than the

quotient obtained by the process above mentioned, and the verdict was freely assented to by all of the jurors. While one or more of them may have been thereby influenced to consent to a verdict for a larger sum than he otherwise would have fixed as the proper amount of damages, they were not coerced nor deceived. Each juror was free to give or withhold his consent, and was conscious of it, and they actually balloted more than once after the proceeding referred to, and before an agreement was arrived at. It is not practicable for the court to control a jury during their deliberations to the extent of prescribing or proscribing any particular arguments or methods of persuasion that may or may not be used by them to influence each other; and it is not wrong for the members of the jury to influence each other by any effective method free from fraud and intimidation. For these reasons I do not regard the jury as being guilty of misconduct for which their verdict should be set aside.

The motion for a new trial will therefore be denied.

UNITED STATES *v.* BAXTER *et al.*

(Circuit Court, D. Washington, N. D. June, 1891.)

1. TRESPASS—CUTTING TIMBER ON PUBLIC LANDS—EVIDENCE OF VALUE.

In an action of trespass for cutting timber upon public lands, upon an issue as to the value of the saw-logs at a particular place, it is error to permit witnesses to testify as to the value of saw-logs generally at that time, without having their attention directed to the place in question.

2. SAME—BURDEN OF PROOF—DAMAGES.

In an action of trespass by the United States for cutting timber on government land the burden of showing that the timber was cut by mistake, with a view of mitigating the damages, is upon the defendants; and, in the absence of evidence to that effect, there is no error in permitting the government to recover the value of the saw-logs when already brought to the water.

3. SAME—PARTNERSHIP.

Where such a trespass is committed by a firm, one partner cannot show that as to him it was done through mistake, though his partner may not have been mistaken, and ask that one judgment for damages be rendered against him and a different one against his partner, since his holding the fruits of the tort after being notified of the mistake is a ratification of his partner's act.

At Law. On motion for new trial.

P. H. Winston, U. S. Atty., for the United States.

W. R. Andrews, for defendants.

KNOWLES, J. This action was instituted on the part of the United States to recover damages for a trespass upon certain of its lands bordering on Puget sound. It is alleged in the complaint that defendants entered upon this land, and cut a large number of trees, of the value of \$11,000. The defendant Baxter denied the trespass. The defendant Hansen made no appearance in the case, and a default against him was entered. The United States had judgment in the district court of Washington territory where the suit was instituted. The defendant Baxter ap-

pealed from this judgment to the supreme court of said territory. While said appeal was pending in said court, the territory of Washington ceased to exist, and the state of Washington was organized, and admitted into the national Union by virtue of the enabling act, authorizing the people of Washington territory to form a state constitution, and providing for the admission of such state into the Union. The United States circuit court organized for the district of Washington became the successor of the territorial supreme court of this cause. This court must take up this case as it was presented in the record of the supreme court of the territory. It was there for correction of errors in the trial of the cause in the territorial district court. This court being the successor of that court, as the case stood therein, so it must stand here. No new trials were granted by virtue of the transmission from a territorial to a state form of government. When the case was called for trial in the district court, the defendant Baxter asked the court to compel the plaintiff to elect whether it would wage this action for the value of the timber as trees or logs at Quartermaster harbor, and the piles as piles, or whether the action should be waged for the value of the lumber as manufactured lumber. The court does not seem to have ruled upon this motion, but it appears the plaintiff elected to wage its action for the value of the logs as logs at Quartermaster harbor, and the value of the piles as piles. Upon the trial of the cause the witness Enoch J. Mathews, introduced by plaintiff, said: "I do not know the value of the logs at that time." Counsel for plaintiff then asked the witness this question: "What is your best recollection as to the value of the logs at that time?"—which question was objected to by the defendant Baxter, because the testimony was incompetent and immaterial, which objection was overruled, and the ruling excepted to by the defendant. The witness then answered: "To my best recollection, logs were worth five dollars per thousand at that time." It will be seen that the evidence was not directed to the point as to what his recollection was as to the value of the logs at Quartermaster harbor or any other place. There may have been one value for logs at Quartermaster harbor and another value at Seattle or Tacoma. Neither the question nor answer confines the value at any particular place. To allow the witness to testify as to the value of property, he should have some knowledge of the value of the same either from the market price or selling price of the same, or from its adaption to its ordinary and appropriate use. *Railroad Co. v. Pearson*, 35 Cal. 247; *Reed v. Drais*, 67 Cal. 491, 8 Pac. Rep. 20.

A man's recollection of the value of property is a poor criterion to guide a jury in estimating damages. A man's best recollection is a very indefinite matter. It might amount to so little as to be entirely worthless for any practical purposes, or to influence a business man in arriving at any reasonable conclusion in any business transaction. For these reasons I think it was an error to allow the witness to answer the question asked. It is urged that this evidence was cured by the evidence of the witness F. N. Whitworth. Let us see what his evidence was upon this point. He says saw-logs at that time were worth about \$5 per thou-

sand. The time referred to here evidently was in October, 1883. We do not know whether the logs had been disposed of at that time or not. We are not informed by the witness at what place logs were worth \$5 per thousand. The evidence should have been confined to Quartermaster harbor, where the plaintiff had elected to prove his damages. I cannot see that this evidence cured in any way the error in the admission of the evidence of the witness Mathews. It cannot be seen from the record whether the jury based their assessment of damages on the evidence of Mathews or Whitworth, or how they could base their assessment of the value of the logs at Quartermaster harbor upon the evidence of either. The general rule is that where there is error in admitting evidence there must be a reversal of the judgment, and a new trial ordered, unless it can be shown from the record that the error could have worked no prejudice to the party against whom it was introduced. Hayne, New Trial & App. § 287.

It is also urged on the part of the appellant that there was error committed in the court below in sustaining the objection to the declarations of Hansen as to the ownership of the camp and property while in possession at or near Quartermaster harbor. It does not appear what was included in the term "camp and property," whether it included the logs cut upon the public lands in that section by Hansen or by Hansen and Baxter. The evidence was offered to prove that Hansen and Baxter were not partners, I suppose. This was a collateral matter. The evidence was not offered for the purpose of limiting or qualifying the possession of Hansen of the camp or property. It does not appear to have been in derogation of any right of Hansen's. They were not made as part of the *res gestæ* of any transaction he was in the act of carrying on. It does not appear why the declarations sought to be introduced in evidence were made. Under these circumstances, I cannot find any error in the exclusion of this evidence, and I do not think its exclusion violated any rule expressed in any of the authorities cited by appellant.

The next point urged is that the United States had no right to recover as damages for the alleged trespass the value of the timber cut as logs at Quartermaster harbor. There is a very plain answer to this by pointing out the obvious fact that it cannot be told from the evidence in the case or the verdict of the jury at what point the value of the logs cut was fixed. It is evident from the evidence that the trespass complained of was committed upon government land. Every man is presumed to have intended to do what he did do. This is a rule in criminal as well as civil actions. When the evidence shows that a man has committed an unlawful act, if it was done on account of a mistake, that is for him to show. If Hansen and Baxter cut the timber set forth in the complaint, it was for them to show it was done by mistake, not the United States to show there was no mistake on their part. When the trespass was shown, the presumption was that it was intentional, willful.

It is claimed that, because the complaint shows that the trespass was willful, the United States should have proved this fact before it could recover for the value of the timber cut as logs at Quartermaster harbor.

It was not necessary to allege that the trespass was willful. The law does not require that the aggravations accompanying a tort should be alleged. 1 Suth. Dam. p. 766. Such matters may be proven with the view to increasing the damages, perhaps, under the rules expressed in the case of *Wooden-Ware Co. v. U. S.*, 106 U. S. 434, 1 Sup. Ct. Rep. 398. If the defendant had been able to show that there was a mistake in cutting this timber, the amount of damages would have been materially reduced. But, as stated above, the defendants are in law presumed to have intended to do what the evidence shows they did do. There was no evidence that tended to show that Hansen was mistaken as to where he was cutting the timber set forth in the complaint. Baxter, it is true, claims a mistake as far as he is concerned. It is attempted to separate Hansen and Baxter in this transaction; that is, to hold that, although Hansen may not have been mistaken, yet, if Baxter was, there should be one judgment for damages against Baxter and another against Hansen. I do not think this can be done. It was urged to some extent in the argument that the contract of partnership to cut timber upon the public domain was against public policy and void, and that hence he (Baxter) could not be charged as a partner. If there was any such contract I hold that it did not lay in the mouth of Mr. Baxter to set it up. No man can set forth in his own defense that he has violated the law. *Bank v. Case*, 99 U. S. 628. If such a partnership existed, Baxter would have been liable for the tort of Hansen. If the partnership was a lawful one, and Hansen, one of the partners, committed a willful tort, I should think, in such a case as this, the firm would be liable. The firm, if there was one, got the benefit of this willful tort. It received the timber cut. It was sold, and the firm got the benefit of the proceeds of the sale. Although notified that a willful trespass was committed, Mr. Baxter has never repudiated the trespass, and delivered up to the United States the fruits of the same, and turned to Hansen for a redress of his wrongs. He is holding onto the fruits of Hansen's willful trespass, and says, "I ought not to be held responsible for his willfulness." Under such circumstances, Baxter ought to be considered as ratifying the willful tort of Hansen. I do not think there was any necessity of proving a partnership in this case. A common or joint undertaking, which might not have been in fact a partnership agreement, would have been sufficient, if fully established. There is much presented in the argument in this case to show this condition of affairs existed. Baxter seems to have taken a very active part in this business of cutting logs,—too active an interest for one who occupied the position he claims he did, namely, that of mortgagee. The mortgage Baxter held on Hansen's property seems to have been assigned to him for about \$87. The mortgage covered about \$700 worth of property. Hansen owed Baxter between \$300 and \$400. I cannot see the necessity, under the circumstances, for Baxter to have resorted to so much trouble in order to get the \$300 or \$400 Hansen owed him, when it appears he had enough property to satisfy this debt after paying Baxter the amount he paid for the mortgage.

For the reason that the court erred in the admission of the evidence of Mathews as to the damages, the motion for a new trial is granted, and the cause will be set down for a hearing in this court.

YOUNG v. WEMPE *et al.*

(Circuit Court, N. D. California. February, 1891.)

1. COMPTROLLER OF THE CURRENCY—DEPUTY—PRESUMPTION.

The deputy comptroller of the currency being authorized by law to act for the comptroller in certain contingencies, the courts will presume, in the absence of any showing to the contrary, that the deputy, in acting for the comptroller in any particular instance, has acted lawfully.

2. NATIONAL BANKS—ASSESSMENT ON STOCKHOLDERS—ACTION BY RECEIVER—COMPLAINT.

In an action by the receiver of a national bank against its stockholders to collect an assessment made by the comptroller of the currency the complaint need only allege that the comptroller determined that the assessment was necessary and levied it, since such an assessment is conclusive as against the stockholders.

3. SAME—FORM OF ACTION.

Such an assessment may be collected by the receiver by an action at law against the stockholders.

4. SAME—DEFENSE—ESTOPPEL.

In such action the stockholders cannot inquire into the legality of the receiver's appointment.

5. SAME—CONSTITUTIONAL LAW.

The collection of such an assessment by an action at law does not deprive the stockholders of their property without "due process of law."

6. SAME—LIABILITY OF STOCKHOLDER.

A person who becomes a stockholder in a national bank thereby submits himself to the provisions of the national bank act, and becomes liable to be assessed to the extent of his statutory liability for all debts of the bank existing while he holds his stock.

At Law.

Dorn & Dorn, for plaintiff.

A. N. Drown, for defendants.

HAWLEY, J., (*orally*.) This is an action brought by the receiver of the California National Bank of San Francisco, Cal., to recover from defendants, as stockholders in said bank, the amount of an assessment made by the comptroller of the currency of the United States. The defendants demur to the complaint upon several grounds. I have carefully examined the several authorities cited by the respective counsel, and my conclusion is: (1) That the debtors of an insolvent national bank, when sued by a receiver, cannot inquire into the legality of his appointment. (2) That the law authorizes the deputy comptroller of the currency of the United States to act in place of the comptroller in certain contingencies stated, and the court will presume, in the absence of any showing to the contrary, that the deputy has acted in conformity with law. (3) That the assessment made by the comptroller of the currency is conclusive upon the stockholders; at least that it is only

necessary in the complaint to allege the fact that the comptroller determined that it was necessary to enforce the liability of the stockholders, and did levy the assessment. (4) That an action at law may be maintained by the receiver to recover the assessments against stockholders. (5) That stockholders are liable to be assessed equally and ratably to the extent of their statutory liability for all debts existing while they hold stock, and before they make a valid transfer of the same. (6) That the various provisions of the national bank act are a part of the contract of the charter of a national bank, and when a party becomes a stockholder therein he necessarily submits himself to the provisions of the law under which the bank is authorized to transact business. (7) That the claim of defendant that he will be deprived of "due process of law" cannot be maintained. These conclusions are sustained by the following authorities: *Kennedy v. Gibson*, 8 Wall. 498; *Casey v. Galli*, 94 U. S. 673; *Bank v. Case*, 99 U. S. 628; *Bailey v. Sawyer*, 4 Dill. 463; *Strong v. Southworth*, 8 Ben. 331; *Stanton v. Wilkeson*, Id. 357; *Welles v. Stout*, 38 Fed. Rep. 67; *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. Rep. 788. The demurrer is overruled.

D'ORLU v. BANKERS' & MERCHANTS' MUT. LIFE ASS'N OF UNITED STATES *et al.*

(Circuit Court, N. D. California. February, 1891.)

INSURANCE—PREMIUM—FORFEITURE—TENDER.

Under Civil Code Cal. § 2611, which provides that an insurance policy may declare that a violation of specified provisions thereof may avoid it, a tender of the premium, together with all other sums due on the policy, will not prevent a forfeiture of the policy for a previous failure to pay the premium when due.

At Law.

Carrol Cook and *J. E. Toulds*, for complainant.

Haggin & Van Ness, for defendants.

HAWLEY, J., (*orally*.) This is an action to recover the sum of \$10,000 alleged to be due upon a certificate of membership or policy of life insurance, issued by defendant on January 20, 1886, to one Robert Roy, and made payable upon his death to the plaintiff. This policy, among other things, provides "that all expenses essential to the conduct of the business of the association should be paid from the amounts received as admission fees and annual dues." It is alleged in the complaint that on the 20th day of January, 1889, there was, by the terms of the certificate, the sum of \$30 payable to the defendant association, which sum was not paid when due; but that, within a few days from said 20th of January, the said sum was tendered to the defendant association on behalf of complainant, as also were all other sums payable by the terms thereof up to the time of the death of said Robert Roy; but

that each and all of said payments were refused by the defendant upon the ground that said policy of insurance had been forfeited by the non-payment of said sum of \$30 on said 20th day of January. The defendant demurs to this complaint upon the ground that upon the facts stated therein it affirmatively appears that plaintiff is not entitled to the relief prayed for. Did the non-payment of the premium due on the 20th of January, 1889, operate as a forfeiture of the certificate of membership? The authorities bearing upon this subject, both state and national, are uniform, and substantially to the effect that the time of payment of the premium, as provided in the policy, is of the essence of the contract of insurance; and that the non-payment of the premium at the time designated in the policy or certificate involves a forfeiture in all cases wherein it is so provided by the express terms of the contract. *Insurance Co. v. Statham*, 93 U. S. 24; *Klein v. Insurance Co.*, 104 U. S. 88; *Thompson v. Insurance Co.*, Id. 252; *Insurance Co. v. Pruett*, 74 Ala. 487; *Robertson v. Insurance Co.*, 88 N. Y. 541; *Gateman v. Insurance Co.*, 1 Mo. App. 300. Plaintiff's counsel admit that in the absence of any statutory provisions the case would fall within the general rule. But it is claimed that, notwithstanding the express terms of the certificate or policy of insurance, no forfeiture occurred, for the reason that it is alleged that a tender of all sums due was made within a reasonable time after the premium became due. This contention is sought to be maintained upon the theory that section 2076 of the Code of Civil Procedure and sections 3275, 3281, and 3302 of the Civil Code of this state apply to this case, and take it out of the general rule. These sections relate to general provisions upon the subjects named, and are intended to cover all cases of the character therein referred to not otherwise especially provided for. Section 2611 of the Civil Code, relating to the subject of insurance, expressly provides that "a policy may declare that a violation of specified provisions thereof shall avoid it; otherwise the breach of an immaterial provision does not avoid the policy." It is therefore apparent that the general provisions relied upon by plaintiffs have no application to this case. Plaintiff also claims that the "Act to regulate the forfeiture of policies of life insurance," approved February 2, 1872, prohibits the forfeiture of insurance policies for non-payment of premiums. This act, however, was expressly repealed by the provisions of "An act to amend the Civil Code, and to repeal certain acts relative to insurance," approved April 1, 1878, (amendment to Codes 1877-78, p. 82.) To construe this policy as if the forfeiting clause was not contained in it would be to make a new and substantially different contract for the parties, which the courts are not at liberty to do. There are no facts alleged in the complaint, and no statute of this state to which my attention has been called, that brings this case within any of the exceptions to the general rule. The demurrer to the complaint must be sustained. It is so ordered.

BANK OF BRITISH NORTH AMERICA v. BARLING *et al.**(Circuit Court, N. D. California. February, 1891.)*

BILL OF EXCHANGE—JURISDICTION OF FEDERAL COURT.

A bill of exchange drawn by a corporation in favor of itself, and by it indorsed in blank, is payable to bearer, within the meaning of the statute restricting the jurisdiction of circuit courts in actions on negotiable instruments.

At Law.

C. P. Pomeroy, for plaintiff.

J. T. Goodfellow, for defendant *Eva*.

HAWLEY, J., (*orally*.) This is an action to recover from the defendants, as stockholders in the Alaska Improvement Company, (a California corporation,) the proportionate part of three certain inland bills of exchange drawn by said corporation, and is based upon the provisions of section 322 of the Civil Code of California, which provides that "each stockholder of a corporation is individually and personally liable for such portions of its debts and liabilities as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation, and for a like proportion only of each debt or claim against the corporation." The bills were drawn by the corporation, and were made payable to its own order, on the firm of William T. Coleman & Co., and prior to their delivery were indorsed in blank by said corporation. After delivery, and before maturity, W. T. Coleman & Co., at the city of Vancouver, British Columbia, transferred and delivered them to the plaintiff, a foreign corporation. The bills, not having been paid at maturity, were protested, and notice given to the Alaska Improvement Company. This action was thereupon instituted against defendants. The defendants demur to the complaint upon the ground that this court has no jurisdiction of the person of the defendants or the subject of the action, in this:

"That the plaintiff sues as an assignee of a chose in action, to-wit, bills of exchange, which were drawn by a domestic corporation in favor of itself on William T. Coleman & Co., who were citizens and residents of the state of California; the drawer, drawee, and payee of each of said bills of exchange being citizens and residents of the state of California."

The statute relative to the jurisdiction of the circuit court, in actions of this character, reads as follows:

"Nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer, and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents, if no assignment or transfer had been made."

If this action is to be considered as an action by an assignee to recover the contents of a chose in action, then the first question to be determined is whether the bills of exchange are choses in action, payable

to bearer. The rule in regard to commercial paper is to the effect that a bill or note made by a person payable to himself or to his order, if indorsed by him and delivered to another person, becomes, in legal effect, payable to the bearer, and may be so treated and declared on. They are designed to enable the holder to pass them without indorsement, and it seems to be simply a roundabout way of making the bill or note payable to bearer. Tied. Com. Paper, § 20; Daniel, Neg. Inst. § 130; *Bank v. Alley*, 79 N. Y. 536. In Tiedman on Commercial Paper the author says:

"In order that commercial paper may be negotiated without indorsement, and the consequent liability of indorsers, and yet avoid the commercial discredit of an indorsement 'without recourse,' it has become quite common for bills and notes to be made payable to the order of the drawer or maker, so that the named payee is the same person as the drawer or maker. The drawer or maker then indorses it in blank, and it is then transferred as if it had been made payable to bearer. Of course, two parties, distinct and separate, are as necessary to the negotiation of a bill or note as they are to the making of any other contract. In consequence of this necessity, it was once supposed that a note or bill would be invalid if the payee and the maker or drawer were one and the same person. But while it is manifest that such a bill or note is valueless, until it has been transferred by indorsement to another person, because there has been no delivery, and consequently not a complete contract, as soon as it has been indorsed and delivered to the purchaser there are two distinct, separate parties to the contract, and the paper may be sued on as if originally made payable to bearer."

In the light of these authorities, I am of opinion that the bills of exchange must be treated and considered as having been made payable to bearer, and, having been made by a corporation, it follows that this court has jurisdiction of the case by the express provision of the statute above cited. *Newgass v. New Orleans*, 33 Fed. Rep. 196; *Rollins v. Chaffee Co.*, 34 Fed. Rep. 91; *Wilson v. Knox Co.*, 43 Fed. Rep. 481; *Barnum v. Caster Co.*, 34 Fed. Rep. 91. This conclusion is not, as argued by defendant, opposed by any principle announced in *Rollins v. Chaffee Co.* There the court said:

"The warrants being payable to the order of a person named therein, and passing only by indorsement, in the absence of averment that the assignors were qualified to sue in this court, we are without jurisdiction."

In that case the warrants were not made payable to the maker, and by it indorsed, but were made payable to another person. Here the bills were made payable to the maker, and by it indorsed in blank, and then delivered, and the bills, as thus delivered, under the rules applicable to commercial paper, must be treated as having been made payable to bearer. This case comes within the rule of *Barnum v. Caster Co.*, *supra*, where "the warrants, being payable to bearer, and made by a corporation, appear to be within the exception of the statute." The demurrer is overruled.

UNITED STATES v. NICHOLS *et al.**(Circuit Court, D. Massachusetts. May 14, 1891.)*

CUSTOMS DUTIES—ADHESIVE FELT.

"Felt, adhesive, for sheathing vessels," is among the articles enumerated in "the free list" of the tariff act of 1883, (22 St. 519.) This description is held to cover adhesive felt such as was used at the date of the act for sheathing vessels, although such felt may be imported for other uses. The use of an article does not necessarily control its classification for tariff purposes.

At Law.

Appeal from decision of general appraisers under section 15 of customs act of June 10, 1890. The following was the decision of the board of general appraisers, November 15, 1890, from which the appeal was taken by the collector to the circuit court:

"The merchandise was classified as an unenumerated manufactured article, under section 2513, Rev. St., (Act 1883,) and duty was assessed at 20 per cent. Appellants claim free entry as adhesive felt for sheathing vessels, under Tariff Ind. par. 696. The felt in question is in sheets and double sheets, and the appraiser reports that 'the article itself is identical in character with that which is usually imported for sheathing vessels.' The appellants do not claim that the felt is intended for sheathing vessels, while the collector and appraiser state that it is imported for other use. Paragraph 696, Act 1883, places on the free list 'felt, adhesive, for sheathing vessels.' It would be impracticable to follow up imported merchandise to its destined uses, and it would be impossible in most cases to penetrate the intentions of manufacturers, shippers, and importers. Nor does the use of an article necessarily control its classification. There is no disagreement as to the fact that the adhesive felt in question is suitable, fit, and of the kind commonly used for sheathing vessels, and it must therefore be classified under paragraph 696, Act March 3, 1883. The entry should be reliquidated accordingly."

Frank D. Allen, U. S. Atty., for collector.

J. P. Tucker, for appellees.

NELSON, J. I think there is nothing whatever in the point raised by the plaintiff in this case. The words "for sheathing vessels," as used in the clause of the tariff act of 1883 referred to, are descriptive of the article intended to be exempted from duty, and the clause is to be construed as if it read: "Adhesive felt, such as is now used for sheathing vessels." *Hartranft v. Langfeld*, 125 U. S. 129, 8 Sup. Ct. Rep. 732. That it has been discovered since the act was passed that adhesive felt of this description could be used for some other purpose than sheathing vessels affords no ground for taking the article out of the free list, when used for the new purpose, and making it dutiable as an unenumerated manufactured article, under section 2513 of the tariff act of March 3, 1883.

Upon the facts agreed, the decision of the general appraisers was clearly right, and should be affirmed. Ordered accordingly.

*In re McCARTY.**(Circuit Court, S. D. New York. May 11, 1891.)***CUSTOMS DUTIES—VALUES ON ENTRY—HOW ESTIMATED—FOREIGN CURRENCIES.**

Merchandise purchased in Bohemia, within the empire of Austria-Hungary, of which country the florin was the standard currency, was invoiced to the importer at New York, and the values given in rix marks and florins; the value of the florin of Austria-Hungary being stated in the United States consul's certificate, annexed to the invoice, as 41.57 cents, estimated in United States gold dollars. *Held*, that the value of the merchandise in the entry should have been estimated by the collector of the port of New York in florins of Austria-Hungary reduced to United States currency on the basis of 34.5 cents to the florin, as declared by the director of the United States mint, and proclaimed by the secretary of the treasury on the 1st of January previous, and not in rix marks, at 23.8 cents to the rix mark, although the total value of the goods in United States money was greater by the latter process of calculation.

At Law.

Application by the collector of the port of New York for a review by the United States circuit court of a decision of the board of United States general appraisers reversing the decision of the said collector in this matter, pursuant to section 15 of the act of June 10, 1890, "An act to simplify the laws in relation to the collection of the revenues." The merchandise in question was imported by McCarty & Co., per steamer *Rugia*, from Hamburg, and entered at the port of New York, July 29, 1890. It was invoiced from Dux, in Bohemia, a province of the empire of Austria-Hungary, of which country the silver florin was the standard currency, and the values were given on the invoice in rix marks and florins. On the entry the value of the goods was likewise stated in rix marks and florins,—the rix marks reduced to United States currency, giving \$330, and the florins at 34.5 cents to the florin, giving \$275, to which figure the sum of \$55 was added "to equal marks," thus raising the amount to \$330 likewise. Upon the total, as stated in rix marks, the value of the merchandise for the purpose of estimating the duties was computed, and against this method of computation the importers duly protested and appealed to the board of United States general appraisers under the act of June 10, 1890, who reversed the decision of the collector, holding that the invoiced, entered, and appraised value should have been liquidated upon the basis of the silver florin, the standard coin of Austria-Hungary, from whence the merchandise was imported, the value of which florin in the currency of the United States at the time of the liquidation of the entry as established by the director of the mint, and proclaimed by the secretary of the treasury, was 34.5 cents.

Edward Mitchell, U. S. Atty., and *James T. Van Rensselaer*, Asst. U. S. Atty., for collector.

Wm. Wickham Smith, for importers.

LACOMBE, Circuit Judge, (*after stating the facts as above.*) It appears on the back of the invoice that the appraiser, who is the officer who fixes the value, has approved of the value of 1,496.75 marks, and of the de-

duction therefrom of 110.13 marks, and of the striking out of any item of "addition for value." The result of what he has approved on the back of the invoice, which went to him, is a valuation of 1,386.62 marks. I understand, moreover, from the certificate and from the circular of the treasury department that the currency of the country where these goods were purchased is florins, in which currency the invoice should be made out and the value should be stated. Upon the face of this invoice there appears, in a parallel column with the value in marks, a value in florins; and there is a total in florins as well as in marks, representing the same absolute value, and interconvertible. The 1,386.62 marks is, therefore, as a matter of arithmetic alone, converted into 795.91 florins, which is the currency into which, under the law, it should be converted for the purpose of appraising the value, that value being determined by the reduction of the florins into the currency of the United States on the basis of 34.5. When that is done, the result is \$275. That result is obtained simply by the application of arithmetic to the certificate of the appraiser. Now, there are upon the face of the invoice, in addition to \$275, the words, "Add to equal marks \$55." It does not appear here who put that there, or when, or why, or what it means. Therefore, on the face of the paper as it stands, I shall confirm the decision of the appraisers.

In re GODWIN et al.

(Circuit Court, S. D. New York. May 11, 1891.)

CUSTOMS DUTIES—CLASSIFICATION—"COLLECTION OF ANTIQUITIES."

A single oriental rug of the sixteenth century, bought in Paris, France, at nearly the same time with one other antique rug and 3 articles of antiqué tapestries and 4 other oriental rugs purchased in Constantinople by the same purchaser, for the purpose of being added to a collection of old furniture, bric-a-brac, etc., in the private house of the owner in New York, although not imported in the same vessel as the other articles, is duty free under the tariff act of March 3, 1883, (paragraph 669 of the free list.)

At Law.

Application, under section 15, Act June 10, 1890, by the collector of the port of New York for a review by the United States circuit court of the decision of the board of United States general appraisers, reversing the decision of the said collector as to the rate and amount of duties upon certain merchandise imported by R. J. Godwin & Sons, from Liverpool, August 14, 1890. The merchandise was invoiced from Paris, France, as one Persian rug of the sixteenth century, valued at 22,000 francs, and was classified by the collector for duty as "wool rug," at 40 per cent. *ad valorem*, under the provision of paragraph 378, Tariff Ind. (New Ed.) of the Tariff of March 3, 1883. The importer protested, claiming that it was duty free under paragraph 669 of free list of the

same tariff, providing for "cabinets of coins, medals, and all other collections of antiquities;" and the board of United States general appraisers, after taking evidence in the matter in behalf of the importer, reversed the decision of the collector, holding that, with the proof before them, the rug was entitled to free entry as a single article, intended to be added to an already existing collection, and also that it was part of the collection originally purchased, and therefore came strictly within the provision of Tariff Ind. par. 669. Further evidence was also taken before one of the general appraisers as an officer of the court, pursuant to section 15 of the act of June 10, 1890, and upon the return of the board of United States general appraisers, and all the evidence taken, the matter came up for review in the circuit court. The proof showed that the rug was bought in the city of Paris by the purchaser, a gentleman from New York, who owned a house in the latter city, in which he had collected numerous articles of old furniture, tapestries, bric-a-brac, etc.; that the rug was at least as old as the sixteenth century; that one other antique rug was bought by the purchaser at the same place at about the same time; that he also purchased three pieces of antique tapestries from another dealer in Paris, and, at about the same period, four oriental rugs in Constantinople; that he intended that the rug in question should be shipped with the tapestries, but by some mistake this was not done; that all these nine articles were bought by him in Europe, to be added to his collection in his house at New York; that the rug was hung up in his hall, and was not used upon the floor, and its chief value was in its antiquity.

Edward Mitchell, U. S. Atty., and *Henry C. Platt* and *James T. Van Rensselaer*, Asst. U. S. Attys., for collector.

J. L. Stackpole, for importer.

LACOMBE, Circuit Judge. I am unable to assent to the proposition that a single antiquity, although intended to be added to an existing collection of antiquities already here, may be admitted free under paragraph 669 of the act of 1883. It appears here, however, that it has only been an accident which has separated the rug now in controversy from the other six or eight antiquities with which it was united when in the hands of the owner on the other side. Therefore, though it is perhaps somewhat straining the language of the statute in the interests of art, I shall affirm the decision of the appraisers, holding that this rug is to be treated the same as if the eight pieces came in together, and that it may, within the language of the act, be considered a collection of antiquities.

The decision of the general appraisers is affirmed.

*Ex parte McCabe.**(District Court, W. D. Texas, Austin Division. April 2, 1891.)***1. FOREIGN EXTRADITION—WARRANT.**

Where, upon the extradition of a person charged to be a fugitive from justice, under the treaty with Mexico, December 11, 1861, (12 St. 1199,) a warrant for his arrest is issued by the "county judge and extradition agent," the function so performed is judicial, and not administrative, and is for the purpose of preliminary examination; and the warrant is not invalid because it fails to show his authority as an extradition agent, under article 4 of the treaty, providing that within the frontier states and territories of each country the surrender may be made by the chief civil authority thereof, or by such chief civil or judicial authority of the districts or counties bordering on the frontier as may for this purpose be authorized by said chief civil authority of said frontier state or territory.

2. SAME—NECESSITY OF COMPLAINT UNDER OATH.

Under Rev. St. U. S. § 5370, providing that whenever there is a treaty or convention for extradition the officer designated "may, upon complaint made under oath charging any person, * * * issue his warrant for the apprehension of the person so charged," a sufficient complaint on oath is essential to the jurisdiction, and a warrant issued without it is void.

3. SAME—SURRENDER OF A STATE'S OWN CITIZENS—COMITY.

In the absence of a treaty stipulation, there is no obligation, under the laws of nations, upon a sovereign state to surrender persons charged with crimes committed in another country, upon demand of the state whose laws they have violated; and where it is provided in an extradition treaty that "neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this treaty," the United States will not surrender one of its citizens charged with a murder committed in one of the states of Mexico.

Petition for Writ of *Habeas Corpus*.

George R. Scott and F. R. Graves, for petitioner.

MAXEY, J. On the 26th of February, 1891, a petition, duly verified by affidavit, was presented to the court on behalf of Mrs. Mary Inez McCabe, stating that she had been arrested by the sheriff of Nueces county, Tex., and was now illegally detained and restrained of her liberty. It is alleged in the petition that the petitioner was born in Bandera county, Tex., of parents of American birth; that her husband, H. T. McCabe, was born in the state of Illinois, of parents of American birth, and that both she and her husband have continued to be and are now citizens of the United States. The further allegations are made:

"That since the 13th day of February, A. D. 1891, she has been unlawfully and illegally restrained of her liberty by one Patrick Whelan, sheriff of Nueces county, and who pretends to be acting under and by authority of a certain treaty and convention between the United States of America and the republic of Mexico, of date the 11th of December, 1861, and by virtue of certain telegraphic and other pretended writs and papers from a pretended officer, who styles himself the county judge of Cameron county, and extradition agent, county of Cameron, and the copies of the which said papers and process are hereto attached."

After reciting other facts, not necessary to consider, the petition prays for the issuance of a writ of *habeas corpus*. Among the papers attached as exhibits to the petition, the only one deserving of notice is the writ issued by Judge Forro in the following form:

"THE UNITED STATES OF AMERICA.

"The State of Texas to the Sheriff or any Constable of Nueces County, Texas, greeting: Whereas, pursuant to the existing treaty between the United States of America and the republic of Mexico for the extradition of criminal fugitives from justice under certain circumstances, the Hon. LAMON F. FLORES, judge in and for the third judicial district of the state of Tamaulipas, and extradition agent in and for said district in said state of Tamaulipas, republic of Mexico, has made requisition and application in due form to me, E. C. FORTO, county judge of Cameron county, Texas, and extradition agent, for the arrest of Maria Inez McCabe, who stands charged with the crime of murder, alleged to have been committed in the town of Reynosa, within the third judicial district, as aforesaid, on the 18th day of August, 1890, by feloniously killing one Max Stein, at such time and place, and that the said Maria Inez McCabe has fled from the custody of the proper officers in the city of Matamoras, in said state of Tamaulipas, and has taken refuge in this state of Texas from the laws and justice of the state of Tamaulipas as aforesaid. And whereas, it appears proper that the said Maria Inez McCabe should be apprehended, as requested in said requisition and application made by the said judge of the third judicial district of the said state of Tamaulipas, and extradition agent as aforesaid, on the 14th day of February, 1891, and that the said charge preferred against her, the said Maria Inez McCabe, be examined in the manner provided for by law: Now, I, E. C. FORTO, county judge of Cameron county, Texas, and extradition agent, do hereby command you to arrest the said Maria Inez McCabe, if to be found in your county, and bring her before me as such county judge of said Cameron county, Texas, and extradition agent, at my office in the city of Brownsville, in the said county of Cameron, and state of Texas, forthwith, then and there to answer the said requisition and application for arrest and extradition, as aforesaid, and that the necessary proceedings may be had in pursuance to law, in order that the criminality of the said Maria Inez McCabe may be heard and considered, and, if deemed sufficient to sustain the charge, that she may be surrendered under the law. Herein fail not, but of this writ make due return, showing how you have executed the same.

"Witness my official signature, and the seal of the county court of the county of Cameron, at office in the city of Brownsville, Texas, on this 16th day of February, A. D. 1891.

[Signed]

"E. C. FORTO.

"County Judge and Extradition Agent, Cameron County, Texas."

On the day the petition was presented, a writ of *habeas corpus* was directed to be issued to Sheriff Whelan, and a *certiorari* to Judge FORTO, and the order of court further directed the clerk to transmit a copy of the order, by registered mail, to the consul of the republic of Mexico, resident at Brownsville. The writs to the county judge and sheriff, respectively, were made returnable the 17th of March, 1891, on which day the sheriff produced the prisoner before the court, and made return to the *habeas corpus*, the material portion of which is in the following words:

"In obedience to the within writ, I hereby produce before the Hon. district court of the United States for the western district of Texas Mary Inez McCabe, and attach hereto the writ of E. C. FORTO, county judge of Cameron county and extradition agent, upon which authority I had and held the said Mary Inez McCabe at the time of service upon me of the within writ of *habeas corpus*."

The writ of *certiorari* was not served upon the county judge in Cameron county, but in Austin, and only a few days before the day set for the hearing. His sworn answer shows that it was impracticable for him to procure copies of the proceedings had before him in time for the 17th; and to avoid further delay, the following statement made by Judge FORTO, and on file among the papers of the cause, was accepted as a sufficient return to the writ:

"That the warrant for the arrest of Mrs. M. I. McCabe was based on a requisition made by the district judge and extradition agent at Matamoras, Mexico. That said requisition charges the said M. I. McCabe with having committed the crime of murder, as recited in said warrant. That said requisition is not certified to by the American consul residing at Matamoras, Mexico, and that it came to me through the Mexican consul at Brownsville."

As directed by the order of court, the clerk transmitted by registered mail a copy of the order before mentioned to the Mexican consul at Brownsville, and his reply, acknowledging receipt, is now on file.

It will thus be seen that the warrant for the arrest of the prisoner was predicated upon the requisition made by Hon. LAMON F. FLORES, federal judge of the third district of the state of Tamaulipas, and acting as extradition agent for said district. And the sheriff of Nueces county was commanded by the warrant to arrest Mrs. McCabe, and take her before the county judge of Cameron county, "then and there to answer the said requisition and application for arrest and extradition." Judge FORTO had before him no "complaint made under oath" charging the prisoner with crime, nor was there in fact presented to him any complaint, document, or other paper as a predicate for the warrant, except the requisition of Judge FLORES. The only step taken by the county judge was the issuance of the warrant of arrest. Thenceforth he performed no official act in relation to the proceeding. At the hearing on the 17th inst., which was *ex parte*, no one appearing for the Mexican government, the only evidence introduced by the prisoner was on the question of citizenship, and from the proof it clearly appears that both she and her husband are now, and have been continuously since their births, citizens of the United States. The court desires here to state that the expression of its views will be limited solely to the objections urged by counsel for petitioner. Other questions, as those affecting the regularity and validity of the requisition emanating from Judge FLORES, and the competency of the sheriff of a county to execute a warrant of arrest issued pursuant to the extradition statutes, and perhaps some others, which are suggested by the proceedings in this case, will be passed over, and their consideration reserved. Upon the foregoing record, the question arises, shall the prisoner be discharged, or remanded to custody to be dealt with by the proper authorities, as the laws of extradition and the treaty between the United States and the republic of Mexico direct? Her counsel insist upon an immediate discharge, and assign in support of their contention three specified grounds: (1) The warrant which issued for the arrest of the petitioner is void, because it fails to disclose upon its face that the officer issuing it was duly authorized for that purpose by the chief ex-

ecutive of Texas. (2) The warrant is without validity for the further reason that it was not based upon a complaint made under oath. (3) The petitioner, being a citizen of the United States, cannot lawfully be surrendered to the authorities of Mexico for punishment for crime committed within the jurisdiction of the latter republic.

The first point requiring the consideration of the court is whether the questions suggested by the objections of counsel are raised in such manner as to be reviewable on a writ of *habeas corpus*. It is settled law that a writ of *habeas corpus* in a case of extradition cannot perform the office of a writ of error. Employing the language of the supreme court:

"The main question to be considered upon such a writ of *habeas corpus* must be, 'Had the commissioner jurisdiction to hear and decide upon the complaint made by the Mexican consul?' and, also, was there sufficient legal ground for his action in committing the prisoner to await the requisition of the Mexican authorities?" *Benson v. McMahon*, 127 U. S. 462, 8 Sup. Ct. Rep. 1240.

It is not deemed necessary to enter upon a discussion of the proposition, and the court will content itself, after a careful examination of the authorities, with the statement of the conclusion that the questions in this case are properly presented, and require a distinct ruling. *In re Luis Oteiza v. Cortes*, 136 U. S. 330, 10 Sup. Ct. Rep. 1031; *Benson v. McMahon*, *supra*; *In re Macdonnell*, 11 Blatchf. 170; Rev. St. U. S. § 761.

The objections of counsel will be treated in the order of their presentation.

1. Should it appear upon the face of the warrant for the apprehension of the petitioner that the county judge was duly authorized by the chief executive of Texas to act as a committing magistrate? This contention of counsel originates in a misconception of the respective duties of a judicial officer, prescribed by the statute, and those of a purely executive or administrative officer, as contemplated by the treaty between the United States and republic of Mexico, concluded at Mexico December 11, 1861, and proclaimed by the president of the United States June 20, 1862. 12 St. at Large, 1199. The functions of the two officials are altogether distinct and different in their character. The judicial officer acts in obedience to the general laws regulating the international extradition of fugitives from justice, which supply the requisite judicial machinery to enable the national chief executive to discharge the obligations resting upon our government pursuant to treaty stipulations, thus investing him with the necessary power to preserve the national faith and protect the honor and dignity of the government. On the other hand, the state executive officer, under the treaty with Mexico, is indebted solely to the treaty for whatever power or authority he may possess, and his rights and corresponding duties are plainly limited and prescribed by its stipulations. While by force of the statute and treaty combined the functions of both officers may devolve upon, and be exercised by, one and the same individual, as appears to be the case here, there is no necessary relation between them. The individual may act in a dual capacity, but not necessarily. The two high contracting par-

ties deemed it wise, in stipulating for the requisition and surrender of fugitives who had committed crimes in the frontier states, to clothe, in addition to the president, certain state officers with authority to act in that behalf. While thus acting, they are in no proper sense judicial officers, nor performing a judicial duty. In making the requisition they simply demand the surrender of a fugitive, and in effecting the surrender they deliver him up to the proper authorities after a prior judicial preliminary examination. It may be said—and at this day the soundness of the assertion will scarcely be doubted—that neither national nor state executive possesses the power, under the treaty with Mexico, to surrender a fugitive to the Mexican authorities until a warrant has been judicially issued for his arrest, and an examination had, to the end that evidence of criminality may be heard and considered. No such extraordinary power will be found in the treaty, and none such has place in the statutes passed in aid of and to enforce our treaty obligations with foreign powers for the extradition of fugitive criminals. Reference to the statutes and treaty will verify the correctness of the foregoing views, and demonstrate the fallacy of the position assumed by counsel. “Whenever,” the statute provides, “there is a treaty or convention for extradition between the government of the United States and any foreign government, any justice of the supreme court, circuit judge, district judge, commissioner authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any state, may, upon complaint made under oath, charging any person found within the limits of any state, district, or territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the secretary of state, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.” Rev. St. § 5270.

As provided by the statute, three classes of judicial officers may issue warrants for the apprehension of fugitives in proper cases arising under treaties,—federal judges, judges of state courts of record of general jurisdiction, and commissioners authorized so to do by any of the courts of the United States. In the absence of treaty provisions upon the subject, the warrant of arrest must be issued by the official designated in the statute. The treaty with Mexico is silent upon the point. But counsel invoke article 4 in support of their contention. It is there provided:

"On the part of each country, the surrender of fugitives from justice shall be made only by the authority of the executive thereof, except in the case of crimes committed within the limits of the frontier states or territories, in which latter case the surrender may be made by the chief civil authority thereof, or such chief civil or judicial authority of the districts or counties bordering on the frontier as may for this purpose be duly authorized by the said chief civil authority of the said frontier states or territories; or, if from any cause, the civil authority of such state or territory shall be suspended, then such surrender may be made by the chief military officer in command of such state or territory."

As before explained, the authority conferred by article 4 upon state officers is of an executive character; and it may be that, when the final act of surrender is made, which is the only duty contemplated by the article, the order issued for the purpose by the "chief civil or judicial authority of the districts or counties bordering on the frontier," should affirmatively show that the officer effecting the surrender was duly authorized by the chief executive of the state. But in this case no order for the surrender of the petitioner has been issued, nor was one necessary or appropriate. The exigency had not arisen which demanded it. The warrant which was issued by the county judge was for the purpose of compelling the petitioner to appear and submit to a preliminary examination; and the fact that it was issued by an officer who styles himself "county judge and extradition agent, Cameron county, Texas," is of no consequence. In performing the act, the function was judicial not executive. No extradition agent, as such, could issue a warrant of that nature; and, when the duty is performed by a proper state judge, the statute makes it no more incumbent upon him to recite in the warrant the source of his authority than it does in those cases where the warrant issues by an associate justice, circuit or district judge of the United States. To sustain their views counsel refer to the case of *In re Kelley*, 25 Fed. Rep. 268. In that case it is held that the proceeding instituted under the statute and treaty with Great Britain is special, "and the fact that the commissioner [meaning United States commissioner] who issued the warrant is authorized so to do is jurisdictional, and must appear upon the face of the warrant." See, also, *In re Farez*, 7 Blatchf. 34; *Ex parte Lane*, 6 Fed. Rep. 34; Spear, Extradition, 252, 253.

The correctness of the doctrine announced in the cases cited is not challenged. It applies strictly to commissioners, who have statutory power to act only when "authorized so to do by any of the courts of the United States." It has already been shown that no limitation of that kind applies to state judges of the class designated in the statute. The authorities invoked by counsel are altogether inapplicable, having no reference to the precise point here involved. Upon the first question submitted, the court is of opinion that the position taken by counsel for the petitioner is manifestly untenable.

2. The second ground of objection assumes that the warrant cannot legally issue by the committing magistrate in the absence of a complaint made under oath. The statute, which names the state judge as a proper officer to issue the warrant, also, in the same section, makes the

sworn complaint a prerequisite to its issuance. It is provided by the statute that the officer designated "may, upon complaint made under oath, charging any person, * * * issue his warrant for the apprehension of the person so charged." "This shows," says Judge MITCHELL, "that without a sufficient complaint on oath there is no jurisdiction to issue the warrant." Further, he says:

"It was argued that on *habeas corpus* the judge should not go beyond the warrant, and if that were regular he should remand the prisoner. The answer to this is that the commissioner has no power to issue the warrant, and no jurisdiction under the act of congress, until a complaint on oath be made before him. Those, therefore, who oppose the discharge of the prisoner in order to show that there is a valid warrant, are bound to show that it was issued on such complaint on oath, and to show this they must produce the complaint. If when produced it shows its original invalidity, it must fall to the ground and the warrant with it." *In re Heilborn*, 1 Parker, Crim. R. 436.

See, also, *In re Farez*, *supra*; *In re Henrich*, 5 Blatchf. 414; *Ex parte Lane*, *supra*; *In re Roth*, 15 Fed. Rep. 507; Whart. Confl. Law, § 848; Spear, Extradition, p. 250; 7 Amer. & Eng. Enc. Law, 623, and note. Authorities to show that the warrant should be supported by affidavit would seem to be superfluous. The language of the statute is susceptible of but a single construction, and that, by its terms, a sworn complaint is indispensable as a basis for the warrant admits of no question. In this respect the warrant cannot be aided by the treaty, for the sufficient reason that the latter does not supply or provide for the machinery necessary to carry into effect the obligations of the respective governments. It is immaterial to the present inquiry that an extradition agent may have authority, under articles 2 and 4 of the treaty, to make a requisition and effect a surrender. Neither these articles nor others of the treaty give him, as such, or otherwise, power to issue warrants for the apprehension of a fugitive; the authority in that behalf being derived from the statute. No complaint having been made under oath charging the petitioner with crime, the warrant issued by the county judge must be held invalid.

3. Does the treaty with Mexico authorize the surrender of an American citizen to the Mexican government for punishment for crime committed within the jurisdiction of that republic? The judiciary is rarely called upon to decide questions of more magnitude and importance than those arising under treaty engagements involving the reciprocal rights and duties of independent governments. The court therefore approaches with diffidence the performance of so delicate a duty, and has exercised in this case unusual care and diligence in the endeavor to reach a just conclusion,—just to the two high contracting parties, and just to the petitioner, whose liberty is imperiled. It is believed that this precise question has not been determined by any of our courts, state or federal. In the case of *Benson v. McMahon*, *supra*, the supreme court had under consideration certain clauses of the treaty with Mexico, but this point was not involved. The report of that case fails to disclose the citizenship of Benson, who was committed for extradition, and, presumably, he was not a citizen of the United States. The subject of the extra-

dition of criminals has been a prolific source of discussion by jurists, publicists, writers upon international law, and the executive departments of independent states; and, while the discussions disclose a conflict of opinion as to the duty imposed by the laws of nations touching the surrender by one nation to another of fugitives from the justice of the latter, the almost unbroken current of American authority and the practice of our own government go to show that the obligation to surrender does not exist in the absence of treaty engagements to that effect. In 1835, Judge BARBOUR, afterwards associate justice of the supreme court, had occasion to consider the question in the *Case of Jose Ferreira dos Santos*, 2 Brock. 493. Referring to the opinions of Grotius, Burlamaqui, Heineccius, Vattel, Puffendorf, and other writers and publicists, the learned judge adopts the view of Puffendorf, which he declares to be, "that the obligation to deliver up a criminal is rather in virtue of some treaty than in consequence of a common and indispensable obligation." On page 509, after a reference to certain treaties between France and other foreign powers, he proceeds:

"Why, let me ask, were all these treaties in ancient and modern times? I answer, either because the opinion of Puffendorf was considered right, that without a treaty stipulation there was no obligation to surrender, or, at least, the question was so unsettled, the respective rights and obligations of nations so indeterminate, and the refusal on the part of nations to surrender so frequent, that without a treaty there was no obligation at all, or none of any sort of practical value; for what is this imperfect obligation of which the writers speak? It is the right of one to ask, which involves the right of the other to refuse, and, as applied to this particular subject, the refusal had become so common as to be almost the habitual practice, until treaties were formed concerning it."

He then examines the practice of our own and foreign governments in reference to the subject of extradition of fugitives, and concludes, on page 513, with the expression of opinion "that the government of the United States are not under any obligation to deliver the prisoner, in the absence of any treaty stipulation."

Holmes v. Jennison came before the supreme court in 1840, two years before the extradition treaty with Great Britain in 1842. Discussing that case, Mr. Chief Justice TANEY says:

"Since the expiration of the treaty with Great Britain, negotiated in 1793, the general government appears to have adopted the policy of refusing to surrender persons, who, having committed offenses in a foreign nation, have taken shelter in this. It is believed that the general government has entered into no treaty stipulations upon this subject since the one above mentioned, and in every instance where there was no engagement by treaty to deliver, and a demand has been made, they have uniformly refused, and have denied the right of the executive to surrender, because there was no treaty, and no law of congress to authorize it. And, acting upon this principle throughout, they have never demanded from a foreign government any one who fled from this country in order to escape from the punishment due to his crimes." 14 Pet. 574.

In 1845 Judge WOODBURY, in the *Case of the British Prisoners*, holds a similar view:

"But without such a stipulation, however fit it might seem in point of morals to surrender citizens of other countries to answer for offenses committed at home against their own laws, it is usually considered that there is no political obligation under the laws of nations to do it." 1 Woodb. & M. 68.

In the same year (1845) the question was considered by Mr. Buchanan, secretary of state, in a communication to Mr. Wise, in which the following language is employed:

"But the practice of nations tolerates no right of extradition. Whatever elementary authors may say to the contrary, one nation is not bound to deliver up persons accused of crimes who have escaped into its territories on the demand of another nation against whose laws the alleged crime was committed. The government of the United States has from the very beginning acted upon this principle. Mr. Jefferson, when secretary of state under the administration of General Washington, declared that 'the laws of this country take no notice of crimes committed out of their jurisdiction. The most atrocious offender, coming within their pale, is received by them as an innocent man, and they have authorized no one else to seize and deliver him up.' * * * The truth is that it has been for a long time well settled, both by the law and practice of nations, that without a treaty stipulation one government is not under any obligation to surrender a fugitive from justice to another government for trial." 2 Whart. Int. Law Dig. pp. 745, 746.

In the year 1847, in *Re Metzger*, Mr. Justice McLEAN, as the organ of the supreme court, says:

"The surrender of fugitives from justice is a matter of conventional arrangement between states, as no such obligation is imposed by the laws of nations." 5 How. 188.

In a communication of Mr. Cushing, attorney general, to the president, in 1853, he thus states the principle:

"It is the settled politic doctrine of the United States that, independently of special compact, no state is bound to deliver up fugitives from the justice of another state. * * * It is true any state may, in its discretion, do this as a matter of international comity towards the foreign state, but all such discretion is of inconvenient exercise in a constitutional republic organized as is the federal Union; and accordingly it is the received policy of this government to refuse to grant extradition except in virtue of express stipulations to that effect." 6 Op. Attys. Gen. 86; Id. 432.

"The ancient doctrine," says the court of appeals of Kentucky, in 1878, "that a sovereign state is bound by the laws of nations to deliver up persons charged with or convicted of crimes committed in another country, upon the demand of the state whose laws they have violated, never did permanently obtain in the United States. It was supported by jurists of distinction, like Kent and Story, but the doctrine has long prevailed with us that a foreign government has no right to demand the surrender of a violator of its laws, unless we are under obligations to make the surrender in obedience to the stipulations of an existing treaty. * * * As said by Mr. Cushing, in the *Matter of Hamilton*, a fugitive from justice of the state of Indiana: 'It is the established rule of the United States neither to grant nor to ask for extradition of criminals as between us and any foreign government, unless in cases for which stip-

ulation is made by express convention.'” *Com. v. Hawes*, 13 Bush, 708, 709.

Mr. Spear, in his work, already cited, page 13, after reviewing the authorities, expresses his conclusion in the following words:

“The preponderance of authority derived from practice, the legislation of congress, the opinions of the attorney generals of the United States, and the deliverances of the judiciary, both state and federal, clearly show that no department of the general government is either bound or authorized to deliver up fugitive criminals from other countries, except in those cases for which provision is made by treaty. The powers of the government are bestowed by the constitution; and, except as it may be clothed with the extradition power through treaties, no such power is found among the express or implied grants to congress, or among those to the executive department, or among the powers given to the federal judiciary. There can be no discretion in the exercise of the power, since it does not exist at all.”

See, also, *Blandford v. State*, 10 Tex. App. 627; *U. S. v. Watts*, 14 Fed. Rep. 130; Whart. Confl. Laws, § 835; Wools. Int. Law, § 79; 2 Whart. Int. Law Dig. § 268; Wheat. Int. Law, (6th Ed.) pp. 176, 177; 16 Alb. Law J. 361, 366; 7 Amer. & Eng. Enc. Law, p. 600, and notes.

In 1886, the supreme court, discussing the question of extradition of fugitives, observes:

“It is only in modern times that the nations of the earth have imposed upon themselves the obligation of delivering up these fugitives from justice to the states where their crimes were committed for trial and punishment. This has been done generally by treaties made by one independent government with another. Prior to these treaties, and apart from them, it may be stated, as the general result of the writers upon international law, that there was no well-defined obligation on one country to deliver up such fugitives to another; and, though such delivery was often made, it was upon the principle of comity, and within the discretion of the government whose action was invoked, and it has never been recognized as among those obligations of one government towards another which rests upon established principles of international law.” *U. S. v. Rauscher*, 119 U. S. 411, 412, 7 Sup. Ct. Rep. 234.

In this connection it is worthy of remark that, since the opinion of Mr. Chief Justice TANEY was written, in which the belief is expressed that the United States, “in every instance where there was no engagement by treaty to deliver,” have uniformly refused and denied the right of the executive to surrender, the exceptional case is reported of the surrender, in the absence of a treaty, of Don Jose Augustin Argüelles by Mr. Seward to the Spanish government. Referring to this case, it is said by Mr. Wharton (2 Int. Law Dig. p. 746) that “in *Argüelles’ Case*, 1864, (cited in Whart. Confl. Laws, § 941; Spear, Extradition, 1,) the defendant was delivered to the Spanish government by Mr. Seward without a treaty, and the proceedings were so summary as to prevent a review on *habeas corpus*.” In his comments upon the case, Mr. Spear says:

“The delivery of Argüelles, being wholly without any legal authority, was not at all excusable by the fact that the alleged fugitive was supposed to be guilty of a heinous offense. This supposition, if true, does not change the

principle or the nature of the act. Rules of law do not vary with the merits or demerits of the particular case to which they are applied." Spear, Extradition, p. 13.

While, therefore, investigation discloses that Chancellor Kent of our own country, and several distinguished publicists and writers upon international law of foreign countries, assert, apart from treaty engagements, the obligation to surrender a fugitive from justice, the overwhelming weight of American authority and the practice of our government are clearly in the opposite direction, and deny the existence of any obligation to surrender arising out of the law of nations. What, then, was the result? Treaties for the extradition of fugitive criminals, under certain circumstances, were concluded by the United States with foreign powers, and these treaties, in the terms of article 6 of the constitution, are declared to be the supreme law of the land; and as such supreme law they are to be construed as other laws. "A treaty," says the supreme court, "then, is a law of the land as an act of congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined; and, when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute." *Head Money Cases*, 112 U. S. 598, 599, 5 Sup. Ct. Rep. 247; *U. S. v. Rauscher*, *supra*. In interpreting treaties, "we are to find out the intention of the parties by just rules of interpretation applied to the subject-matter; and, having found that, our duty is to follow it as far as it goes, and to stop where that stops, whatever may be the imperfections or difficulties which it leaves behind." *The Amiable Isabella*, 6 Wheat. 71. See, also, *Chew Heong v. U. S.*, 112 U. S. 536, 5 Sup. Ct. Rep. 255. It is said:

"There is no rule of construction better settled, either in relation to covenants between individuals or treaties between nations, than that the whole instrument containing the stipulations is to be taken together, and that all articles *in pari materia* should be considered as parts of the same stipulation." 2 Whart. Int. Law Dig. p. 29.

The treaty with Mexico being supreme law, it is the duty of courts to take judicial notice of it, and to enforce private rights, when appropriately presented, growing out of its stipulations. The court will therefore proceed to inquire into the construction of the treaty, in order to determine whether our government has authority to surrender the petitioner. If the authority exist, she could not complain of its exercise in a proceeding conforming in all respects to legal requirements. In the absence of such authority, she should not for a moment be restrained by the strong arm of the law, however regular, in other respects, the proceedings might be, or however heinous the offense of which she is accused. Agreeably to its caption, the treaty is one "between the United States of America and the United Mexican States for the extradition of criminals." The introductory clause is as follows:

"The United States of America and the United Mexican States, having adjudged it expedient, with a view to the better administration of justice and to the prevention of crime within their respective territories and jurisdiction,

that persons charged with the crimes hereinafter enumerated, and being fugitives from justice, should, under certain circumstances, be reciprocally delivered up, have resolved to conclude a treaty for this purpose. * * *

"Article 1. It is agreed that the contracting parties shall, on requisition made in their names, * * * deliver up to justice persons who, being accused of the crimes enumerated in article third of the present treaty, committed within the jurisdiction of the requiring party, shall seek an asylum or shall be found within the territories of the other. * * *

"Art. 3. Persons shall be so delivered up who shall be charged, according to the provisions of this treaty, with any of the following crimes, whether as principals, accessories, or accomplices, to-wit: Murder, [including assassination, parricide, infanticide, and poisoning.] * * *

"Art. 6. The provisions of the present treaty shall not be applied in any manner to any crime or offense of a purely political character, nor shall it embrace the return of fugitive slaves, nor the delivery of criminals who, when the offense was committed, shall have been held in the place where the offense was committed in the condition of slaves, the same being expressly forbidden by the constitution of Mexico; nor shall the provisions of the present treaty be applied in any manner to the crimes enumerated in the third article committed anterior to the date of the exchange of the ratifications hereof.

"Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this treaty." 12 St. pp. 1199-1202.

The foregoing extracts embrace all the treaty stipulations which in any manner affect the present inquiry. What, then, was the purpose and intention of the two governments in inserting the stipulation: "Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this treaty?" We have seen that, with substantial unanimity, American jurists and statesmen recognized, under the law of nations, no obligation to surrender a fugitive, whether citizen or alien, and that by our government it was never done except in few, if more than one, isolated instances. Hence the resulting necessity to enter into treaty engagements for that purpose. Hence the extradition statute of 1848 and amendments, embodied in Rev. St. § 5270 *et seq.*, which, in conjunction with treaties, the supreme court affirms in *Rauscher's Case*, *supra*, "are in their nature exclusive." If there were no pre-existing obligation to extradite a fugitive, the obligation must necessarily grow out of either statute law or treaty engagement. It is therefore apparent that the purpose of the treaty was to authorize the parties to do something which they had no previous authority to do. The parties come together, through their respective representatives, and make an agreement—an obligatory, binding agreement—to surrender, under certain circumstances, persons who commit crimes and flee from offended justice. They are authorized to act as they bind themselves. The agreement is mutual, the rights and obligations reciprocal. If power to surrender be not affirmatively given, the right to demand a fugitive can have no existence. The right to demand implies, *ex vi termini*, the corresponding authority and obligation to surrender. But both to exist should be founded upon express stipulations. The agreement here is, in article 1 of the treaty, that the contracting parties shall, on requisition made in their name, deliver up persons, who, being accused of crimes, etc. "Persons," without qualification, would necessarily include all

persons, citizens and aliens alike; and, under that general designation, the executive, it is believed, could not lawfully withhold the surrender of an American citizen upon requisition made by the republic of Mexico. But the treaty does not stop there. A subsequent limiting clause denies the obligation to surrender a citizen: "Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this treaty." The obligation to deliver being denied, upon what can rest the authority? It did not exist in our government, as already shown, independent of treaty engagements, or, if existing as a mere matter of comity or courtesy, there was no lawful mode of enforcing it; and certainly it finds no countenance either in the constitution or laws of congress. The former is silent as to extradition, considered from an international stand-point, and simply confers the general power to make treaties, from which springs the right of the treaty-making power to negotiate with foreign governments for the extradition of fugitives. All the inferences and deductions to be drawn from the statutes would seem clearly to support the view taken by the court; that is, there should be a binding treaty stipulation to authorize the executive to surrender a fugitive. The first act of congress on the subject was approved August 12, 1848. Its caption reads: "An act for giving effect to certain treaty stipulations between this and foreign governments, for the apprehension and delivering up of certain offenders." 9 St. at Large, 302. Section 5270, Rev. St., which is, in substance, the same as the first section of the act of 1848, provides that, if the officer upon the preliminary hearing deems the evidence sufficient to sustain the charge, "he shall certify the same * * * to the secretary of state, that a warrant may issue upon the requisition of the proper authorities for the surrender of such person, according to the stipulations of the treaty or convention." The warrant for surrender does not issue according to the will or discretion of the executive, but agreeably to the stipulations of the treaty; that is to say, according as the parties have obligated themselves by treaty engagements. If it were otherwise, if the executive could at his option and in his discretion transport for trial to a foreign country a person accused of crime, he would in such cases exercise a power which, it is thought, finds no sanction under our constitutional form of government. While nations are not careful to screen criminals seeking an asylum in their midst, personal liberty is so jealously guarded by the American constitution that its safety and security should not be dependent upon the exercise of the arbitrary will and discretion of any official, however lofty his official station. The statute, therefore, employing apt words to confine the warrant of surrender to that class of persons and offenses as to which the parties have entered into binding treaty stipulations, should be held to exclude other classes, and to deny authority or discretion to surrender where the obligation is by treaty expressly denied. *U. S. v. Rauscher*, *supra*, is referred to in support of this view. While the questions in the two cases are dissimilar, the general principles underlying the *Case of Rauscher* have direct application to the case before the court.

It will not be amiss to refer, as germane to the proposition discussed, to the extradition treaties concluded between the United States and foreign nations. By the author, 7 Amer. & Eng. Enc. Law, published in 1889, it is stated there were at that time in force 33 of such treaties. They are chronologically arranged as follows: Great Britain, 1842; France, 1843; Hawaiian Islands, 1849; Swiss Confederation, 1850; Prussia and other states, 1852; Bremen, 1853; Bavaria, 1853; Wurttemberg, 1853; Mecklenburg-Schwerin, 1853; Mecklenburg-Strelitz, 1853; Oldenburg, 1853; Schaumburg-Lippe, 1854; Hanover, 1855; Two Sicilies, 1855; Austria, 1856; Baden, 1857; Sweden and Norway, 1860; Venezuela, 1860; Mexico, 1861; Hayti, 1864; Dominican Republic, 1867; Italy, 1868; Republic of Salvador, 1870; Nicaragua, 1870; Peru, 1870; Orange Free State, 1871; Ecuador, 1872; the Ottoman Empire, 1874; Spain, 1877; Netherlands, 1880; Belgium, 1882; Grand Duchy of Luxemburg, 1883; Empire of Japan, 1886. Those with Prussia, Bremen, Bavaria, Wurttemberg, Mecklenburg-Schwerin, Mecklenburg-Strelitz, Oldenburg, Schaumburg-Lippe, Hanover, Austria, Baden, Hayti, Peru, the Ottoman Empire, Spain, the Netherlands, and Belgium, contain a stipulation substantially in the very words (the meaning being precisely the same) of the concluding clause of the sixth article of the treaty with Mexico, to-wit: "Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this treaty." The corresponding clause in the treaties with the Two Sicilies, Sweden, and Norway, and the republic of Salvador is as follows:

The Two Sicilies. "Art. 24. The citizens and subjects of each of the high contracting parties shall remain exempt from the stipulations of the preceding articles, so far as they relate to the surrender of fugitive criminals."

Sweden and Norway. "Art. 4. Neither of the contracting parties shall be bound to deliver up, under the stipulations of this convention, any person who, according to the laws of the country where he shall be found, is a citizen or a subject of the same at the time his surrender is demanded."

Republic of Salvador. "Art. 5. In no case and for no motive shall the high contracting parties be obliged to deliver up their own subjects." Spear, Extradition, 575-628; Rev. St. relating to District of Columbia, Post-Roads, and Public Treaties.

A similar clause is not contained in any of the other treaties above mentioned. The preamble to the treaty with Prussia and several other states contains the recital:

"Whereas, the laws and constitution of Prussia and of the other German states, parties to this convention, forbid them to surrender their own citizens to a foreign jurisdiction, the government of the United States, with the view of making the convention strictly reciprocal, shall be held equally free from any obligation to surrender citizens of the United States."

It is apparent the recital, which is but the reason assigned by Prussia for refusing to extradite her citizens, does nothing more than relieve the United States from the obligation to surrender. But the clause in article 3, already quoted, which embodies the agreement of the parties, the binding part of the compact, goes further, and, in effect, denies the right of

either party to deliver up its own citizens. Such is the view entertained of this particular clause by Mr. Wharton. "If a German," he asserts, "comes to us, commits a crime, and then returns to his own land, though we cannot demand his surrender, yet he may be punished, and restitution awarded, under proceedings from his own sovereign. But if an American goes to Germany, and there is guilty of a crime against the territorial law, and returns to America, his offense goes unpunished. He cannot be punished by us, because our courts take no jurisdiction of offenses committed abroad against foreign laws. He cannot be surrendered to Germany, because our treaties with Germany expressly prohibit such surrender." Whart. Conf. Laws, (2d Ed.) § 841, note 2. And in the text, same section, he further says: "An exception to this effect exists in our treaties with Prussia and the North-German states, with Bavaria, Baden, with Norway and Sweden, with Mexico, with Austria, and with other states to be hereafter specified."

As indicating the construction given by Mr. Lawrence, a writer of distinction, to the clause of the treaty in question, he makes the following classification of our extradition treaties: "(1) Those excepting the subjects of the other contracting power. (2) Those containing no such exception." Under the first are embraced the treaties with Mexico, Prussia, and others. The second includes those with Great Britain, Switzerland, etc. Whart. Conf. Laws, § 857, notes. To same effect see 7 Amer. & Eng. Enc. Law, pp. 616, 617, par. 11. "Some of the extradition treaties of the United States," says Mr. Spear, "expressly provide that neither party shall be required to deliver up its own citizens, which is equivalent to saying that neither will, in respect to such citizens, furnish any facility to the other for bringing them to justice for any offense which they may commit against its laws; and hence, if, under such a treaty, either party should by mistake deliver up one of its citizens, it clearly would not be allowable for the other to put that citizen on trial upon the pretext that the terms of the treaty relate only to the extradition, and have no relation whatever to the trial, either as to the person or the offense to be tried." Spear, Extradition, 79.

All of our law-writers, without an exception, brought to the attention of the court, concur in the opinion that the sixth article of the treaty with Mexico forbids the United States from surrendering their own citizens. Nor is there less uniformity in the practical construction given that article by the department of state. And such construction by a department of the government charged with the administration of a law, although not binding upon the courts, should properly receive great weight when the law is sought to be judicially construed. The rule should apply with special force to that class of cases, where, like the one before the court, the national chief executive, acting through the state department, is indued with the ultimate power of withholding the final warrant for surrender of the fugitive. Rev. St., §§ 5270, 5272; *In re Stupp*, 11 Blatchf. 125, and note; Spear, Extradition, 245, 246. The proposition asserted is sustained by numerous authorities. Mr. Justice HARLAN, in *U. S. v. Johnston*, clearly states the principle:

"In view of the foregoing facts, the case comes fairly within the rule, often announced by this court, that the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous." 124 U. S. 253, 8 Sup. Ct. Rep. 446.

Says the court in *U. S. v. Hill*:

"In the construction of a doubtful and ambiguous law, the contemporary construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect." 120 U. S. 182, 7 Sup. Ct. Rep. 510; *U. S. v. Philbrick*, 120 U. S. 59, 7 Sup. Ct. Rep. 413.

The same doctrine was applied in *Brown v. U. S.*, where it is said:

"It must be conceded that, were the question a new one, the true construction of the section would be open to doubt. But the findings of the court of claims show that soon after the enactment of the act the president and the navy department construed the section to include warrant as well as commissioned officers, and that they have since that time uniformly adhered to that construction, and that under its provisions large numbers of warrant officers have been retired. This contemporaneous and uniform interpretation is entitled to weight in the construction of the law, and in a case of doubt ought to turn the scale." 113 U. S. 570, 571, 5 Sup. Ct. Rep. 648; *Railway Co. v. State*, 77 Tex. 388, 12 S. W. Rep. 988, and 13 S. W. Rep. 619; *U. S. v. Payne*, 8 Fed. Rep. 892.

To the consideration, then, of the practice of the state department in construing the last clause of the sixth article of the treaty the attention of the court will be next briefly directed.

(1) In 1874, says Mr. Frelinghuysen, in discussing the *Trimble Case*, a Mexican, Francisco Perez, charged with the murder of Joseph Alexander, an American, at Brownsville, Tex., escaped into Mexico, and Mr. Fish, secretary of state, declined to prefer a formal requisition to the Mexican government for the surrender of the fugitive.

(2) The Mexican authorities in 1884 made demand on our government for the extradition of Alexander Trimble, a citizen of the United States, who was accused of crimes committed in the republic of Mexico. The secretary of state, Mr. Frelinghuysen, construing the treaty as inhibiting the surrender of an American citizen, refused to deliver up Trimble. In a carefully prepared opinion in that case he states his conclusion in the following words: "I understand the treaty with Mexico as reading thus: 'The president shall be bound to surrender any person guilty of crime, unless such person is a citizen of the United States.'" Senate Ex. Doc. No. 98, 1st Sess. 48th Cong.

(3) Charles Hudson, an American citizen, was held in Texas, in 1888, for extradition to Mexico on a charge of robbery committed in that republic. In response to a letter from the governor of Texas, Mr. Bayard, secretary of state, replies:

"I have the honor to acknowledge the receipt of your letter of the 18th instant in relation to the case of Charles Hudson, held in Texas for extradition to Mexico on a charge of robbery. It being alleged that Hudson is a citizen of the United States, you request to be informed whether the department will

adhere to its former ruling in the *Trimble Case*, since that ruling, if applied to the case in question, might prevent the extradition of the prisoner, and render futile the efforts and expenditures of the Mexican government to obtain his surrender. As the decision of the department in the *Trimble Case* is understood, it was held that as, under the extradition treaty between the United States and Mexico, 'neither of the contracting parties shall be bound to deliver up its own citizens,' the president would not be authorized, in the absence of an express grant of power under the laws of the United States, to surrender to Mexico a citizen of the United States. The treaty provision referred to, which is found similarly stated in many of our extradition treaties, was held to negative any obligation to surrender, and thus to leave the authorities of this government without authority to act in such a case. After due consideration, the department is of opinion that the construction given to the treaty in the *Trimble Case* is correct." (See letter on file in department of state, Austin, Tex.)

(4) More recently, and within the past 60 days, the question was considered by Mr. Blaine, present secretary of state, whose letter to Hon. W. H. Crain is published in the public prints. Dr. Martinez, it is said, was basely assassinated on the streets of Laredo, Tex., by persons who fled to Mexico. On behalf of citizens of Laredo, Mr. Crain requested the state department to take steps looking to the extradition of the assassins. That portion of the secretary's letter deemed pertinent to the present question reads as follows:

"The department regrets that the present conventional relations between the United States and Mexico do not admit of a demand for the extradition of the assassins, since it is stated they are citizens of Mexico. Present treaty provides that neither of the contracting parties shall be bound to deliver up its citizens, and, as this clause has been held to preclude the surrender of a citizen of the United States, Mexico refuses to give up her citizens. This question was last agitated in the well-known case of Alexander Trimble and his associates, who were charged with murder and robbery in 1884. They were arrested in Texas with a view of their extradition by the authorities of that state, and when the case was reported to their government, and the fact of their citizenship of the United States was disclosed, this department interfered, and they were discharged. In view of this, and several prior and subsequent cases in which a similar construction has been given to the treaty, this government is precluded from demanding the extradition of the fugitives in the present instance."

Thus it appears that, extending through a period of 17 years, 4 different administrations of the federal government have invariably held that no authority was conferred upon the executive, by the sixth article of the treaty, either to demand of the Mexican authorities the extradition of their subjects committing crimes in the United States, or to surrender an American citizen upon demand made by the republic of Mexico. Following the construction so consistently applied to the treaty, the executive department, whose appropriate duty it is to execute the treaty pursuant to its stipulations and statutory requirements, has uniformly refused to surrender our own citizens; and it may be well said, if doubt exist as to the true construction of the treaty, which the court freely admits is not entertained in the present case, this contemporaneous and uniform interpretation "ought to turn the scale." So far as the court is

advised, there is but one opinion of the question by law-writers and the executive department of our own country. Nor can it be accurately said that the Mexican courts have authoritatively placed a different construction upon the treaty. There is but a single instance known to the court where the question was brought to the attention of their judicial tribunals. That is a case referred to by Mr. Foster, minister to Mexico, in a communication to Mr. Evarts, secretary of state, which will be found but imperfectly reported in 1 Ex. Doc. (3d Sess. 45th Cong.) 1878-79, pp. 560-567. It appears therefrom that in 1877 two persons, Dominguez and Barrera, accused of murder in Texas, fled to Mexico, and the authorities of Texas applied to those of the state of Tamaulipas for their extradition. "They were arrested, and their delivery ordered by the federal executive through the department of war. But the prisoners applied to the district judge of Matamoras for *amparo*, or protection, a proceeding somewhat similar to our writ of *habeas corpus*, which application the judge sustained; a decision based upon the ground that, as Mexican citizens, extradition would be a violation of the individual guaranties of the federal constitution. An appeal was taken by the prosecuting attorney from this decision, and the case was thus brought before the federal supreme court. After a lengthy discussion of the case, and a consideration of all the constitutional, international, and political questions either involved or introduced, in which almost all the magistrates of the court participated, the decision of the district judge of Matamoras was reversed, and the court decided, by a vote of 9 to 5, that the individual guaranties of the Mexican constitution would not be violated by the extradition of the criminals." See Mr. Foster's letter, page 560. Whether the prisoners were eventually delivered up to the Texas authorities is not disclosed by the report. But it does appear there was no order made for their surrender, nor for their discharge. They were simply held for the purpose of inquiring into the question of their citizenship. Mr. Foster inclosed with his report opinions of only two of the judges, Chief Justice VALLARTA and Magistrate RAMIREZ, and a brief extract from the opinion of Magistrate BAUTISTA. No other opinions appear in the volume referred to. Chief Justice VALLARTA and Magistrate RAMIREZ discussed the question, among others, of the authority of the Mexican government, under the sixth article of the treaty, to surrender its citizens to the United States upon demand made by the proper officers. Upon that point Magistrate RAMIREZ says: "I think, also, that while our federal constitution and the extradition treaty of December 11, 1861, are in force, the executive power cannot consent to the extradition of any Mexican citizen." The chief justice maintained the contrary view, holding a Mexican citizen to be subject to extradition. The reasoning and conclusions of both judges are entitled to respectful consideration, but they are in no manner controlling upon our courts; and certainly, in no event, would the mere expression of opinion upon a collateral question establish a precedent to be followed by other tribunals. What was said was mere *dicta*, obviously apparent from the language of the chief justice: "A case," says he, "of the extradition of

Mexicans, as I have said, is not treated here. The evidence of documents exists to the effect that the order issued by the department of war was given in the understanding that Dominguez and Barrera were American citizens, and that General Canales consulted the government in regard to this point." The interpretation of the treaty by the executive branch of our government, and its unbroken practice in obedience thereto, the opinions of our law-writers, the logical deductions fairly drawn from the application of established rules of construction, and finally all these, supplemented by a protesting minority of the federal supreme court of Mexico, stand opposed to the views of Chief Justice VALLARTA. That criminals should be punished, and that nations should render to each other all lawful assistance in their power to effectuate that end, may be readily conceded. But ours is a government of law, and the rights, powers, and prerogatives of the executive are derived from the constitution and statutes, and treaties made in pursuance thereof. If these deny, or do not confer, authority to surrender a citizen to a foreign state, then its exercise would be but the exertion of usurped power. Borrowing the words of Mr. Frelinghuysen: "It would be a great evil that those guilty of high crime, whether American citizens or not, should go unpunished; but even that result could not justify an usurpation of power." Nor is judicial usurpation less reprehensible. Both are wrong; both defy the law, and are repugnant to the genius of our institutions.

It is cause for regret that this case cannot reach the supreme court, to whose judgment the questions involved should be remitted for final and conclusive determination. But that fact should not deter the trial court from the performance of its duty. If the prisoner be unlawfully restrained of her liberty, an order for her enlargement should be entered without hesitation. Being of opinion, for the reasons given, (1) that the warrant issued by the county judge for the arrest of the petitioner is void; (2) that her surrender is not authorized by the treaty with Mexico, —it results that her detention is illegal, and she should therefore be discharged from custody; and it is so ordered.

UNITED STATES v. BELVIN *et al.*, (three cases.) SAME v. PATTESON *et al.*, (two cases.) SAME v. GUIGON *et al.* SAME v. STEPHENS *et al.*

(Circuit Court, E. D. Virginia. April 22, 1891.)

1. ELECTIONS—HINDERING VOTERS AT FEDERAL ELECTION.

Rev. St. U. S. § 5506, making it unlawful to hinder a citizen from voting, though unconstitutional in so far as it attempts to regulate state or municipal elections, is valid as a regulation of congressional elections. Following *U. S. v. Munford*, 16 Fed. Rep. 223. Distinguishing *U. S. v. Reese*, 92 U. S. 214.

2. SAME—INDICTMENT.

Hindering voters at an election is a misdemeanor only, and charges for hindering, and for conspiring to hinder, at the same time and place, may be joined in the same indictment.

3. SAME.

An indictment under Rev. St. U. S. § 5506, making it unlawful to hinder, or to conspire to hinder, a citizen from voting at an election, which merely charges that

defendant did hinder a certain person from voting, without setting forth the acts and method of the hindering, is too vague and general, and should be quashed.

4. SAME.

Such defect is not cured by adding, as the method by which the voters were hindered, that defendant unlawfully challenged them, or that he consumed the time for conducting the election by frivolous interrogations, or by unlawfully creating disorder by pushing and saying disorderly and illegal things to the voters, since such acts are in themselves too general, and are not in themselves contrary to the laws of the United States. Following *U. S. v. Crutskshank*, 92 U. S. 542.

5. GRAND JURY—QUALIFICATION.

An officer who has issued a warrant of arrest for accused, and expressed an opinion as to his guilt, is not thereby disqualified to serve as a grand juror, and assist in finding an indictment against him.

6. SAME—LEGALITY—REMOVAL OF FOREMAN.

The fact that the foreman of a grand jury is relieved from serving, and another appointed in his place, does not invalidate the jury.

At Law. Violation of election law.

Thos. R. Borland, U. S. Atty., and *L. C. Bristow*, Asst. U. S. Atty.
Meade Haskins and *James Lyons*, for defendants.

HUGHES, J. These seven indictments stand upon a motion to quash, and after full argument I am to pass upon that motion. It is conceded that all of the indictments are based upon section 5506 of the Revised Statutes of the United States, which provides for the punishment of every person who, by any unlawful means, hinders, delays, prevents, or obstructs, or combines and confederates with others to hinder, delay, prevent, or obstruct, any citizen from voting at any election in any state, territory, county, city, or parish. Five of these indictments charge that the persons against whom they are brought did hinder, delay, prevent, and obstruct sundry persons, whom they name, from voting at the election held in the first precinct of Jackson ward, in the city of Richmond, on the 6th day of November, 1888, for the election of a member of the fifty-first congress of the United States; and also charge that the persons indicted did unlawfully combine and confederate with each other to hinder, delay, prevent, and obstruct sundry citizens from voting at the said election. Two of the indictments contain only the latter charge. The motion to quash is made on grounds which have no reference to the form and structure of the indictments; and also on grounds apparent on the face of those instruments. I will deal with the first class of objections before considering the second.

The principal objection of the first class is that section 5506 of the Revised Statutes was a law which congress had no authority to pass; and therefore that acts committed in violation of it are not within the cognizance of this court. It is argued that in the case of *U. S. v. Reese*, 92 U. S. 214, the supreme court, Chief Justice WARRE delivering the opinion, pronounced the fourth section of the enforcement act of May 31, 1870, (which is identical with section 5506 of the Revised Statutes,) unconstitutional; and that if one be unconstitutional the other is so by necessary consequence. This court has already considered this objection. We treated it so fully in the case of *U. S. v. Munford*, 16 Fed. Rep. 223, the circuit and district judges both delivering opinions, that I now need

only refer to what was said in that case. Chief Justice WAITE was then a member of this court, though not present; and it is hardly to be supposed that the opinions rendered by the two other judges, who may be presumed to have known his views, were in conflict with anything which the chief justice had said in the *Case of Reese*.

The offense for which Reese was tried was committed in the progress of a municipal election, over which the federal court that tried him could have had no jurisdiction, unless given by some constitutional act of congress. No constitutional statute could be passed by congress relating to state and municipal elections, except for the express purpose of protecting voters from being hindered or prevented from voting on account of their race, color, or former slavery. The act of May, 1870, contained no such limitation, and was therefore held to be inapplicable to a municipal election. But it is a plain *non sequitur* to contend that, because an act of congress has no constitutional warrant in relation to a state election, therefore it has no such warrant when applied to a congressional election. The argument on this subject is fully elaborated in the case of *U. S. v. Munford*, and need not be repeated here. In the case of *U. S. v. Cruikshank*, 92 U. S. 542, another section of the enforcement act of 1870 was brought in review, which was pronounced unconstitutional on grounds analogous to those alleged in *Reese's Case*. The cases of *U. S. v. Harris*, 106 U. S. 629, 1 Sup. Ct. Rep. 601, and of *Baldwin v. Franks*, 120 U. S. 678, 7 Sup. Ct. Rep. 656, 763, cited by the defense in the cases at bar, turned upon the constitutionality of the second section of the act of congress of 20th of April, 1871, nearly identical with which is section 5519 of the United States Revised Statutes. That section is egregiously and palpably unconstitutional on its face. But neither in its origin nor its history has it any relation to or analogy with section 5506 of the Revised Statutes, under which the indictments at bar are brought. It cannot be reasonably contended that because it was beyond the competency of congress to pass one law, it was therefore beyond its power to pass another law unlike the first in purport and purpose. The decisions in the cases of *Harris* and of *Baldwin v. Franks* do not, therefore, rule those we now have under consideration.

Another ground on which the motion to quash these indictments is based is thus stated by counsel, (I have somewhat abbreviated the last clause:)

"That W. H. Taylor, the foreman of the said grand jury, as originally constituted, was the prosecuting witness in the case against them, and the United States commissioner who issued the warrants of arrest for the said defendants, and that the said W. H. Taylor had formed and expressed an opinion as to the guilt or innocence of the said defendants, and was thereby disqualified to act as a grand juror in this case; moreover, because the said W. H. Taylor was irregularly removed from the grand jury after the said grand jury had been impaneled and sworn, and he had been appointed foreman thereof, and because afterwards a new foreman was appointed,"—

—all of which proceedings vitiated the grand jury.

Some of the allegations in this statement may or may not be true. There is no proof of them before the court. What actually transpired in open court was as follows, so far as I can recall the circumstances after a lapse of 12 months: The grand jury were duly impaneled on the 8th April, 1890. They retired and were in session for a time on that day, but brought in no indictments. On the next morning, after their names had been called, Taylor, the foreman, said to the court something to the effect of his having acted as commissioner of the United States circuit court in the cases of several persons charged with violations of the election laws at the recent election, and that he had become aware that these violations were to be made the subject of investigation before this grand jury. He therefore asked, because of his previous connection with these election cases, to be excused from further service on the jury. Taylor was excused and discharged, and another member of the grand jury was sworn as foreman, and the jury were sent to their room and proceeded with their deliberations. This was on the 9th April, on which day indictment No. 710 was brought in. On the next day indictment No. 711 was found; on the 23d April Nos. 713 and 714 were found; on the 24th April No. 715, and on the 25th April Nos. 716 and 717, were found.

I do not see in these occurrences anything to affect the validity of the grand jury which found these indictments, or of its proceedings. The function of the grand jury is not to try persons accused of crimes, but merely to examine whether and what crimes have been committed, to designate the persons at whom the evidence points as criminal, and, by indictment, to charge such persons before the court and country as answerable for the crimes which have been committed. Originally grand jurors were chosen for the purpose of giving testimony to their fellow-jurors as to crimes committed within the county. If a grand juror sees one man murder another he may testify to that fact to the jury of which he is a part, without thereby disqualifying himself to act as a grand juror. Grand jurors are not sworn on their *voir dire* to say whether they have formed or expressed an opinion of the guilt or innocence of a person charged with crime. On the contrary, the court charges each of them to bring to the attention of the grand jury all offenses of which he may have any personal knowledge. The grand jury does not try; it merely accuses with a view to trial. The petit jury tries; no other body does or can try the graver offenses. Nor is an examining magistrate or commissioner disqualified to act as a grand juror upon cases sent on by himself. His examination is not a trial. He has no right to form an opinion of the guilt or innocence of an accused person brought before him for preliminary examination. The weight of evidence determines whether the accused shall be sent on. In sending the accused on the law presumes him innocent, and requires the committing magistrate to presume him innocent until convicted by the petit jury before whom he is afterwards to be tried upon his deliverance. But, while all this is true in strict law, yet, in the interest of impartial justice, it is better that

grand jurors should have had as little to do with an offense as is practicable, if it is to come before their body for examination. It was in the interest of impartial justice, and not because, in strict law, Taylor was not as competent to act on the grand jury of which he was foreman as any other member of it, that he was excused from further service by the court. That a court may, in its discretion, excuse the foreman or any member of a grand jury from further service, without invalidating the jury, is too obvious to need demonstration. The law provides that 23 may be sworn, and it also provides that 16 may act as a quorum. It contemplates the contingency that as many as 7 may be absent, either from death, sickness, or other cause, without invalidating the jury. Moreover, if by any chance the number should be reduced below 16, the law provides a method for filling up the vacancies that have happened. I think the grand jury of this court convened on the 8th of April, 1890, was a valid legal body, competent to act after the retirement of its first foreman, and that the indictments which they found are free from objection on any ground relating to the validity of the grand jury.

We come now to consider the objection that the indictments "are irregular and void on their face." First, it is contended that the charge set out in them that defendants hindered, delayed, prevented, and obstructed voters from voting cannot be joined in the same indictment as it is in five of these indictments, with the charge that they combined and confederated with each other to hinder, delay, prevent, and obstruct. It is true that a charge of conspiracy to commit murder and a charge of murder cannot be joined in the same indictment, and the rule holds also as to felonies. But this is because murder and the felonies constitute such grave charges against an accused person that the law, in its humanity, will not require him to defend himself against any other charge when he is upon his defense for one of these. But the rule does not hold in regard to certain classes of misdemeanors. All violations of laws of congress are misdemeanors, unless expressly declared to be felonies by the respective laws creating them.

The offenses charged in the indictments at bar are misdemeanors, and a charge of conspiring to commit them may be joined with a charge of committing, when they are made as they are in these indictments. It must be observed that these instruments do not charge that A. committed the offense at Richmond, B. at Petersburg, C. at Norfolk, D. at Hampton, E. at Williamsburg, and F. at Alexandria; and that A., B., C., D., E., and F. combined and confederated with each other to commit these several offenses. But the indictments charge that A., B., C., D., E., and F. combined and confederated with each other to hinder, delay, and prevent certain citizens from voting on the 6th November at Jackson ward, in Richmond, in a congressional election, and that those same persons did then and there hinder, delay, and prevent the said citizens from voting at that place in the said election. A joinder of charges in this manner, of conspiring to commit, and of committing, a misdemeanor,

v.46F.no.5—25

by the same persons, at the same place, puts no hardship upon the accused, who can defend themselves from one of the charges without any reasonable embarrassment from having at the same time to defend themselves from the other. Such a joinder of charges may be permitted for the sake of convenience, without violence to the policy or to the humanity of the law. And therefore I am of opinion that the five indictments containing this joinder of charges are not assailable on account of that fact.

Coming last to the principal objection urged against these indictments, it is complained that the charges they make are in vague, general terms, without such special averments as are required by the rules of criminal pleading; as are necessary to put the defendants on notice of what they are to meet by evidence; and as identify the offenses charged with such precision that, upon acquittal or conviction, the accused may not be brought to future trial for the same offenses in other prosecutions. Two of the indictments charge, in the general language of section 5506, that at the election which has been described the accused did unlawfully combine and confederate with each other to hinder, delay, prevent, and obstruct certain persons named from voting at the said election, adding nothing to show by what acts and methods the hindering and obstructing was done; nothing to show the court that the acts were within the purview of the statute; nothing to give the accused notice of the proofs that he was called upon to meet; nothing to so identify the offense that it could not be made the subject of a future prosecution. I think the ruling of the supreme court in the case of *U. S. v. Cruikshank*, 92 U. S. 542, governs the two indictments alluded to. It was there decided that in criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right, under the sixth amendment, "to be informed of the nature and cause" of the accusation. The court accordingly held that the indictment must set forth the offense with certainty, and that every ingredient of which the crime is composed must be clearly alleged. It held that where the definition of an offense, whether at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the statute, but must "descend to particulars." In its facts and leading features, *Cruikshank's Case* is on all fours with the case at bar. The verdict on trial being simply guilty or not guilty, the indictment must inform the court of the facts charged, so that it may decide whether they are sufficient to support a conviction if one should be had. This is elementary law, and in criminal jurisprudence it is of fundamental importance. There can be no doubt, therefore, that indictments Nos. 710 and 711 are defective, and must be quashed. The other five indictments under consideration contain each two counts, the second of which in each is identical in form with the single count embraced in indictments Nos. 710 and 711. These second counts in each of the five indictments are therefore governed by the ruling in *Cruikshank's Case*, and must be quashed.

There remain, therefore, for consideration only the first counts in each of the five indictments, Nos. 713, 714, 715, 716, and 717. These are nearly alike in language and structure. They charge that the accused persons hindered, delayed, and prevented certain persons named from voting at the election described, and they contain each additional clauses intended to indicate the means by which the hindering, etc., was done. But these additional clauses are themselves drawn in such general terms as fail to improve upon the main charge of hindering, delaying, preventing, and obstructing. For instance, the charge of hindering is reinforced by the specification that the accused unlawfully challenged the voters named in the indictment. Except in forts, arsenals, and places belonging to the United States, and on the high seas, no offenses can be committed against the United States except those which are declared to be offenses by express acts of congress. To challenge a voter, even to unlawfully challenge a voter, even in a federal election, is not a crime against the United States cognizable in the federal court. To hinder a voter from voting in a federal election is. Therefore, when an indictment charges too generally that the accused hindered a voter from voting, it does not and cannot cure the defect of that charge to specify that the hindering was by means of challenging voters. The specification is as general as the main charge, and only weakens it. The indictments also go on, after making a general charge of delaying voters in casting their votes, to specify that the accused did "consume the time for conducting the election by putting frivolous interrogations" to certain persons named who offered to vote. Now, to unlawfully delay a voter in voting at a federal election is a crime against the United States, but "to consume the time for conducting an election" by frivolous or other questions is not a federal crime, and it cannot help a charge of delaying a voter in voting, which is defective by reason of generality, to specify that it was effected by consuming time by frivolous questions, for one charge is as general as the other.

Again, these indictments, after charging in general terms that the accused prevented and obstructed certain voters from voting, go on to specify that the accused "did unlawfully create disorder by pushing, and doing and saying many other disorderly, improper, and illegal things to the persons offering to vote." Here, again, it is to be remarked that unlawfully creating disorder by unlawfully pushing, and doing and saying improper things to voters, is not a crime against the United States, and, even if it were, is as general as the charge of preventing and obstructing. Such an allegation gives no precision to a general charge of preventing and obstructing voters, and fails to cure its fault. The objection to these several specifications is that they are themselves too general; that they do not "descend to particulars;" that they are specifications which do not specify. It does not help the too great generality of a charge of unlawfully hindering, to specify generally that it was done by unlawful challenging; nor does it help the defect of a general charge of delaying to specify generally that the time for conducting the election was unlawfully consumed by frivolous interrogations; nor does it im-

prove a general charge of preventing and obstructing to specify generally that it was done by unlawfully pushing, etc. Two generalities do not make one speciality. My opinion and decision is that, in this respect, all the indictments are ruled by the decision of the supreme court in the case of *U. S. v. Cruikshank*, and must therefore be quashed.

The following was entered as the order of the court: This day came again the United States by their attorneys, and the defendants likewise, and the court, having maturely considered the motions of the defendants to quash these indictments, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the motions of the defendants to quash these indictments must be sustained. It is therefore ordered by the court that these indictments be, and the same are hereby, quashed, and that the defendants go thereof without day.

In re HUMASON.

(District Court, D. Washington, E. D. May 4, 1891.)

1. "DUE PROCESS OF LAW"—INFORMATION.

The provisions of Act Wash. 1890, known as the "Information Law," authorizing the prosecuting attorney to file informations in cases in which persons have been accused of crime before a committing magistrate, and held for trial after due preliminary examination, and admitted to bail or held in custody while awaiting trial, are not void, as depriving the defendant of his liberty without "due process of law," under the fourteenth amendment, because it dispenses with indictment and presentment by a grand jury, nor because the act, in a separable provision, authorizes prosecutions by information without preliminary examinations or any certificate of probable cause.

2. HABEAS CORPUS—FEDERAL COURTS.

Under Rev. St. U. S. § 753, forbidding the granting of a writ of *habeas corpus* by the federal courts, except for causes therein specified, the writ will not be granted either because the person assuming to act as prosecuting attorney, by whom the information against petitioner was filed, is only *de facto* a prosecuting attorney, or because petitioner was denied admission to bail pending a writ of error which he had sued out in the state court.

On Petition for *Habeas Corpus*.

W. W. D. Turner, George Forster, and T. C. Griffiths, for petitioner.

George Turner, Frank Graves, and S. G. Allen, for respondent.

HANFORD, J. The petitioner shows that he has been convicted of a crime against the laws of the state of Washington in the superior court of the county of Spokane, and sentenced to suffer imprisonment in the state penitentiary for a term of two years, and that he is now in the custody of the sheriff of Spokane county by virtue of a warrant issued to carry the sentence into execution; and he alleges that the proceedings against him in the superior court, and the warrant under which he is now restrained of his liberty, are all illegal, and contrary to that clause of the fourteenth amendment to the constitution of the United States which provides that no state shall deprive any citizen of life, liberty, or

property without due process of law. The particular reasons assigned for denouncing the proceedings as being unconstitutional are—*First*, the statute known as the information law of the state is unconstitutional; *second*, the person assuming to act as the prosecuting officer, who filed the information upon which the petitioner was proceeded against, was not, in law or in fact, such officer, the office of prosecuting attorney being at the time filled by another person; *third*, the petitioner has been denied the right of admission to bail pending the hearing of his cause in the supreme court of the state upon a writ of error which he has sued out. The twenty-fifth section of the first article of the state constitution provides that “offenses heretofore required to be prosecuted by indictment may be prosecuted by information or by indictment, as shall be prescribed by law.” Pursuant to this provision, a statute was passed at the first session of the state legislature containing, among other provisions, the following:

“Section 1. All public offenses may be prosecuted in the superior courts by information, in the following cases: *First*, whenever any person is in custody or on bail on charge of felony or misdemeanor, and the court is in session, and the grand jury is not in session, or has been discharged; *second*, whenever an indictment presented by a grand jury has been quashed, and the grand jury returning the same is not in session, or has been discharged; *third*, when a cause has been appealed to the supreme court, and reversed on account of any defect in the indictment; *fourth*, whenever a public offense has been committed, and the party charged with the offense is not already under indictment therefor, and the court is in session, and the grand jury is not in session, or has been discharged; *fifth*, whenever the court is in session or not in session, any competent and reputable person, having knowledge of the commission of any misdemeanor, not within the exclusive jurisdiction of a justice of the peace, may make an affidavit before any person authorized to administer oaths, setting forth the offense and the person charged in plain and concise language, together with the names of the witnesses, and file the same with the clerk of said superior court, who shall thereupon notify the prosecuting attorney thereof. The prosecuting attorney shall at once prepare and file an information in every case against the person charged in said affidavit, whether the court is in session or not.

“Sec. 2. All informations shall be filed in the court having jurisdiction of the offense specified therein by the prosecuting attorney of the proper county as informant. He shall subscribe his name thereto, and indorse thereon the names of the witnesses known to him at the time of filing the same; and at such time before the trial of any case as the court may, by rule or otherwise, prescribe, he shall indorse thereon the names of such other witnesses as shall then be known to him; and said court shall possess and may exercise the same powers and jurisdiction to hear, try, and determine all such prosecutions upon information, to issue writs and process, and do all other acts therein, as it possesses and may exercise in cases of like prosecutions upon indictments.

“Sec. 3. All informations shall be verified by the oath of the prosecuting attorney, complainant, or some other person, and the offenses charged therein shall be stated with the same fullness and precision in matters of substance as is required in indictments in like cases.”

The fourteenth amendment to the constitution of the United States was not adopted until after several states of the Union had made pro-

vision for prosecuting public offenses by information, and practically dispensing with the grand jury system, and after the validity of such constitutional and statutory provisions had been affirmed by decisions of the courts of the respective states in which they were adopted. If an indictment or presentment of a grand jury is essential to "due process of law," within the meaning of that phrase as used in the fourteenth amendment, then all of the states, including those above referred to, which had theretofore enacted laws providing for prosecutions by information, are alike prohibited from proceeding in that manner against persons charged with violations of state law; and yet, in the 25 years since the adoption of this amendment, it has not been adjudged in a single case by any court that it has annulled or abrogated the laws providing for that mode of proceeding. Since the adoption of the amendment, the state of California has changed its procedure in criminal cases so as to allow prosecutions by information; and in the case of *Hurtado v. People*, 110 U. S. 516, 4 Sup. Ct. Rep. 111, 295, the question whether a person convicted in a proceeding by information in that state was deprived of liberty without "due process of law," in violation of the fourteenth amendment, was directly passed upon by the supreme court of the United States, and, in an able opinion exhaustive of the learning upon the subject, the constitutionality of the California law was affirmed by that court. That decision is conclusive. Since it was rendered hundreds of men have been proceeded against by information, and punished, and it is too late now to question the validity or constitutionality of state laws authorizing prosecutions for local offenses by information, or to longer maintain that an indictment by a grand jury is essential to "due process of law."

In behalf of the petitioner, it has been conceded that the decision of the supreme court referred to settles the law as far as the court passed upon and directly decided the questions involved in this case; and it is not contended that the petitioner's imprisonment is in violation of the constitution of the United States, merely because no indictment by a grand jury has been preferred against him, but his contention is that the law of this state authorizing prosecutions by information is invalid for the reason that it authorizes the prosecuting attorney to institute a prosecution for a criminal offense without any preliminary hearing or investigation or a finding of probable cause. For this reason it is said that the law gives arbitrary and despotic power to the prosecuting officer, and is essentially different from the law of California which was passed upon by the supreme court, and objectionable for lack of the very elements of the California law which the supreme court in its opinion was careful to make mention of, as matter necessary to support the decision. Arbitrary power in a single individual to bring a citizen into court, and place him on trial for crime, may be so contrary to the spirit of the fourteenth amendment as to be considered obnoxious to the provisions of that article. This court will not affirm to the contrary in the decision of this case,—it is unnecessary to do so; and yet the court is not called upon and does not feel authorized to declare the information law of this state

to be totally void. The act in question gives power to the prosecuting attorney to file informations in cases in which persons have been accused of crime before a committing magistrate, and held for trial after due preliminary examination, and admitted to bail or held in custody while awaiting trial. Other laws in force in this state provide for magistrates, with authority to hold preliminary examinations, and admit accused persons to bail, or commit them to custody, so that there is in the judicial system created by laws of the state ample provision made for proceedings by information after a preliminary hearing and the finding by a judicial officer of probable cause; just such a proceeding as the supreme court in the case of *Hurtado v. People*, has declared to be constitutional and valid. If the state has attempted, in a distinct and severable clause of one of its statutes, to grant such arbitrary and unlimited power to a prosecuting officer as is forbidden by any constitutional provision, the valid and constitutional laws of the state are not for that reason to be set aside or declared to be unconstitutional. It is as much the duty of the court to uphold and maintain the laws and authority of the state, so far as they are valid and constitutional, as it is to afford protection to every citizen against oppression by the exercise of power prohibited by the constitution. The information law of this state is so framed that it, distinctly and in separate clauses, grants specific and clearly defined powers to the prosecuting attorney, some of which, as already shown, are clearly and unquestionably not in violation of the constitution. The parts of the act containing these objectionable provisions will not be impaired or in any way affected by wholly eliminating or disregarding the other parts to which objection is made. Therefore it is the plain duty of the court to preserve and abide by so much of this act as it finds to be good and valid, regardless of the questions raised as to the validity of the other provisions which it contains. The law being at least in part valid, the petitioner cannot be set at liberty by writ of *habeas corpus*, unless he brings his case before the court so as to show affirmatively that he has not been proceeded against under the provisions of that part of the law which is certainly constitutional and valid. He has not done so, and the first of the three grounds alleged for granting the writ is therefore found to be insufficient.

It is my opinion that the second and third grounds may both be disposed of by reference to section 753, Rev. St. U. S., which forbids the granting of the writ by the courts of the United States except for causes therein specifically enumerated, and which do not include either of the causes herein alleged, except the first, which has already been passed upon; but, even if this were not so, the court would still be constrained to deny the writ, for the reason that the causes are insufficient, in any view of the case. The person who filed the information against the petitioner was acting under color of authority granted him by the laws of the state, and he was recognized by the court in which his duties are to be performed as the incumbent of the office of prosecuting attorney. It is a fundamental principle that the official actions of a *de facto* officer are not subject to collateral attack by reason of any question as to the right

of the incumbent to the office. This is not controverted by the petitioner. It is said, however, that there cannot be two incumbents of one office at the same time, and the office of prosecuting attorney at the time this information was filed was actually filled by a person other than the one who signed the information. The facts, however, are otherwise. Mr. Ridpath was never elected or appointed to the office of prosecuting attorney for Spokane county. The office formerly held by him was that of prosecuting attorney for the district composed of the counties of Spokane and Stevens, and was created by the laws of the territory of Washington. He was a district officer, and not a county officer. The state constitution, in section 5 of article 11, creates the office of prosecuting attorney in each county, and there is under the state laws no such district office as that formerly held by Mr. Ridpath. Section 14, art. 17, of the state constitution, provides that—

“All district, county, and precinct officers, who may be in office at the time of the adoption of this constitution, * * * shall hold their respective offices until the second Monday in January, A. D. 1891, and until such time as their successors may be elected and qualified, in accordance with the provisions of this constitution.”

By virtue of this section, Mr. Ridpath continued to perform his duties as a district prosecuting attorney until the first Monday of January, 1891. He could not thereafter continue to perform the functions of such district officer until the election and qualification of his successor, for the reason that the office which he held then ceased to exist, so he could not have a successor in that office. Neither could he, by virtue of having once filled a district office created by the laws of the territory, lawfully become the incumbent of a county office created by the constitution of the state. Therefore he was not, at the time this information was filed, the *de jure* prosecuting attorney of Spokane county. He has not been since the first Monday of January, 1891, recognized by the courts or officers of the state government as a prosecuting attorney, nor has he performed the duties of the office as a *de facto* officer.

The petitioner's right to a *supersedeas* and admission to bail, pending a review of his case by the supreme court of the state, depends upon the laws of the state, and, if he is by the laws of the state entitled to be admitted to bail, deprivation of such right, in contravention of such laws, affords no ground for the exertion of power by a national court. The national courts have no power to relieve a citizen from injustice resulting from maladministration of state laws or from errors of the state courts. Upon the courts and judicial officers of the state he must depend for securing such rights as the laws of the state give him. Upon due consideration of the whole case, it is my opinion that there is no ground to justify the court in granting the writ of *habeas corpus*, and it is therefore ordered that the petitioner be remanded to the custody of the sheriff of Spokane county.

SMITH & EGGE MANUF'G CO. v. BRIDGEPORT CHAIN CO.

(Circuit Court, D. Connecticut. May 25, 1891.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT.

Claim 1 of letters patent No. 202,528, dated April 16, 1878, to Frederick Egge, for an improvement for manufacturing chain from sheet-metal by machinery, by forming the partially shaped flat links from a plate, bringing these links (flatwise or with their broad surfaces horizontal) to the point at which they are to be connected with each other, successively threading the separate flat links through the eyes of the previously bent and partially formed links, the broad surfaces of which are vertical or at right angles to the sides of the flat links, etc., is not infringed by letters patent No. 368,275, dated August 16, 1887, to Richard A. Bruel, in which the element of an automatic feed or delivery of the blanks or flat links to the receiver which conducts them to the threading device, is wanting.

2. SAME.

The turning device of the Egge machine, consisting of two auxiliary springs, against which the blanks strike, whereby they are partially turned, as the threading is being performed, the turn being completed by the feeding forward of the chain which pulls or draws the broad side of the link blank against the front of the bending cavity, is infringed by the Bruel machine, in which the turn is entirely performed by the pull or feeding forward of the chain, dispensing with the two springs.

In Equity. On bill for infringement.

Frederick W. Smith, Jr., for plaintiff.

Morris W. Seymour, for defendant.

SHIPMAN, J. This is a bill in equity, based upon the alleged infringement of letters patent No. 202,528, dated April 16, 1878, to Frederick Egge, assignor to the plaintiff, for improvements in apparatus for manufacturing sheet-metal chains. Sheet-metal chains are composed of links, each one of which is cut from sheet-metal. The blank of each link consists of a narrow central body having an eye at each end, the width of the eye being somewhat greater than the width of the body. These blanks are doubled at the center of the body so as to bring the two eyes together, the eyes forming one end of a link, while the loops produced by doubling forms the other end. Each successive link is threaded through the eyes in the previously bent link. Previous to the Egge patent, chains of this general class had been made exclusively by hand, or partly by hand and partly by machinery. In the machines described in the Bellaire and Poirrot French patent, dated April 15, 1869, and in the English patent of January 1, 1870, to Clark, as a communication from David, of Paris, the blanks were bent into a U shape by machinery and were threaded by hand. In the English patent, the bent blanks, after having been threaded by hand, are closed by machinery. The French patent to David, dated March 26, 1875, describes a machine in which each straight blank is threaded by hand through the eyes of a previously bent link. Each link is bent by machinery. The E. Weissenborn United States patent of December 11, 1855, describes a hand machine, so far as threading is concerned. The links of the machine are of a different character from those of the patent in suit. The French patent to Murat, dated June 30, 1871, is for making a flat wire chain in which the links are bent by machinery, and are supposed to be automa-

ically interlooped with each other. Nothing can be learned from the specification as to the mechanical means by which the interlooping is performed. From the drawings the expert for the defendant believes that the eyes of the already doubled blank are mechanically laterally enlarged to receive the next flat blank in a plane parallel with the plane of the previously bent link. This method of threading, if it is the method of the machine, would not make chains from ordinary sheet-metal. The metal of the chain must be of so fine a character as not to split when the punch passes through the eye. Ordinary sheet-metal could not endure that operation. The state of the art shows that before the date of the Egge patent no machine existed for automatically both bending, threading, and interlooping the links of chains of any kind of metal, unless it might be done by the Murat machine, which was not designed for and could not manufacture a sheet-metal chain. An automatic machine for the complete construction of sheet-metal chain did not exist until the invention of Egge. His machine consisted of mechanism for blanking out the flat links from a plate, for bringing these links (flatwise or with their broad surfaces horizontal) to the point at which they are to be connected with each other, successively threading the separate flat links through the eyes of previously bent links, (the broad surfaces of which are vertical or at right angles to the sides of the flat links,) turning the flat links, bending them to interloop and unite with previously bent links, and subsequently shaping the links. These successive steps require appropriate mechanism for effecting each step which is fully described in the patent. The machine is an exceedingly useful one, and has effected great economy in, as well as an enlargement of, the manufacture of sheet-metal chains. Such chains are now extensively used, instead of ropes, to hold the weights which are attached to windows. An automatic machine must both bend, thread, and interloop or unite. It was necessary to thread each blank flatwise, and then turn it into such a vertical position that it could be bent and interlooped, and no previous machine had either done this, or had indicated how it might be done. The peculiarity and the novelty of the invention consists in the manner and in the mechanical means by which the links are threaded flatwise and then turned preparatory to bending, whereby all the steps of the manufacture are enabled to be performed automatically and in combination. The turning of the flat blank so that it comes into a vertical plane after it has passed through the eyes of the previously bent link is the most vital part of the invention. The blanking and bending and finishing, separately considered, had been done before, but, by reason of his threading and turning devices, the inventor was enabled to unite in one machine the groups of instrumentalities or the appropriate devices which were adapted to produce in succession each requisite result. The object of the draughtsman of the patent was to make it as broad as possible, and to attempt to cover an art or process, and also methods of threading, turning, and interlooping, irrespective of mechanism, and next the mechanism or combinations of mechanism. The first three of the seventeen claims, and the only ones which are now said to be infringed, are as follows:

"(1) The hereinbefore described improvement in the art of manufacturing chain from sheet-metal by machinery, which improvement consists in forming the partially shaped flat links from a plate, bringing these links (flatwise or with their broad surfaces horizontal) to the point at which they are to be connected with each other, successively threading the separate flat links through the eyes of previously bent and partially formed links, (the broad surfaces of which are vertical or at right angles to the sides of the flat links,) turning the flat links, bending them to interloop and unite them with the previously bent links, and subsequently completely shaping the links and forming the finished chain, substantially as set forth.

"(2) As an improvement in the art of manufacturing chain from sheet-metal by machinery, the hereinbefore described method of automatically adjusting a flat link in a previously bent link preparatory to bending, which consists in feeding forward the flat link endwise, threading it through the eyes of the bent link intersecting its forward line of travel at right angles, and turning it as it is fed along after its forward widened end has passed through said eyes, substantially as set forth.

"(3) As an improvement in the art of manufacturing chain from sheet-metal by machinery, the hereinbefore described method of connecting and uniting the links, which consists in feeding forward the flat and partially shaped links flatwise, or with their broad surfaces horizontal in a path intersected at right angles by that traversed by the previously connected links, threading the flat links successively through the eyes of the previously bent and united links, the broad surfaces of which are vertical and at right angles to the sides of the flat links, giving a partial turn to the flat links, and then bending them at their middles to respectively unite them with the previously bent and united links, substantially as set forth."

In view of the primary character of the machine as a whole, the construction which was adopted in *Morley Mach. Co. v. Lancaster*, 129 U. S. 263, 9 Sup. Ct. Rep. 299, is the proper one for these claims. This construction excludes the idea that the claims are for a result, or for a process or for methods of accomplishing a result, irrespective of the machinery by which the work is accomplished, but they are for sets of mechanism, and are infringed by another machine in which the same sets of mechanism are combined, provided each mechanism, individually considered, is a proper equivalent for the corresponding mechanism in the Egge patent. But, inasmuch as Egge was the first person who produced an automatic machine for the entire manufacture of sheet-metal chain, he is entitled to a liberal construction of those claims which are not for described details. The following language from the decision in the *Morley Case* describes the manner in which the first three claims of the Egge patent are to be considered:

"Those claims are not for a result or effect, irrespective of the means by which the effect is accomplished. It is open to a subsequent inventor to accomplish the same result, if he can, by substantially different means. The effect of the rule before laid down is merely to require that, in determining whether the means employed in the Lancaster machine are substantially the same means as those employed in the Morley machine, the Morley patent is to receive a liberal construction, in view of the fact that he was a pioneer in the construction of an automatic button-sewing machine, and that his patent, especially in view of the character and terms of the four claims in question, is not to be limited to the particular devices or instrumentalities de-

scribed by him, used in the three main elements of his machine, which, combined together, make it up."

The defendant's machine is made under letters patent No. 368,275, dated August 16, 1887, to Richard A. Bruel. Bruel was foreman in the tool-room of the plaintiff, and had special charge of its chain machinery. He voluntarily left its employment, and, in about three months thereafter, applied for his patent. His machine bears a general likeness to the Egge machine in its various features, contains the same system of instrumentalities in the same groups and order, and, broadly considered, performs the same functions in substantially the same way as the corresponding mechanism in the Egge machine, and with the same result. The differences between the two machines, so far as the first three claims are concerned, are two in number. The defendant's machine, as actually in use, has an ordinary press for cutting the blanks, which are then delivered by hand to the receptacle which receives the column of blanks. It is, as used, not strictly an automatic machine for delivering the blanks from the punch to the receiver. There is, I suppose, no difficulty in making the connections automatic, but the Egge patent is for an automatic machine in the various steps of the manufacture, and the operations were designed to be connected and continuous. Inasmuch as the defendant's machine, as used, has not an automatic delivery of the blanks, there is not an infringement of the first claim. The turning mechanism of the two machines differs in the following respect: In the Egge machine there are two auxiliary springs, against which the blanks strike, whereby they are partially turned, as the threading is being performed; then the turning is completed by the feeding forward of the chain, which pulls or draws the broad side of the link blank against the front of the bending cavity. In the defendant's machine the turning is entirely performed by the pull or the feeding forward of the chain. Bruel dispensed with the two springs, and relied entirely upon the Egge means for completing the turn. The phraseology of the second claim is "turning it as it is fed along after its forward widened end has passed through said eyes." If this claim is confined to the springs which partially turn the blank as it is being threaded, then the defendant does not infringe. I think that the mechanism for turning which is included in this claim includes that which completely turns the blank, as it is being brought along, into the position for bending, and consequently the defendant's machine is an infringement of the second claim. The third claim includes mechanism for "giving a partial turn to the flat links" after they had been threaded. The Bruel machine omits part of these devices, and retains the residue. As this claim does not require that all the specific devices for turning should be necessarily included in it, the defendant infringes this as well as the preceding claim. Let there be a decree against infringement of the second and third claims, and for an accounting.

DIEFENTHAL *et al.* v. HAMBURG-AMERIKANISCHE PACKETFAHRT ACTIEN-GESELLSCHAFT.

(District Court, E. D. Louisiana. April 20, 1891.)

ADMIRALTY—JURISDICTION—MARITIME CONTRACTS.

A contract with the owners to supply their vessels for the period of a year with all the provisions they might require while in the port where the supplies are to be furnished, is not a maritime contract, and a court of admiralty has no jurisdiction of a suit for damages for its breach by the ship-owners.

In Admiralty.

J. R. Beckwith and *Jos. N. Wolfson*, for libelants.

Farrar, Jonas & Kruttschnitt, for respondents.

BILLINGS, J. This is a suit in admiralty, brought by process *in personam*. The question submitted is presented by a plea to the jurisdiction. The suit is brought to recover damages for a breach of a contract. The question, therefore, is whether the contract which has been violated is maritime. The contract is fully described in the libel. The respondents were owners of a number of steamers running between New Orleans and various European ports. They made a contract, whereby it was agreed that the libelants would, for the period of one year, furnish and deliver to the respondents on board of their several vessels all the meat, eggs, and vegetables required as supplies for the passengers and crews of said boats at fixed prices. The libel further propounds that the number of respondents' boats departing within the year from New Orleans was 43; that the execution of the contract was entered upon, and two boats had been furnished with supplies, which, at the agreed prices at that season of the year, caused a loss to the libelants; and that the respondents, refusing to carry out thereafter the said contract, have caused a loss to the libelants of the full sum of \$10,000. The contract, therefore, was a contract whereby the libelants agreed to sell and deliver, and the respondents, who were owners of vessels engaged in foreign commerce, agreed to purchase and receive, at enumerated prices, the supplies which such vessels might require at the port of New Orleans for the period of one year. In *Insurance Co. v. Dunham*, 11 Wall. 1, at page 26, the court define a maritime contract as one having reference to maritime service or maritime transactions. At page 31, the court says:

"Perhaps the best criterion of the maritime character of a contract is the system of law from which it arises, and from which it is governed."

In *The Paola R.*, 32 Fed. Rep. 174, the circuit court held, confirming the judgment of the district court, that the compressing of cotton, though done for the purpose of condensing the cotton as a preparation for the affreightment by reducing its bulk, was not a maritime contract. So, too, in this circuit it is held that the services of the stevedore are not maritime. In *Pritchard v. The Horatia*, Bee, 167, Judge HOPKINSON held that the court of admiralty had no jurisdiction when the transaction was on land, and the contract was for repairs, the vessel not being on a voy-

age, and the owners being represented by a consignee who had ample funds. In *The City of London*, 1 W. Rob. 91, Dr. LUSHINGTON says:

"If a seaman has been engaged, and the owners abandon the voyage before it has been entered upon, it is urged that he must seek his remedy at common law by an action on the case. To this position I am disposed to assent. The question would be a question of *quantum meruit*; and if this court was to take upon itself to adjudicate upon the question of *quantum* of damage sustained, it would be usurping the functions of a jury, to whose consideration the question is more particularly referable."

In *Minturn v. Maynard*, 17 How. 477, the court say:

"The court very properly dismissed the libel for want of jurisdiction. There is nothing in the nature of a maritime contract in the case. The libel shows nothing but a demand for a balance of accounts between agent and principal, for which an action of *assumpsit*, in a common-law court, is the proper remedy. That the money advanced and paid for respondents was, in whole or in part, to pay bills due by a steam-boat for repairs or supplies, will not make the transaction maritime, or give the libellant a remedy in admiralty."

In *Vandewater v. Mills*, 19 How., at page 92, the court say:

"This is nothing more than an agreement for a special and limited partnership in the business of transporting freight and passengers between New York and San Francisco, and the mere fact that the transportation is by sea, and not by land, will not be sufficient to give the court of admiralty jurisdiction of an action for a breach of contract. It is not one of those to which the peculiar principles or remedies given by the maritime law have any special application, and is the fit subject for the jurisdiction of the common-law courts."

In *Ferry Co. v. Beers*, 20 How. 401, the court say:

"The admiralty jurisdiction in cases of contract depends primarily upon the nature of the contract, and is limited to contracts, claims, and services purely maritime, and touching rights and duties appertaining to commerce and navigation. 1 Conk. M. L. 19."

In *The Steamer St. Lawrence*, 1 Black, 527, the court say:

"And the reports of the decisions of this court will show that the subject has often been before it, and carefully considered, without being able to fix with precision its definite boundaries; * * * and this boundary is to be ascertained by a reasonable and just construction of the words used in the constitution, taken in connection with the whole instrument, and the purposes for which admiralty and maritime jurisdiction was granted to the federal government."

In *The Paola R.*, 32 Fed. Rep. 174, Judge PARDEE approved and followed *Leland v. The Medora*, 2 Woodb. & M. 109, where it was laid down that—

"Admiralty jurisdiction in contracts relates to the subject-matter. This means the subject-matter of the contract,—that is, the thing to be done being maritime, and not the object of a contract, as a ship."

The qualification adopted by the supreme court in *Ferry Co. v. Beers*, *supra*, from Mr. Conkling, draws the line of admiralty jurisdiction, so far as this contract is concerned, and includes only those "touching rights and duties appertaining to commerce and navigation." See, also, *Cox v.*

Murray, 1 Abb. Adm. 342, where Judge BETTS, quoting numerous authorities, says:

"Undertakings which are merely personal in their character, or which are preliminary or leading to maritime contracts, do not seem ever to have been recognized as within the admiralty jurisdiction."

This passage is quoted with approbation by Justice CLIFFORD in *Cunningham v. Hall*, 1 Cliff. 54. It is to be further noticed that Judge BETTS, at page 342, says that the strong current of authorities is against the jurisdiction of the admiralty tribunals over suits for "the violation of agreements to supply a vessel with stores." In *Plummer v. Webb*, 4 Mason, 388, Judge STORY says:

"In cases of a mixed nature it is not a sufficient foundation for admiralty jurisdiction that there are involved some ingredients of a maritime nature. The substance of the whole contract must be maritime."

This is a contract relating to the furnishing of supplies. But it is, after all, not a contract where, until the supplies are actually furnished, the contractors relied upon any ship, but upon the other contracting party. "The proximate and not the remote cause is looked to as the source of jurisdiction in admiralty." Dunl. Adm. Pr. mag. p. 44. It was not a contract for supplies for a ship, except that the wants of the 43 ships were to furnish the measure of the extent of what was to be furnished,—*i. e.*, the contract related to navigation only so far as concerned amounts. For all other purposes it was a general contract for the sale and delivery of provisions, and, according to the distinction which has been made in the cases above referred to both in England and in this country, though having ulterior reference to navigation, is still one for the refusal to carry out which, by the defendants, the plaintiffs must have their remedy in the common-law courts, and not in the court of admiralty. It need not be held that there could not be an admiralty suit in some cases where there is no maritime lien. But where the contract is for supplies, to bring it within the admiralty jurisdiction it must come within the reason that brings material-men within the dominion of admiralty courts,—*i. e.*, it must appear that the necessities or conveniences of ships in ports remote from home ports require that a credit should be given and a debt created which, though arising on land, are distinctively maritime, because necessary to maritime commerce as conducted by ships. It must begin and end in the necessities of a particular vessel for her own voyage. Where owners group together a large number of vessels, and make annual contracts for their supplies, the admiralty jurisdiction does not include them, because the reason for it does not. The objection to the jurisdiction, which it seems to me must prevail, is that this contract, though relating remotely to navigation and maritime commerce, is separated so far from them that it did not spring from the necessities of navigation, and is not within the considerations which make it essentially and distinctively maritime, and, though in part executed, is not, with reference to damages for its further non-execution, within the jurisdiction of the courts of admiralty. The exception to the jurisdiction must be maintained.

GRIMSLEY v. HANKINS.¹

(District Court, S. D. Alabama. April 30, 1991.)

1. ADMIRALTY—JURISDICTION—INJURY FROM STEAM-BOAT EXPLOSION.

Injury to a seaman from explosion of steam-tug boiler, due to negligence of the owner of the vessel, is actionable in admiralty.

2. ABATEMENT—INJURY TO MINOR.

Death of minor from such injury survives to his father, or to his mother, if the father be dead, under Code Ala. 1886, § 2588.

3. STEAM-BOAT EXPLOSION—PRIMA FACIE EVIDENCE OF NEGLIGENCE.

A steam-boat boiler explosion causing injuries is *prima facie* evidence of negligence on the part of owners and officers; but this may be rebutted by showing due diligence in supplying suitable machinery, and officers and seamen of ordinary competency.

4. SAME—NEGLIGENCE OF FELLOW-SERVANTS—LIABILITY—COMMON EMPLOYER.

If one person is injured by the negligence of another, engaged in the same employment, the employer is not liable if he has not been negligent in their selection, and has provided means and appliances adequate for their work.

5. STEAM-BOAT EMPLOYEES—COOK AND ENGINEER—FELLOW-SERVANTS.

A cook and engineer on a river steam-boat, exercising no authority the one over the other, and both subject to the master, are fellow-servants, and the cook cannot recover of the owner for damages caused by the engineer's negligence.

In Admiralty. Libel *in personam*.

Smith & Gaynor, for libellant.

McIntosh & Rich, for defendant.

TOULMIN, J. The libellant sues to recover damages alleged to have been sustained by the death of her minor son, William L. Grimsley, which was occasioned by the explosion of the boiler of a steam-tug owned by the defendant, and on which said minor was lawfully employed, as averred in the libel. The husband of libellant and father of said minor, who was, at the time, the engineer on said steamer, also lost his life by said explosion. Libellant avers her right to maintain this action, and that she sues under and by virtue of a statute of the state of Alabama, which provides that, when the death of a minor child is caused by the wrongful act or omission or negligence of any person or persons, his or their servants or agents, the mother, in case of the death of the father, may maintain an action of damages therefor. Code Ala. § 2588.

The libel avers that the explosion was caused by a defect in the works, machinery, or plant connected with and used in running and operating the steamer, and that said defect existed by the negligence of defendant, his servants and agents; and the libel further avers that the explosion, by which said minor came to his death, was caused by the negligence of the engineer in charge of the machinery of said steamer. There are exceptions to the libel on the ground that it sets forth no admiralty or maritime cause of action, and alleges no fact which can give this court jurisdiction. An answer is also filed, which, in substance and effect, takes issue on every material allegation of the libel. The exceptions are overruled. See *The E. B. Ward*, 17 Fed. Rep. 456; *The Garland*, 5 Fed. Rep. 924; *Holmes v. Railway Co.*, Id. 75.

¹Reported by Peter J. Hamilton, Esq., of the Mobile bar.

I find from the evidence that the death of William L. Grimsley was caused by the explosion of the boiler of the steam-tug on which he was employed as cook; that he was so employed with the knowledge and consent of his father, with whom he lived, and who was the engineer on the tug at the time of the said employment, and at the time of the unfortunate accident, and had been such engineer for some time previous thereto; that the tug, at the time of the explosion, was going up the Mobile river, to engage in her regular occupation of towing; and that there were on board the master and pilot, engineer, cook, and fireman. "The explosion of a boiler of a steam-boat causing injuries is *prima facie* evidence of negligence on the part of owners and officers;" and it devolves on the owner to rebut the presumption of negligence arising from the fact of explosion. *The Reliance*, 2 Fed. Rep. 249; *Posey v. Scoville*, 10 Fed. Rep. 140; *Rose v. Transportation Co.*, 11 Fed. Rep. 438. The presumption of negligence may be rebutted in this case by its being shown that the defendant used proper diligence in furnishing and maintaining in repair suitable machinery, reasonably safe, with which to operate the tug, and in the employment of officers and servants, who had ordinary fitness and competency for the performance of their duties. The defendant did not covenant to furnish machinery and appliances that were safe beyond a contingency, nor did he warrant the competency of fellow-servants. But he was required to use due care and reasonable diligence for the protection of his employes. "The law devolves on employers the duty to use ordinary care and diligence to furnish safe and suitable instrumentalities and appliances for the use of the employes in their business, and to keep the ways, works, machinery, and plant free from defects which are dangerous, so as not to expose the employes to unnecessary perils,—such care and diligence as men of ordinary prudence would exercise under like circumstances." *Wilson v. Railroad Co.*, 85 Ala. 269, 4 South. Rep. 701; *Railroad Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184; *Garrahy v. Railroad Co.*, 25 Fed. Rep. 258, and notes.

The proof shows that, within a year prior to the explosion, the boiler, machinery, and appliances were inspected, approved, and licensed for one year by the government inspectors. But there is evidence which tends to show that about two weeks before the explosion there was some derangement of the appliances for supplying the boiler with water. It appears that the tug was furnished with a suitable pump, and with an injector to supply water to the boiler, and that the derangement or disorder was particularly confined to the injector; that the pump was at the time detached, but could be adjusted in a few minutes, and put to work. It further appears that it was the duty of the engineer to make the attachment of the pump when necessary, and that it was not unusual for steamers to have their pumps detached, as this one was, when they were furnished with an injector. The proof, however, shows that, within three days prior to the explosion, the boiler, pumps, and all other machinery on the boat were examined, thoroughly cleaned, and put in order, by a competent engineer, who was the local agent of the owner in

the management of the tug, and who the night before the explosion made a trip with her from this city across the bay and back with a barge in tow, (a distance of some 25 miles,) and that every thing worked well and satisfactorily. On the next day the tug, with Engineer Grimsley in charge of the engine, left this city, and, when about 25 miles therefrom, while ascending the river, the explosion occurred, causing the death of said engineer and cook, as already stated, but left surviving the master and fireman. They could give no account of the cause of the explosion. The master testifies that, so far as he knows or could judge, the machinery was all right, and working satisfactorily up to the time of the explosion. He heard nothing to the contrary. The proof further shows that the engineer was competent and a person of ordinary fitness for the position; that he had his license as engineer, and that the same had been renewed for seven successive years. My opinion, therefore, is that the defendant exercised due care in selecting a proper and competent engineer, and furnished him with suitable means and resources for the work in which he was engaged. On the evidence in the case, the explosion cannot be accounted for on any other theory than that of the negligence of the engineer in failing to keep a sufficient supply of water in the boiler. If, then, the death of the cook was occasioned by the negligence of the engineer, is their common employer liable therefor? Where several persons are engaged in the same employment, and one of them is injured by the negligence of another, the employer is not liable, provided he is not negligent in their selection, or in providing adequate materials and means for the work in which they are engaged; and, if it be admitted that the cook came to his death through the negligence of the engineer, yet, if this officer was his fellow-servant, the defendant is exempt from liability. Whit. Smith, Neg. pp. 141-144, notes.

There was nothing in the employment and service of the engineer which made him any more the representative of the defendant than the employment and service of the cook made him such representative. The engineer was not employed to do any of the duties of the master, and the cook was not under his superintendence, or required to obey his directions, so far as the evidence shows. They were both in the same common employment. It has been held that, where the master is on board, the subordinate officers and seamen are fellow-servants. *The Egyptian Monarch*, 36 Fed. Rep. 776; *The Queen*, 40 Fed. Rep. 694. That the cook and the engineer were engaged in the same common employment, and were fellow-servants, see *The City of Alexandria*, 17 Fed. Rep. 390, where it is held that a cook and steward are co-employees. See, also, *Quinn v. Lighterage Co.*, 23 Fed. Rep. 363. "The porter and the carpenter are fellow-servants with the stewardess of a steamer, and the owner is not liable to her for any damages occasioned by the negligence of either the porter or the carpenter." *Steam-Ship Co. v. Merchant*, 133 U. S. 375, 10 Sup. Ct. Rep. 397. "The firemen, brakemen, porters, and the engineer are fellow-servants." *Railroad Co. v. Ross*, *supra*; Whit. Smith, Neg. pp. 141, 151, 152, and notes.

Applying the well-established rules of law, of which I have spoken, to the proof, my conclusion is that the libellant is not entitled to recover, and that the libel should be dismissed; and it is so ordered.

THE DIXIE.¹

ISHAM *et al.* v. A CARGO OF PINE PILES.

VANDERBILT v. THE DIXIE.

(District Court, S. D. New York. June 2, 1891.)

1. CHARTER-PARTY—BILL OF LADING, "MORE OR LESS"—CONSTRUCTION—DRAFTS.

The barge D. was chartered to load a cargo of piles to a specified draught. The shipper only kept tally of the loading, and presented to the owner a bill of lading for 400 piles, "more or less," which he signed, adding, "as per charter-party." The shipper mailed the bill of lading to the consignee, and on the same day drew a sight draft for \$350, writing him that he had shipped 400 piles, and the draft was paid. The vessel loaded to the agreed draught, but with only 310 piles. *Held*, that the words "more or less" in the bill of lading, and the reference to the charter-party, absolved the ship from liability for the 90 piles short.

2. DELIVERY OF FREIGHT—SECURITY—DEMURRAGE.

For cargo deliverable in the water along-side, security for the payment of freight may be demanded, or *pro rata* payment as the delivery progresses; and, on an agreement for "quick dispatch" in unloading, *held*, demurrage allowable for delay in giving security.

In Admiralty.

Libel for \$1,000 freight, as per charter. Cross-libel for breach of charter and bill of lading. On February 13, 1891, Mr. Isham, on behalf of the owners of the barge Dixie, chartered her to W. L. Doughtrey to carry a full cargo of pine piles from Suffolk, Va., to Jersey City, N. J. The charter provided that—

"The cargo should be loaded and discharged free to shipper for the lump sum of \$1,000, vessel to load 10 feet of water aft, and 8½ feet forward, if the piles would load her down to this depth. The cargo to be received and delivered along-side, within reach of the vessel's tackle. Eight working hours to load in. Demurrage \$25 per day. Quick dispatch in discharging."

Mr. Doughtrey had been supplying piles to Messrs. Vanderbilt & Hopkins of this city, and had contracted to sell them, among others, 400 piles of a larger size, and 200 of a smaller size, with the right to draw drafts, to be annexed to the shipping railroad receipts, to the amount of \$3.50 per pile so shipped. The Dixie was chartered for the purpose of transporting as many of these piles as she could carry. In the negotiations previous to charter the owners had refused to load any definite number. The loading of the cargo being nearly completed, on the 28th of February Mr. Isham, at Doughtrey's request, signed a bill of lading dated on that day for "300 pine piles, more or less, under deck, and 100

¹Reported by Edward G. Benedict, Esq., of the New York bar.

piles, more or less, on deck,—total, 400 piles, more or less,”—deliverable at Jersey City to Vanderbilt & Hopkins, they “paying freight for the said piles at the rate of \$1,000 for piles delivered, as per charter-party.” On the same day Doughtrey drew upon Vanderbilt & Hopkins at sight for \$350 “for ad [vance] on 100 piles.” He had previously drawn upon them two drafts, one for \$507.50, and another for \$511, on the 16th and 24th of February, respectively, with railroad receipts to him at Suffolk attached. The bill of lading of February 28th was not attached to the draft of that date, but was forwarded to Vanderbilt & Hopkins; and the draft was paid, as they claim, upon the faith that 400 piles had been shipped upon the barge. On delivery the cargo was found to consist of but 310 piles, and the consignees in their answer and in their cross-libel claim to recoup against the lump sum of \$1,000, freight, their damages for the non-delivery of the missing 90 piles. They subsequently obtained from Doughtrey the 90 piles, but they claim as damages the expenses of transporting them from Suffolk, as well as the necessary expenses of a man sent to obtain them, and also certain consequential damages arising from the delay in supplying these piles to a Mr. Gillies, to whom they had sold them, and who, in order to fulfill his own contract, was obliged, as he says, to purchase the missing 90 piles at a higher price, in consequence of which he had claimed damages against Vanderbilt & Hopkins. Four days’ demurrage was claimed for the barge for detention at New York before beginning to unload.

Wing, Shoudy & Putnam, for the Dixie.

Holmes & Adams, for cargo of pine piles.

BROWN, J. 1. The evidence shows that the barge took on a full cargo at Suffolk, both below deck and on deck,—more, in fact, than was altogether prudent at that season of the year,—and she delivered all that she received. Her charter obligation was therefore completely performed, and the lump sum of \$1,000 freight was fully earned.

2. Upon the bill of lading I cannot find either that the vessel became responsible to Vanderbilt & Hopkins for 400 piles, or for any more than she had on board, nor that any legal damages are shown to have resulted, even if she had been liable for that full number. Not only does the bill of lading use the words “more or less” in connection with the numbers specified under deck and on deck, but the whole bill of lading was further conditioned by the words, “as per charter-party,” inserted in writing as an express qualification of the whole. Neither the owner nor the master of the barge kept any tally of the number of piles loaded. They had no interest in the number. The charter was for a lump sum, and they had agreed only to take a full cargo. The tally was kept by Mr. Doughtrey. The bill of lading was signed for his convenience in the manner he chose to make it out, but with such qualifications as limited its provisions to the performance of the charter-party. I am satisfied, upon the evidence, that this was in accordance with the practice in that business at that place. Even if there were no such custom, or if the consignees had no knowledge of it, the qualification of “more or less” in

the bill of lading was alone sufficient to apprise them that they could not count upon the precise number of 400 piles; while the express reference to the charter-party was sufficient to put them on their guard, and would have shown that no definite number was contracted to be shipped, but only a full load, whatever the number might be. They, therefore, as much as Mr. Doughtrey, took the risk of the result of the loading. These provisions together were equivalent to the language often found in other bills of lading, "weight or number unknown," or "not accountable for weight or number," under which the vessel is only answerable for the delivery of what she has received on board. *The Querini Stampalia*, 19 Fed. Rep. 123, and cases there cited; *McKay v. Ennis*, 37 Fed. Rep. 229-232; *The Pietro G.*, 39 Fed. Rep. 366, 40 Fed. Rep. 497.

As respects any damage suffered by the consignee, the evidence shows that the draft of February 28th was on its face drawn as an "ad [vance] on 100 piles" only. The previous drafts were accompanied by railroad receipts, a part of which did not specify the number of piles. Mr. Doughtrey's letter of February 28th, apprising Vanderbilt & Hopkins of the last draft, and stating that he "drew for 100 piles;" that he annexed "the Dixie's bill of lading for 400 piles," which was plainly an incorrect statement; and that "other piles would be coming in all next week," and urging them not to fail to accept the draft,—would seem to have been the more probable ground of acceptance of the last draft than any reliance on the bill of lading, which did not purport to give the full number of 400 piles. The piles being subsequently received, there was no loss of them. The cost of bringing them to New York would constitute no claim of damage against the barge, because she never was under any obligation to bring more than she did bring, and, in any event, Vanderbilt & Hopkins would be obliged to pay the freight on delivery, besides the \$3.50 per pile. No damage arises from the delay in arrival, because the contract between Vanderbilt & Hopkins and Doughtrey did not bind the latter to delivery of the piles contracted for within any definite period; much less had the Dixie any such contract as to make her liable for any such special damage. The claim of Mr. Gillies is altogether remote.

3. Under the peculiar circumstances of a delivery of a cargo of piles into the water along-side, the vessel was entitled to security for freight before delivery, or else to payments on account while the discharge was proceeding. The delay for which demurrage is claimed arose mostly through the negotiations on this subject. These negotiations by the letter of the counsel first employed presented to the consignee an option, which was only terminated on the day before the discharge began. I allow, therefore, one day's demurrage, and no more, as there was no delay in the discharge afterwards. Decree for the libelants Isham for \$1,025, with interest and costs, and for the dismissal of the cross-libel, with costs.

THE SCOW No. 19.¹

EASTON & AMBOY Co. v. THE SCOW No. 19.

(District Court, S. D. New York. May 18, 1891.)

SALVAGE—DERELICT SCOW—EAST RIVER—DAMAGE TO THIRD BOAT.

About 2 o'clock in the morning of March 25, 1891, those on libellant's tug-boat Mercedes perceived a capsized mud-scow adrift in the East river. With great difficulty, owing to the unwieldy nature of the scow, the tug pushed and guided the scow to the end of pier 10, breaking a hawser in the attempt. The tug then went for aid, and while she was gone the scow broke adrift from the pier, and damaged a schooner. It was afterwards picked up by three tugs belonging to the same owner as the Mercedes, and taken to Jersey City. The value of the scow was \$3,200 to \$4,000. Held, that the owner of the tugs should recover \$600 as salvage, from which should be deducted the amount paid by claimant for the damage to the schooner.

In Admiralty. Suit to recover salvage.

R. D. Benedict, for claimant.

Goodrich, Deady & Goodrich, for libellant.

BROWN, J. About 2 o'clock on the morning of March 25, 1891, as the libellant's boat Mercedes was proceeding down the East river, the capsized mud-scow No. 19 was observed in the East river, drifting towards the drilling machine at Diamond Reef. The pilot of the tug undertook to rescue the scow, but found much difficulty in getting a suitable hold upon it, as the scow was large, heavy, and unwieldy. After pushing it away from Diamond Reef, he at length got a hawser attached to it, but in attempting to tow the scow to Jersey City the hawser broke, and, the flood-tide setting in, and finding himself unable to secure another line to the scow, he succeeded in pushing and guiding it to the outer end of pier 10, East river, where it was temporarily made fast to spiles at about 5 A. M., with the intent to take it afterwards to some other more proper place of mooring. The tug then left to change her crew at 6 A. M., and to give notice to the tug-owners of the need of other tugs. The tug Atlanta accordingly was sent a few hours afterwards to move the scow, but, her pilot finding it too cumbersome, at about 9 A. M. went for additional help, and the tugs Sayre and Kalbfleish, belonging to the same owners, were procured. Before they arrived at pier 10, however, the scow, between 11 and 12 o'clock, A. M., had parted her upper line, either through the action of the ebb-tide or from the effects of the swells of passing steamers, which are not shown, however, to have been more than usual there; so that in swinging around with the ebb-tide to the southward she damaged the sloop Vail, moored near her, in the sum of \$267.93, which the owners of the scow shortly after paid. The scow floated down near Governor's island, where she was picked up by the three tugs above named; but, as they found it difficult to cross the North river tide, they took her to pier 3, North river, which was reached at about 7 P. M. of

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

the same day. The next morning the scow was towed to the Morris canal basin at Jersey City, and afterwards to Gowanus, and the above libel thereupon filed for salvage compensation.

The most important elements in the case are: (1) That the scow was apparently derelict, floating down the harbor in the night-time, and liable to do serious damage, not only to herself, but specially to any other vessels that she might encounter; (2) the great difficulty in handling her. If the service was without any serious danger to the tugs, it was at least laborious, and four tugs, to the value of \$60,000, were engaged in the service. The mooring of the vessel at pier 10 was evidently not considered by the salvors as the close of their services. The scow was pushed in there because it seemed to be the best place in the immediate vicinity for temporary mooring. I think the evidence shows that the end of pier 10, a narrow wharf, with spiles for making fast but 22 feet apart, was not a suitable place to moor such a scow, 118 feet long, for any considerable time. Evidently that was not designed. It was a question of judgment, however, for the pilot of the tug, after he had broken his hawser, and could only handle or guide the scow by pushing her, where it was best for him to go. Considering these difficulties, that it was night-time, and that additional dangers might be encountered by attempting to cross to Brooklyn or to go up to the Wallabout, I cannot hold him answerable for negligence in pushing in while he could at pier 10, and tying up there till proper help could be obtained. Instead, however, of procuring speedily the assistance of other tugs, which were near at hand, he elected to wait for the coming of other tugs of the same line, thereby delaying the removal of the scow over six hours. In choosing this course, probably for the purpose of retaining to that one line the whole compensation, I think the salvors took on themselves the risk of their delay in leaving the scow unnecessarily during the ebb-tide at a pier that was evidently of doubtful fitness, and with fastenings that proved insufficient. The salvors were liable, therefore, for the damages to the Vail; and the payment made by the owners of the scow in satisfaction of the Vail's just demand should be credited to the owners in an equitable action like that for salvage.

The value of the scow was from \$3,200 to \$4,000; that of the Mercedes \$18,000. One or two other tugs would have been necessary to remove the scow speedily and safely in the daytime from pier 10 to a proper place of deposit, if she had not broken loose; and such as would naturally have been employed would have been probably worth from \$25,000 to \$36,000 more. The value of the tugs actually employed was about \$60,000.

I do not think the merits of the salvors are diminished by the fact that they did not happen to be experts in dealing with so unusual a subject of salvage as a capsized scow, and did not, therefore, resort to the expert device of cutting holes through the bottom near the keelson, for the purpose of securing a firm and easy attachment of the hawser. Considering all the circumstances, and without charging the scow for the extra services required through her breaking loose from pier 10, I think

that \$600 would be a fair salvage compensation, to which should be added \$21.87 for the loss of the hawser during the first part of the service. This makes \$621.87, from which, deducting the sum of \$267.93 for damages paid by the claimants, there remains \$353.94, for which a decree may be entered, with costs; \$100 of the award to be paid to the captain and crew of the Mercedes, the rest to the owners of the tugs. See *The Anna*, 6 Ben. 166; *A Raft of Spars*, Abb. Adm. 485; *The Lee*, 24 Fed. Rep. 47; *Raft of Piles*, 42 Fed. Rep. 917.

THE ORANGE.¹

THE MARIA HOFFMAN.

MEUS *et al.* v. THE ORANGE AND THE MARIA HOFFMAN.

(District Court, S. D. New York. June 2, 1891.)

1. COLLISION—FOG—FERRY-BOAT—OBSTRUCTION NEAR SLIP.

Ferry-boats being obliged from public necessity to make trips even in dense fog, other boats that unnecessarily obstruct the usual modes of approach to their ferry-slips, under such circumstances, should be held solely in fault for collision, where the ferry-boat is managed with skill and judgment.

2. SAME—CASE STATED—IMPRUDENT NAVIGATION—DANGER SIGNALS.

The ferry-boat O., running from Barclay street to Hoboken, in a dense fog, first made on the Jersey shore the masts of some lighters about 500 feet below her slip, and thence proceeded in the usual manner, not far from the ends of the wharves, towards her slip. The tug M. H. had started from a wharf on the Jersey shore about a mile above, with the barge C. on her starboard side, in the fog, and, after twice hauling up at intermediate wharves on account of the density of the fog, put into pier 3, about 300 feet below the ferry-slip, a few minutes before the O. came along. The M. H. might have gone inside of the slip above, but made fast at the end of pier 3, with her bow loose, and angling outward two or three points, and in that position the O. ran upon the barge, which was visible only 100 or 200 feet before she was struck. No signals were given by the M. H., except danger signals, too late after the ferry-boat was seen. *Held*, that the tug, and not the ferry-boat, was in fault for unnecessary and imprudent navigation in dense fog, for not going into the slip, for taking a dangerous position at the end of the pier, and for not giving warning signals.

In Admiralty. Damages for collision.

Sydney Chubb, for libelants.

Leon Abbett, for the Orange.

Wilcox, Adams & Macklin, for the Maria Hoffman.

BROWN, J. At about 10 minutes past 3 o'clock in the afternoon of January 2, 1891, as the ferry-boat Orange was making one of her usual trips from Barclay street, N. Y., to her ferry-slip at Hoboken, in a dense fog, on the ebb-tide, when about 300 feet below the ferry-slip she came in collision with the libelants' barge Clearfield, which was lying near the end of pier 3, causing damage, for which the above libel was filed. The claim-

¹Reported by Edward G. Benedict, Esq., of the New York bar.

ants of the ferry-boat thereupon, upon petition under rule 59, brought in the tug *Maria Hoffman* also as defendant, charging the latter with fault in bringing the *Clearfield* into that position in the fog, and in failing to give proper signals of her presence. The evidence shows that the fog had been pretty dense all the afternoon; that an hour or two previous the tug had taken the *Clearfield* in tow on her starboard side from the *Thingvalla's* dock, a little distance above the ferry, bound for pier 6, down the river; that, after proceeding a short distance near the Jersey shore, the fog shut down so thick that she put in along-side the *Ham-burg* dock, where she lay with the barge for a considerable time; that afterwards, when the fog lightened a little, she again attempted to make her way further down the Jersey shore, but almost as soon as she had got under way the fog again shut down thick, so that objects could not be seen more than a boat's length ahead; and that she thereupon made pier 3, a little below the ferry, as the first object she could reach, and that the upper end of the barge was made fast to the end of that pier, a few feet below its upper side, by a single line, while the lower end of the barge was left free, angling outward into the river from one to four points, according to the different estimates of the witnesses. About five minutes afterwards the collision happened. The port side of the ferry-boat, about 10 feet from her stem, struck the outer corner of the lower end of the barge, and forced the opposite corner against the pier by a considerable blow, sufficient to break the iron facing upon the ferry-boat, make some indentation in the pier, and cause considerable breaking and twisting of the barge. The ferry-boat was charged with fault in coming up so near to pier 3, and for excessive speed; the tug, for undertaking navigation in such a fog, for assuming a dangerous situation in the way of the ferry-boat, unnecessarily, and for the want of proper danger signals.

The evidence for the ferry-boat shows that after leaving her New York slip the first things seen by her pilot on the Jersey shore were the masts of some lighters in the canal, immediately below pier 4, and about 175 feet below the barge. The fog being lighter above than it was near the water below, no pier-heads and nothing at the wharves could be seen. The pilot thereupon ported his wheel, and proceeded very gently and slowly, either under a slow bell, or with occasional stops, until the barge was seen by the lookout stationed in the very front of the ferry-boat, from 100 to 150 feet ahead, and without any previous warning of her presence there. The lookout immediately hailed to back, which the pilot did, but collision was then unavoidable.

The pilot of the tug testifies that after he came to pier 3 it lightened up a little, and that he saw the ferry-boat when she was abreast of pier 5 or 6, and thereupon gave a danger signal; that he was also giving whistles at short intervals while he lay there. The other witnesses for the tug do not give any confirmation of these signals, except as to the danger signals, which all heard. The danger signals were heard also upon the ferry-boat, but not until after the barge had been seen, and the order to back given, and, as they say, when within 50 feet of the barge.

The witnesses for the tug also confirm the ferry-boat's witnesses as to the very short time between the danger signals and the collision. As these danger signals were undoubtedly given as soon as the pilot of the tug saw the ferry-boat, I can only conclude that he is mistaken as to the distance at which he first saw the ferry-boat, and that she was not seen, nor the danger signals given, until she was close upon him,—too close to make those signals of any use.

As between the ferry-boat and the tug, I think the whole blame of this collision must rest with the tug. The ordinary rules are not applicable in navigating a ferry-boat during fog so dense as prevailed at this time. Necessary steerage-way required a speed that could not be wholly overcome from the moment objects became visible that were not signaled. To apply that rule would require ferry-boats to suspend navigation. The public necessities do not admit such suspension, but require that ferry-boats shall make occasional trips. Rule 24 applies in such cases. The tug was under no such public obligations, and the evidence leaves no doubt that the fog was too thick for safe navigation in the vicinity of the ferry-slips, where the ferry-boats were obliged to enter and depart, and the tug was in fault for attempting it. I do not see any sufficient evidence to show that the ferry-boat was not carefully and skillfully handled. In crossing upon a trip of more than a mile, she first sighted the masts of the lighters within 500 feet of her slip. This, of itself, is evidence of skill and good judgment. From that point it was no fault that she should proceed near the shore. She could not do otherwise. Such is the ordinary and necessary way of making her slip under such circumstances. It is a matter of common knowledge and common prudence, and the public safety required, that other boats should keep out of the way, so far as practicable, within such limits. Pier 3, where the tug put in, was not a public pier, and the pilot of the ferry-boat had no reason to suppose that since his last trip other boats would be unnecessarily navigating there, and putting in at the outer end of that pier, so as to incumber the usual course to his slip in the fog. The slip above pier 3 was clear, and the tug should have gone in there out of the way. The free lower end of the barge also swung off from one to four points, the precise amount being uncertain, which made the situation still more dangerous. As the tug was outside of the barge, and was not struck, the probability is that the barge was angling off from the pier at least two or three points, which would make her outer corner some 50 feet further out than she would have been had she lain directly along the end of the wharf. This difference alone was sufficient to have avoided the collision.

I do not find satisfactory evidence of any excessive speed in the ferry-boat. It was not possible for her to navigate or to make her slip except at a certain moderate speed. The rule as to excessive speed cited from *The Nacoochee*, 137 U. S. 339; 11 Sup. Ct. Rep. 122, and *The Raleigh and The Niagara*, 44 Fed. Rep. 781, namely, "that she was proceeding at a speed under which she could not, by any degree of promptitude or skill, avoid a collision by reversing her engines within the distance at which she could discover approaching or stationary ves-

sels," is not, I think, applicable to the present case, for the reason above stated, and cannot be invoked by the tug or the barge. The ferry-boat was no doubt bound, under such circumstances, to proceed with all reasonable prudence and caution. In my judgment, she did so. If the barge and tow could be considered as having rightfully come to lie at the end of pier 3, and rightfully to have assumed the position they did assume, then, as respects the ferry-boat and her public duty, I should regard the collision as arising from unavoidable accident. In *The St. John*, 29 Fed. Rep. 221, the circumstances were different.

For the reasons above stated, I do not regard the tug and tow as rightfully there, rather than inside the slip above, nor as excusable in angling out as they did. Unnecessary navigation in such a fog was, in itself, imprudent and unjustifiable, and the peculiar position at pier 3 especially so. In such a position, fog-signals ought to have been given as a reasonable caution to the ferry-boat, which the tug knew was approaching. *The City of Alexandria*, 31 Fed. Rep. 427; *The J. Berwind*, 44 Fed. Rep. 693; *The Saratoga*, 37 Fed. Rep. 119. I am satisfied none, except the danger signals, were given.

Decree for the libelants against the tug, with costs. As respects the Orange, the libel is dismissed, with costs.

THE ORANGE.¹

RONAN v. THE ORANGE.

(District Court, E. D. New York. May 15, 1891.)

1. COLLISION—STEAM-VESSELS CROSSING—UNANSWERED WHISTLE—DUTY TO STOP.

A tug, with a tow on her port side, was crossing the course of a ferry-boat at night, the ferry-boat having the tug on her starboard hand. The tug blew one whistle to the ferry-boat, received no reply, but kept up her speed; blew again to the ferry-boat, and, again receiving no reply, rang to hook up the engine, in an endeavor to pass ahead of the ferry-boat. Collision followed between the latter and the tow. *Held*, that the fact that no reply to her signal came from the ferry-boat was notice to her that her signal had not been heard, and it was her duty to stop at once.

2. SAME—DISAPPEARANCE OF RED LIGHT—RIGHTS OF CROSSING VESSEL.

The vessels being on crossing courses, and the ferry-boat having the tug on her starboard hand, the tug claimed that it was her right to keep on, and the duty of the ferry-boat to stop. As the vessels approached, the red light of the tug, for some unexplained reason, disappeared from the view of those on the ferry-boat. *Held* that, if the red light of the tow was not displayed, the ferry-boat was under no obligation to stop, but was justified in proceeding as she did.

In Admiralty. Suit to recover damages caused by collision.

Carpenter & Mosher, for libellant.

Abbett & Fuller, for claimant.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

BENEDICT, J. This action is to recover for injury done to the barge Victoria while being towed along-side the tug Welcome, by her being run into by the Hoboken ferry-boat Orange on the night of June 29, 1888, which night was clear and dark, without a moon. The tug Welcome had taken the barge Victoria from the Osceola's tow, about off Fourteenth street, in the middle of the North river, to take her to pier 5 of the Hoboken coal docks, a pier on the Jersey side of the Hudson river, just below the ferry-slips of the Hoboken ferry. The barge was put along-side the tug, on the port side. She had a paddle-box some 8 feet wide and a pilot-house that shut off the red light of the tug from the view of any vessel approaching off the port bow on an angling course. A witness for the libellant testifies that for this reason, when the tug started with the barge, a red light was placed on the port side of the pilot-house of the barge, the tug also having a red light on her port side. The tow, therefore, when so arranged, presented this peculiarity,—that so long as both the red light of the tug and the red light of the barge kept burning the tow would display in certain positions to vessels approaching on her port on certain courses two red lights, and on other courses only one light; while, if the light on the barge should go out, the tow would, in certain positions, display to vessels approaching on the port one red light, and in other positions no red light at all, owing to the obstruction of the light from the tug's port light by the barge she had on her port side. Of course, without a red light on the barge, the tow, by porting, might at any time cause her red light to disappear from the sight of a vessel approaching off the port bow. So arranged, the tug and barge proceeded at a speed of about nine miles an hour towards pier 5 of the Hoboken coal docks. This course carried her directly across the mouth of the ferry-slips of the Hoboken ferry-boats, and near to the piers when off those slips. As the tug approached the ferry-slips, the pilot of the tug saw a ferry-boat off to port, displaying all her lights, including cabin lights, and knew, as he says, that it was a Hoboken ferry-boat, bound for the Hoboken ferry-slips. It proved to be the ferry-boat Orange. When the tug neared the ferry-slips, across the mouth of which his course would carry him, the master of the tug, according to his testimony, gave a signal of one whistle to the ferry-boat, received no reply, kept up his speed, and ported a little. Then he blew again to the ferry-boat a single whistle, and received no reply, then rang to the engineer to hook up, and give the engine its full power in the effort to pass the ferry-slip ahead of the ferry-boat in safety. The effort failed, and the barge was struck by the ferry-boat on her port side, just abaft amid-ships, and received the injury for which this suit is brought. The boats were then so near the piers that the force of the collision drove the barge into one of the slips.

From these facts it clearly appears that the tug was guilty of fault conducing to the collision in keeping up her speed after she observed that her first signal to the ferry-boat was not replied to. The fact that no reply to her signal came from the ferry-boat was notice to her that her signal had not been heard, and it was her duty to stop at once.

Had she stopped, there would have been no collision. Instead of stopping, she kept up her speed, and by so doing she brought herself directly in front of the ferry-boat, then heading for her slip, and made collision inevitable. But it is said the ferry-boat was on a course crossing the course of the tug, and having the tug on her starboard hand; and it was therefore the right of the tug to keep on, and the duty of the ferry-boat to stop, and allow the tug to pass ahead of her. Undoubtedly such was her duty, if, by the method prescribed by the law, namely, by displaying a red light, the tug had made her course known to the ferry-boat. But if the red light of the tow was not displayed the ferry-boat was under no obligation to stop, but was justified in proceeding as she did. As to the fact that from some cause or other the red light of the tow disappeared from sight after being once seen by the ferry-boat, and was not thereafter displayed until too late to avoid collision, I entertain no doubt. Three witnesses from the ferry-boat, including a pilot, who was in her pilot-house, in no way responsible for the navigation of the ferry-boat, testify that a red light was seen which in a moment disappeared, and that after that no red light was visible until just before the collision, and when the ferry-boat had headed in for her slip and her engine slowed; that upon the red light appearing again, the engine of the ferry-boat was at once stopped and reversed, but the vessels were in collision before it was possible for the ferry-boat to stop. The appearance of these witnesses for the ferry-boat upon the stand, and their testimony as it was given, satisfied me of the truth of their statement in regard to the disappearance of the red light. How the red light came to disappear as it did does not appear. Its disappearance would be accounted for, if at the time only the tug's port light was burning, by a change of course on the part of the tug, as that would cause the tug's port side to be intercepted by the pilot-house of the barge. The captain of the barge testifies that when he started in tow of the tug he lighted a red light, and put it up on the port side of the pilot-house of the barge, because of the liability of the tug's red light to be obstructed; that he saw this light burning shortly after the tug left the Osceola; that he did not see it again before the collision, but the next morning, when he went to the barge where she had been beached near Fourteenth street, the red light was in place, and still burning. This may all be true, and yet the light might have been out at the time of collision, for the light may have gone out before the collision, and been lighted again before 9 A. M. of the next day. The case contains no evidence of a re-lighting of the lamp, nor is any evidence produced from the barge as to what was done on board the barge from the time of collision until 9 A. M. the next morning; but there are some circumstances proved that point to the possibility that the barge's red light was not burning at the time of collision. For instance, no one seems to have at any time seen two red lights on the tow subsequent to leaving the Osceola, although, if the red light which the captain of the barge says he put up on the barge was burning as the tow approached the ferry-boat, two red lights must have been visible from the ferry-boat at some points. Again, the pains

taken by the witness Lansing from the tug to have it understood that he does not swear to a light on the barge is perhaps suggestive. Still further, none of the witnesses from the ferry-boat who saw the tug and barge as the ferry-boat approached speak of a red light displayed on the barge. The red light of the tug was burning, and while it is easy to believe that the absence of the unusual feature of a second red light on the barge along-side would not be remarked, it seems to me that the presence of a red light there, if burning, would have been remarked, and the omission of any witness to mention that two red lights were displayed on the tow at the time the barge was struck indicates that the two red lights were not both burning at that time. But, whatever may have been the cause of the disappearance of the only red light displayed to the ferry-boat as she approached, the fact of its disappearance is proved, and the evidence showing that the tug's red light would be made to disappear by change of course on the tug, whether the red light on the barge had gone out, or been temporarily obstructed by some intervening object, the cause of its disappearance is immaterial. The disappearance of the red light being proved, the navigation of the ferry-boat cannot be held to be faulty, and her liability for the collision has not been shown.

The libel must therefore be dismissed as against the ferry-boat, and as against the tug, which was brought in by petition; the evidence being that the barge and the tug belonged to the same owners.

THE R. H. WILLIAMS.¹

LOMBARD, AYRES & Co. v. THE R. H. WILLIAMS.

(District Court, E. D. New York. May 22, 1891.)

COLLISION—STEAM-VESSELS CROSSING—VESSEL BACKING OUT OF SLIP.

Where a steam-tug was moving at a high rate of speed near the piers in the Kill von Kull, and struck and sunk a vessel which was backing out of a slip, giving a long whistle as she backed, it was *held* that the collision was due to inattention on the part of the passing vessel, which rendered her liable for the collision.

In Admiralty. Suit to recover damages caused by collision.

Carpenter & Mosher, for claimant.

Goodrich, Deady & Goodrich, for libellant.

BENEDICT, J. This is an action to recover of the propeller R. H. Williams the damage done to the tug Little Nellie in a collision that occurred on the 13th of March, 1889, at 6 P. M., just off pier 4, the Seaboard Refinery dock, at Bayonne, N. J. As the Little Nellie was coming out of the slip on the east end of the pier the R. H. Williams was

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

coming down the Kills to the eastward, and close in upon the piers. When the Little Nellie had emerged but a short distance from the slip she was struck on her starboard side by the R. H. Williams, and sunk. The question of liability turns upon the question whether the Little Nellie blew a long blast of her whistle as she drew near to the end of the pier, while passing out of the slip. If she did blow such a whistle, and the same was not heard by those directing the Williams, it must have been owing to inattention on their part; and inattention in such a particular, under the circumstances, was great negligence, for the Williams was running rapidly across the mouths of the slips, by no means as far out as she would have it believed, but very near to the ends of the piers. If, on the other hand, the whistle of the Little Nellie was heard by those directing the Williams, she was in fault for not stopping and staying out into the stream. The proof is that the Williams kept up her speed until the Little Nellie appeared outside of the ends of the pier; and the man at her wheel says he heard no long whistle from the Little Nellie. As to the fact of a long whistle having been blown by the Little Nellie as she passed up the slip nearing the end of the pier, it is proved by the great weight of the evidence, and that it could have been heard by the Williams with ordinary attention. The libelant is therefore entitled to a decree with an order of reference to ascertain the amount of the damage.

THE ROBERT BURNETT.¹

THE DASORI.

OWL TRANSPORTATION Co. v. THE MAYOR, ETC., OF CITY OF NEW YORK,
AND THE ROBERT BURNETT.

(District Court, S. D. New York. May 6, 1891.)

COLLISION—TWO TOWS PASSING—LEEWAY—INATTENTION.

A tow of four boats on a 200-foot hawser astern of the tug B. met a tow consisting of the tug D., with two scows on a hawser. A heavy north-west gale was blowing at the time, and though the tugs passed each other at what would have been a sufficient distance in ordinary weather, the wind caused the tow of the B. to make as much leeway as headway, so that one of the boats on her tow struck one of the scows, and was sunk. The evidence showed that neither tug paid much attention to the tows after the tugs had passed each other. *Held*, that for such lack of attention to their tows, both tugs were responsible for libelant's damage.

In Admiralty. Suit to recover damage caused by collision.

Wilcox, Macklin & Adams, for libelant.

James M. Ward, Asst. Corp. Counsel, for mayor.

Carpenter & Mosher, for the Burnett.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

BROWN, J. On the 22d of November, 1890, the libelant's canal-boat Maggie P. was in tow of the tug Robert Burnett, coming from Port Johnson to the East river, and was the starboard boat in a tier of 4 boats upon a hawser from the Burnett about 200 feet long. When nearly up to Governor's island, the Maggie P. came into collision with the second of two scows that were in tow of the steam-tug Dasori, bound down the bay to the dumping-ground outside of Sandy Hook, and was so damaged that she soon after filled and sank. The Dasori's hawser to the first scow was about 60 fathoms long, and the hawser from the first scow to the second about 30 fathoms. The Dasori was proceeding upon a course S. S. W., and, as the witnesses for both tugs say, passed the Burnett at a distance of 400 or 500 feet to the eastward, a little below Governor's island. Neither anticipated any collision; but in going about 1,000 feet the boats in tow approached each other so rapidly that the starboard bow of the hindmost scow struck the libelant's boat on the starboard side, as above stated. The witnesses for the Burnett ascribe the collision to a strong sheer by the scow, through alleged inattention to her steering and bad management. The Dasori's witnesses deny this, and ascribe the collision to an alleged change of course by the Burnett to the eastward after she had passed the scows. There was at the time a strong north-west gale, so that the Burnett with her tow made but slight headway,—not more than a mile and a half per hour; and her captain testifies that they made about as much leeway as headway, and that at the time of passing the Dasori, and up to the collision, he was heading up the North river and did not haul to the eastward.

I have found it impossible to satisfy myself that the collision could have occurred in the way that the witnesses for either of the tugs have supposed in their testimony, if the two tugs were 400 or 500 feet apart on passing, or anywhere near that distance. I have no doubt, however, they were at a distance quite sufficient in ordinary weather, and that neither anticipated collision. Looking at all the circumstances, I am constrained to find that the collision arose primarily from the great leeway made by the Burnett's tow in the heavy north-west wind, and that sufficient allowance for this was not made by either tug. I think the weight of testimony is to the effect that there was some sheer by the second scow to starboard, but by no means sufficient alone to account for the collision; nor is it probable that considerable sheer in such a wind was avoidable. Both scows had bridle hawsers, and I am quite satisfied that in this respect they were managed with ordinary care. The evidence shows that neither tug paid much attention to their tows behind them after passing each other. Had they done so, it would have been plain, from their rapid approach, that it was their duty to haul off from each other. Neither did so, and, as this duty belonged to both alike, it follows that the damage must be shared alike by both. Decree for libelant against both defendants, with costs.

JOHNSON *et al.* v. BUNKER HILL & S. M. & C. Co.

(Circuit Court, D. Idaho. April 29, 1891.)

1. REMOVAL OF CAUSES—ADMISSION OF TERRITORY.

The Idaho admission act, providing for transfer, from territorial to national courts, of such causes as might have been commenced in the latter courts, had they existed when the actions were instituted, does not give to such national courts a greater or different jurisdiction from that granted to other United States courts, nor to the citizens of Idaho different privileges from those enjoyed by the citizens of other territories.

2. SAME—CITIZENS OF TERRITORIES—PARTIES TO ACTION.

The constitution of the United States, providing for jurisdiction of United States courts in actions between citizens of different states, has no application to actions between citizens of territories and states; hence an action in which the parties on one side were citizens of Idaho territory at time action was commenced cannot be transferred to United States courts.

3. SAME—CAUSES PENDING IN TERRITORIAL SUPREME COURT AT ADMISSION.

The right to transfer such to United States circuit courts, except that class of cases in which the circuit court has appellate jurisdiction from the United States district court, questioned, but not determined.

Motion to Remand to State Court.

John R. McBride, F. Ganahl, and Wm. H. Clagett, for defendant.

W. B. Heyburn, for plaintiff.

Before SAWYER, Circuit Judge, and BEATTY, District Judge.

SAWYER, J., (*orally.*) This case was commenced under the territorial government, before the territory of Idaho was admitted into the Union as a state. The last affidavit filed, which, for the purposes of the decision, we shall assume was regularly filed, shows what the record does not, that one of the parties to this suit, was a citizen of the territory of Idaho, at the time the suit was commenced, and the other a citizen of a state; and, consequently that the case would not, at that time, have been within the jurisdiction of any circuit court of the United States, on the ground of diversity of citizenship. Unless the act of admission has changed the rights of the parties, since the commencement of the suit, this court has no jurisdiction and the case should have gone to the state court; and it has been improperly sent here. There is nothing in the record that shows, that the cause arises under the laws of the United States, in such sense as to give this court jurisdiction. We, therefore, must determine the question of jurisdiction on the point of diversity of citizenship of the parties. It is sent here under the idea that the law provides that the case shall come into this court, and this court shall have jurisdiction, notwithstanding the fact, that the circuit court of the United States would not have had jurisdiction at the time the action was commenced, and the point is, whether that position is correct or not. Two decisions of the court in the district of South Dakota, (*Herman v. McKinney*, and *Dorne v. Silver Min. Co.*, 43 Fed. Rep. 689, 691, decided by Judges EDGERTON and SHIRAS,) maintain that view. Another decision in the district of Montana by Judge KNOWLES, (*Strasburger v. Beecher*, 44 Fed. Rep. 209, and one by Judge HANFORD in the district of Washington, (*Nickerson v. Crook*, 45 Fed. Rep. 658,) maintain

v.46F.no.6—27

contrary views, and the question is, which is right?¹ After a full consideration of the subject, we are satisfied, that the decisions of Judges KNOWLES and HANFORD present the correct interpretation of the statute. We do not think there is any provision for the circuit court of the district of Idaho entailing jurisdiction in cases, in which, it would not have had jurisdiction had it been in existence at the time of the commencement of this suit; and it would not have had jurisdiction, at that time, had it been in existence, of a suit between a citizen of a territory on one side and a citizen of a state on the other side. The clause under which the view expressed in the first cited cases, is supposed to be sustained is section 18, which may be regarded as somewhat ambiguous in meaning, taken by itself:

"That in respect to all cases, proceedings and matters now pending in the supreme or district courts of said territory at the time of the admission into the Union of the state of Idaho, and arising within the limits of such state, whereof the circuit and district courts by this act established might have had jurisdiction under the laws of the United States had such courts existed at the time of the commencement of such cases, the said circuit and district courts, respectively, shall be successors of said supreme and district courts of said territory; and in respect to all other cases, proceedings and matters pending in the supreme or district courts of said territory at the time of the admission of such territory into the Union, arising within the limits of said state, the courts established by such state shall, respectively, be the successors of said supreme and district territorial courts; and all the files, records, indictments, and proceedings relating to any such cases shall be transferred to such circuit, district and state courts, respectively, and the same shall be proceeded with therein in due course of law."

Now it is supposed in the cases in South Dakota, that, this clause, where the circuit or district court of the present district of South Dakota might have had jurisdiction by the laws of the United States had such court existed at the time of the commencement of such suits, authorize those suits which were commenced in the territorial court before admission by citizens of the territory against citizens of a state to be transferred to the present circuit and district courts of that district; that they passed to the circuit court of the United States, for that district. That section, perhaps, is, as before intimated, a little ambiguous, taken by itself, but we do not think that that was the intention of congress, after taking into consideration the preceding and succeeding sections of this act. In section 16 it is provided that "the circuit and district courts for said district, and the judges thereof, respectively, shall possess the same powers and jurisdiction and perform the same duties required to be performed by the other circuit and district courts and judges of the United States, and to be governed by the same laws and regulations." That indicates a purpose to give the circuit and district courts of Idaho the same jurisdiction that is possessed by the circuit and district courts of other districts, and no more. It does not appear to contemplate an *exceptional* jurisdiction. And, to give the construction that is contended

¹NOTE. Since the announcement of the decision of this case I find a decision of Judge KNOWLES maintaining the same view in *Dunton v. Muth*, 45 Fed. Rep. 351.—[SAWYER, C. J.]

for would be to defeat that provision and give the circuit court for the district of Idaho jurisdiction which the United States circuit courts of other districts did not before, and, do not, now, have. Again, the court shall "*be governed by the same laws and regulations*" as those which govern the United States circuit and district courts and judges of other circuits and districts; and to give the construction contended for would be to hold that the circuit court of Idaho, would not be governed by the same laws, and regulations, as the circuit courts of other circuits, and districts, whose jurisdiction is not affected by a change of citizenship *pendente lite*. So, again, section 19 provides that "from and after the admission of said state into the Union, in pursuance of this act, the laws of the United States, not locally inapplicable *shall have the same force and effect within said state as elsewhere within the United States,*" thus again expressing an intention to put, and keep, the people of Idaho, upon precisely the same footing, as the people elsewhere in the United States, and territories; and not to make them an exception in this matter of jurisdiction as the construction contended for, and adopted in South Dakota, would do. Had one of the parties to this suit been a citizen of Utah, Arizona or New Mexico, instead of a citizen of Idaho, at the time of the commencement of the suit, I think it would not be, seriously, contended that upon the admission of Idaho, and organization of the circuit court, the case would have gone to the United States circuit court. Yet there is no more reason in public policy for granting this right to a citizen of Idaho than to a citizen of any other territory. Again, we are not to suppose that congress intended to extend the jurisdiction beyond the provisions of the constitution, even if it has the constitutional power to do so, unless the act is so explicit, that it will bear no other construction.

Now the constitution provides for the jurisdiction of the courts of the United States in cases between citizens of different states, not between citizens of a territory and a state. To give this construction would also be to confer favors upon the citizens of the territory of Idaho, and the Dakotas, and Washington, that were not conferred upon the citizens of any other state or territory; it would be to change their *status* in this particular after the commencement of the suit. We do not think congress intended any such result or contemplated any such change. It did not intend to go beyond the constitutional provision. We think it simply intended to enforce the laws of the United States with reference to the litigation of parties and the jurisdiction of courts as they then stood, and as they were applicable to all other states and territories, and as applicable at the time of the commencement of the suit, only, as is done in the several removal acts, where a change of citizenship, after suit commenced, does not affect the right of removal either way. We desire to call attention to this provision also: "The records * * * shall be transferred to such circuit district and state courts, *respectively*, and the same *shall be proceeded with therein in the due course of law.*" That is to say, the general laws of the United States applicable to the proceedings of these courts in other districts shall apply to them in the district of

Idaho, whether the case goes to a United States, or state court. And again, the provision under which the question arises is "that in respect to all cases, proceedings and matters now pending in the supreme or district courts of said territory at the time of the admission into the Union of the state of Idaho and arising within the limits of such state whereof the circuit or district courts by this act established might have had jurisdiction under the laws of the United States *had such courts [not such state] existed at the time of the commencement of such cases*, the said circuit and district courts respectively, shall be the successors of said supreme and district courts of said territory." At the time this suit was commenced this court had it existed, would have had no jurisdiction of it on the ground of citizenship because it would have had no jurisdiction of a case between citizens of a territory, and citizens of a state; that is settled by the laws of the country and numerous decisions of the supreme court. If congress gives it that jurisdiction, then it must do so by some act—some provision changing the rights of the parties, passed after the commencement of this suit. And the intention of congress to make such changes, *out of harmony with its general system*, should be expressed in unequivocal terms.

Says the learned judge, in *Dorne v. Silver Min. Co.*, before cited, 43 Fed. Rep. 694: "Now no circuit court of the United States *can exist except* in a state admitted into the Union." Then, to state the proposition differently, the enabling act gives jurisdiction at the commencement of the action, provided South Dakota had at *that time been a state in the Union*, and a circuit court of the United States organized therein. But South Dakota was not at that time a state and there was no circuit court of the United States, organized therein, and the statute does not say that the present circuit court shall have jurisdiction over all cases over which it might have taken jurisdiction had South Dakota then been a state, and one of the parties to the suit had then been a citizen of the then state of South Dakota. We submit that this is an entirely different proposition, instead of the same proposition differently stated. The interpretation contended for requires this imaginary interpolation into the statutes, which we are not authorized to make. The supposed existence of a circuit court of the United States for the district of Idaho, by no means authorizes, also, a supposed imaginary *state* of Idaho. We cannot concur in the statement that "no circuit court of the United States *can exist*, except in a state admitted into the Union." We know of nothing in the constitution to prevent congress from creating just such a court as we now have, if, in its wisdom, it had seen fit to do so, for administering the purely national laws as in the case of states, leaving the territorial laws, enacted by its legislation to be administered in the territorial courts, instead of mingling their administration in the territorial courts, as is now done. The territorial courts now, as we understand the matter, act in two capacities. Why might not congress, if it deemed best, separate the two classes of business? Suppose Idaho had not been created a state, but congress had adopted a law on the model of section 16 of the act of admission reading as follows:

"That the said territory of Idaho shall constitute a judicial district the name thereof to be same as the name of the territory, and the circuit and district courts therefor shall be held at the capitol of the territory for the time being, and the said circuit and district courts shall have and exercise the same jurisdiction and powers and in like cases as is exercised by all other circuit and district courts of the United States, and the said district shall, for judicial purposes until otherwise provided, be attached to the ninth circuit. There shall be appointed for said district, one district judge, one United States marshal, one clerk of the district and one of the circuit court, and one United States attorney."

What constitutional objection could be successfully urged against such a law? And if such a law had passed in what respect would these courts so created have been different from the "circuit and district courts for the district [not state] of Idaho," now created? They would have been United States circuit and district courts for the district of Idaho, as they now are, with precisely the jurisdiction, functions, and powers they now have. The state, as such, has no concern with the present courts. The state is only referred to in the section creating this district to define the boundaries, and its name furnishes a name for the district, or is adopted as the name of the district. Why would not the supposed courts be substantially, in all things, the same courts as the present ones? If we are right in this supposition, then, it does not follow that if such a court had been created, there must also necessarily, have been a state created. We are satisfied therefore, that the decisions of Judges KNOWLES and HANFORD give the correct interpretation of this statute and, that, this case is not embraced within the purview of the provision in question, and is not entitled to go into the circuit court, on the ground of the diversity of citizenship, and that it was improperly, sent to this court, and should have been sent to the state court. The order to remand to the state court will therefore be made. *Dorne v. Silver Min. Co.*, as shown by the report of the case in 43 Fed. Rep. 691, was transferred from the *supreme court of the state*, after admission, where it was then pending, the case having been pending in the territorial supreme court, at the time of the admission of South Dakota as a state. It was an action for damages, wherein a verdict and judgment were had in the court of original jurisdiction for over \$15,000. That case, it appears to us as now advised, should have remained in the state supreme court, and not have been sent to the circuit court of the United States. We find no authority in the law admitting the state, or any other law for transferring such a case to the circuit court, or any authority in the statutes whatever, anywhere for exercising by the circuit courts, either before or after the admission, *appellate jurisdiction in such a case*. If we are right in this view, then, the questions decided, arising upon the diversity of citizenship, were out of the case altogether, as the circuit court could not take jurisdiction under any circumstances.

This ground of want of jurisdiction, or authority of the circuit court to succeed to the supreme court of the territory in that case does not appear to have been called to, or to have attracted, the attention of the court. If it did attract the attention of the court, then in construing

the admission act, the court must have overlooked the fact that the circuit court has but a very limited appellate jurisdiction from the district court, as in admiralty cases, in which the exclusive jurisdiction, original and appellate cases, is in the national courts. In such cases, the United States district courts under the national system in use, have original jurisdiction, and the circuit courts, appellate jurisdiction from the district courts. In the territories the original jurisdiction is in the ordinary courts of the territory of original jurisdiction, and the appellate jurisdiction in the supreme courts of the territories. Now, on the admission of a state in such cases, and such other limited classes of cases over which the circuit courts have *exclusive* jurisdiction on appeal from the *exclusive* original jurisdiction of the district courts, appeals may be pending in the supreme court of the territory, and these must, necessarily go to the circuit courts, if anywhere, as the states have no jurisdiction over them; and nothing to do with them. On the other hand, there may, also, be pending in the supreme court of the territory, on its admission as a state, appeals from the lower courts in cases, which are properly of state cognizance, and over which the circuit courts of the United States have no appellate jurisdiction, whatever, and with which they have no right to concern themselves. These, of necessity, should go from the territorial supreme court, to the state supreme court which takes its place, and where only they belong. Thus on the admission of a territory as a state, there may be pending in its supreme court, on appeal both classes of cases, one of which belongs exclusively to the circuit court of the United States, and the other exclusively to the supreme court of the state. And the act for the admission of Idaho, evidently, provides for both classes; and sends them to the proper courts—those which belong to the circuit court, it having the exclusive appellate jurisdiction, to the circuit court; and those which belong to the state jurisdiction to the supreme court or appellate court of the state. The language of the act seems clear on this point, and susceptible of but one construction, that can give all its words full force, and meaning. It is:

“And the *circuit* and district and *state* courts herein named, shall *respectively*, be successors of the supreme court of the territory, within the limits embraced within the jurisdiction of such courts, *respectively*, with full power to proceed,” etc. Section 17.

Now this confers no new jurisdiction on either the circuit court, or supreme court of the state, but simply transfers to each the cases in which they *respectively*, already have jurisdiction, under the laws of congress, and under the laws of the state *respectively*, under which they are organized. And section 18 carries out the idea in this language:

“In respect to all cases, proceedings and matters now pending in the *supreme*, or *district* courts of said territory, at the time of the admission into the Union of the said state of Idaho, whereof the circuit or district courts by this act established, *might have had jurisdiction under the laws of the United States had such courts existed at the time of the commencement of such cases*, the said circuit and district courts *respectively* shall be the successors of said supreme and district courts of said territory.”

Now the circuit court *at this time* has no appellate jurisdiction from any court whatever of such a suit as that transferred from the supreme court of South Dakota to the circuit court of said district, consequently, it could not have had jurisdiction of the same, or a similar case "under the laws of the United States," had this court existed at the time of the commencement of that case. It is, therefore, not within any provision of the act, but it clearly falls within the next provision of section 18:

"And in respect to *all other cases, proceedings, and matters pending in the supreme and district courts of said territory at the time of the admission of such territory into the Union, arising within the limits of said state, the courts, [plural, including supreme as well as district courts,] established by such state shall, respectively, be the successors of said supreme and district territorial courts, [and the records, etc.,] shall be transferred to such circuit, district and state courts, respectively, and the same shall be proceeded with in due course of law.*"

That is to say, all cases pending on appeal in the supreme court of the territory at the date of admission, over which the circuit court has appellate jurisdiction by the other laws of the United States, as in admiralty and bankruptcy cases, and such other very limited classes as have been confided to its appellate jurisdiction, should be transferred to the United States circuit court; and all others to the supreme court of the state. As was said in discussing the first point, any other construction would take the circuit courts of Dakota and Idaho out of harmony with the system of circuit courts established under the constitution and laws of the United States, and give them an exception *appellate* jurisdiction—an appellate jurisdiction not vested in any of the older circuit courts; whereas congress in the various sections quoted plainly indicates a purpose to put them upon the same footing with the other circuit courts, and that they shall have the same power, and be governed by the same laws, and no other. The case in question, in our judgment, as at present advised, should have gone to, and remained in, the state supreme court, and not have been sent to the United States circuit court. This point is not directly, involved in this case, and is, therefore, not now finally decided; but it is understood that there are probably, several similar cases in the new districts of Washington, Montana, and Idaho, in this circuit, and as I shall not traverse that part of the circuit, again for some time, the new district judges are desirous of obtaining my views upon the subject. When the question directly arises either before myself, or the district judges, we shall have it fully argued, and then, after mature consideration, decide the point as though it had not before been considered. These suggestions will not, under the circumstances, be regarded as authoritative, when the question arises for adjudication, and the judges will give them only such weight and consideration, as they deem them to merit. Let the cause be remanded to the state court, upon the ground first discussed in this decision.

HICKLIN v. MARCO *et al.**(Circuit Court, D. Oregon. May 18, 1891.)*

ALLOWANCE FOR VALUE OF PERMANENT IMPROVEMENTS ON A BILL TO REDEEM.

On a bill to redeem from the purchaser at a void sale, in a suit to enforce the lien of a mortgagee, or his assignee, the defendant is entitled to an allowance for the value of permanent improvements placed on the premises.
(Syllabus by the Court.)

In Equity.

Mr. W. Scott Beebe, for plaintiff.

Mr. William B. Gilbert, for defendants.

DEADY, J. The plaintiff, a citizen of California, brings this suit against the defendants, citizens of Oregon, to redeem the north half of the J. L. Hicklin donation claim, situate in the county of Washington, and containing 320 acres of land.

It is alleged in the bill that on February 27, 1879, one J. C. Hicklin, being the owner of said property, mortgaged the same to secure the payment of his note for \$1,000, of even date therewith, payable to the order of T. B. Handley, 90 days after date, with interest at 1 per centum per month; that on March 6, 1879, Handley assigned said note and mortgage to one Thomas Connell, who on August 9, 1879, commenced suit in the circuit court for the county of Washington to enforce the lien of said mortgage, in which, on October 6, 1879, a decree was entered for the sale of the premises, on which the same were sold to said Connell, who on November 23, 1879, received a deed thereto from the sheriff, in pursuance of said sale, and that, by reason of sundry omissions or defects in the service of the summons in said suit by publication, said circuit court never acquired jurisdiction of the person of the mortgagor, and therefore the decree of sale and the sale thereunder are void.

It is also alleged therein, that on October 19, 1886, the premises were regularly conveyed to E. Quackenbush, who thereby became, in effect, the assignee and owner of said note and mortgage, and thereafter sold and conveyed the land in parcels to these several defendants, who have since been, and at the commencement of this suit were, in the possession of the same; that W. C. Hicklin died intestate on August 5, 1888, leaving eight children as his heirs at law, in whom the title to the premises then vested by descent; and that the plaintiff is the owner of an undivided one-fourth of the premises by means of conveyances executed in 1879 from said heirs.

Among other things, it is alleged in the answer that the defendants, while in possession of the parcels of the property conveyed to them as aforesaid, and while claiming in good faith to own the same, and believing they had a good title thereto, paid taxes and made valuable improvements on the land, stating the amount of the taxes and the value of the improvements in each case.

The plaintiff excepts to so much of the answer as impertinent.

On March 18, 1889, T. Lee, a citizen of Illinois, commenced an action at law in this court against C. S. Gault, one of the defendants in this suit, to recover the possession of a 40-acre parcel of this property, alleging that he was the owner in fee of the same, and entitled to the possession thereof.

The defense made to the action was the statute of limitations, and the sale and conveyance in the suit to enforce the lien of the mortgage to Handley, aforesaid.

The case was tried by the court without the intervention of a jury. In the finding of the court it is stated that the state court never acquired jurisdiction of the defendant in the suit to enforce the lien of the mortgage to Handley, and the sale and conveyance under the decree therein is void, because the copy of the summons and complaint did not appear from the return of the sheriff to have been deposited in the "post-office," but simply "deposited" without saying where, and this was not done until the twenty-third day after the order of publication was made, and the decree of sale was given and entered within 29 days after such deposit, instead of 43 days, as required by law; that the plaintiff was the owner in fee of the premises, but the defendant was entitled to the possession thereof until the mortgage is satisfied.

This conclusion was reached on the authority of *Cooke v. Cooper*, 18 Or. 142, 22 Pac. Rep. 945, in which it was held that a person in possession under a void foreclosure sale is deemed a mortgagee in possession, and entitled to remain so until the mortgage is satisfied. Accordingly judgment was given in the action, on the finding, for the defendant, and thereafter this suit to redeem was commenced.

In an action at law to recover the possession of real property, the law of this state is (Comp. 1887, § 321) the value of permanent improvements may be set off against a claim for damages for withholding the same; provided they were made by a person "holding under color of title, adversely to the claim of the plaintiff, in good faith." These defendants appear to hold under color of title; that is, they hold under conveyances which, admitting the right of the grantors therein to convey, are sufficient. *Stark v. Starr*, 1 Sawy. 20. Nothing appearing to the contrary, they are presumed to hold in good faith, and adversely to the plaintiff. *Stark v. Starr*, Id. 23, 25.

But the plaintiff does not make any claim for damages, and therefore he contends that no claim for permanent improvements can be allowed the defendants.

This is the rule at law when the plaintiff seeks to recover the possession of real property that the defendant unlawfully withholds, but in equity the rule is different. He who seeks the aid of a court of equity to get the possession of premises in the occupation of a mortgagee under an unsatisfied mortgage must do equity. A mortgagee in possession is not allowed to charge for permanent improvements, nor is he chargeable with the increased rents and profits directly resulting from such improvements. This is the general rule. 2 Jones, Mortg. § 1127. But to

this rule there are exceptions. "When the mortgagee makes permanent improvements, supposing that he has acquired an absolute title by foreclosure, upon a subsequent redemption he is allowed the value of them." "In like manner a purchaser at a foreclosure sale, who has made valuable improvements in the belief that he has acquired an absolute title, is entitled to be paid for them, in case the premises are redeemed." And, "a purchaser in good faith from the mortgagee in possession, and with the assurance that he gave a perfect title, is entitled to allowance for improvements made by him thereon, although these consist of new structures." *Id.* § 1128.

The doctrine of these extracts from Jones on Mortgages is supported by the following cases: *McSorley v. Larissa*, 100 Mass. 270; *Freichnecht v. Meyer*, 39 N. J. Eq. 551; *Hadley v. Stewart*, 65 Wis. 481, 27 N. W. Rep. 340; *Green v. Dixon*, 9 Wis. 485; *Mickles v. Dillaye*, 17 N. Y. 80.

The case of the defendants is clearly within the exception, and they ought to be allowed in this suit for redemption the value of the permanent improvements they have made or placed on the land, in the reasonable belief that they had a good title thereto.

The exceptions are disallowed.

FINANCE CO. OF PENNSYLVANIA *et al.* v. CHARLESTON, C. & C. R. Co.

Ex parte HART.

(Circuit Court, D. South Carolina. May 29, 1891.)

1. ATTORNEY AND CLIENT—LIEN ON PAPERS FOR SERVICES.

The attorney of a railroad company, who in the course of his regular duties has negotiated conveyances of the right of way and has received conveyances thereof, and has also negotiated donations of property for depot purposes and received conveyances thereof executed in his name as vendee, has a lien upon such papers for his salary and legitimate expenditures about the business, and may retain possession of them until such charges are paid.

2. RAILROAD MORTGAGE—PRIORITY OF LIENS.

But in the foreclosure of a mortgage of the railroad such lien will not be held to extend to the *corpus* of the property, or to authorize the payment of his demand out of the funds in the hands of the receiver before the claims of the bondholders are paid.

In Equity.

Mitchell & Smith and *C. E. Spencer*, for petitioner.

Sam'l Lord, for plaintiff.

SIMONTON, J. This case comes up on a rule to show cause and the return thereto. Mr. James F. Hart was for some time attorney for the defendant company. While he was attorney he secured many rights of way, and obtained the deeds therefor. He had in his possession 144 of these deeds, all but 11 of which were duly recorded. Under the direction of the court, these were all deposited in the registry, without

any prejudice whatever to his rights over them. Beside this, Mr. Hart, under the instructions of the general manager of the railroad company, had gone with the chief engineer, and had selected depot sites. He was promised the opportunities of using the knowledge thus acquired in purchasing adjacent lands, whose enhancement in value in consequence of the location of the depot sites would be a source of profit to him. The depot sites at Kershaw, Westville, and Pleasant Hill were among those located. The land proprietors at these points donated lands for this purpose, and the conveyances were made to him in fee, two of them without qualifying words, one to him "in trust," without naming the *cestui que trust*. The consideration moving the donors was the location of the depots. The rule called upon him to show cause why he retained possession of these papers. For cause he shows that the railroad company is indebted to him, and that he holds the papers under his lien as attorney. The special master reports that there is due to him as attorney the following items:

For salary,	-	-	-	-	-	-	-	-	\$1,833	42
For traveling expenses, stationery, and postage,	-	-	-	-	-	-	-	-	217	70
For clerk hire,	-	-	-	-	-	-	-	-	440	00
For moneys advanced in paying claims,	-	-	-	-	-	-	-	-	45	00
									<hr/>	
									\$2,536	12
Less cash on hand,	-	-	-	-	-	-	-	-	15	00
									<hr/>	
									\$2,521	12

There is no exception to the report on these facts, and it must to this extent be confirmed.

An attorney has a lien on money, choses, and papers in his hands for services rendered. *In re Paschal*, 10 Wall. 483. The respondent, therefore, has a right to the possession of the conveyances of the right of way now held by the clerk solely for him, and if he desires it he can have them restored to his own possession. Of these, 133 had been recorded before this rule was had. The clerk has recorded the remaining 11. This last fact cannot in any way impair his lien. This clearly was his own opinion, as he recorded 133, and we agree with him. The conveyances of the depot sites present a more complicated question. The legal title is in him, and presumably at the instance of the donors. There is no resulting trust, as no money of the railroad was paid for them, and no express trust for the company in the deeds. The respondent is not a mortgagee, nor can we speak of any lien upon the title-deeds as against the railroad company, for, as far as they declare on their face, there appears to be no interest in the company in them. He may refuse to convey the land to the railroad company, or any vendee of its property, until his recognized claims are paid. The mortgage, whose foreclosure is sought by the present bill, has this description of the property mortgaged:

"The railroad and franchise of the party of the first part, extending from its southern terminus in the city of Charleston, county of Charleston, and state

of South Carolina, to its northern terminus upon the Ohio river, at the city of Ashland, in the state of Kentucky, as the same now is or may hereafter be located and constructed by the said railroad company, including all branches and extensions thereof, together with all the franchises, privileges, appurtenances appertaining thereto, and all that may hereafter appertain thereto, and to the tolls, issues, income, and profits to be had from the said property and privileges."

It would seem that the depot sites not in the name of the railroad company are not covered by this mortgage. If they are, it is imperfect as to them. In this event the respondent may refuse to make the deeds necessary to cure the imperfections until his recognized charges are paid. He asks, however, the recognition by the court of his lien, and its order for the payment of his account out of the earnings in the hands of the receiver, and, if these be wanting or deficient, out of the first proceeds of sale of the railroad under the mortgage when it is foreclosed. To enable the court to pass such an order, it must appear that this claim has a rank superior to all liens upon the income and upon the property. The order appointing the receiver in this case appropriates the tolls, income, revenue, and issues to the payment of the proper and necessary expenses and charges of carrying on the business, including the wages and salaries of employees; and the receiver is authorized to pay all the wages due to employees at the date of the order appointing the temporary receiver herein for labor and services within 90 days before the same. Assuming that an attorney is an employee, within the meaning of this order, of which there is grave doubt, (*Vane v. Newcombe*, 132 U. S. 237, 10 Sup. Ct. Rep. 60; *Louisville, etc., v. Wilson*, 11 Sup. Ct. Rep. 407.) the terms of this order preclude any special preference to the respondent. With regard to the payment of the first proceeds of sale, primarily all of these belong to the mortgagees. The appointment of a receiver gives the court no authority to displace their vested contract lien. *Kneeland v. Loan Co.*, 136 U. S. 97, 10 Sup. Ct. Rep. 950. Were the respondent the owner of the rights of way, the court could not now say that, when the whole property is sold for the payment of liens and claims, his claim shall be paid in full, without regard to the fact that there may be a deficiency for the other claims and liens. See *Hand v. Railway Co.*, 17 S. C. 276. It would no doubt be of advantage in the sale of the property to have all disputes as to the title settled. But the court can have no right to direct the money of the mortgagees applied to such a settlement, not only without their consent, but against their will. See *Woodworth v. Blair*, 112 U. S. 8, 5 Sup. Ct. Rep. 6. So with the depot sites the same reasoning would apply. Indeed, it is against the fixed practice and policy of the court to settle the rank of claims or order their payment until a final decree. This case is an illustration of the wisdom of this. It is one of many of the same class presented for consideration. Nearly every attorney employed by the company has put in his claim. Several of them set up liens for the same kind of services. A prejudgment now may prejudice others of equal merit.

The case comes up to be heard on the rule, the return thereto, and the report of the master. It is ordered and adjudged that the respondent is a creditor of the Charleston, Cincinnati & Chicago Railroad Company in the sum of \$2,521.12, and that he has the right to receive from the clerk, and to retain in his possession, the 144 deeds conveying a right of way to said company. That he also has the right to retain in his possession the title-deeds to the depot sites of Kershaw, Westville, and Pleasant Hill; no opinion or decree, however, being now made as to the construction of or effect of said deeds. It is further ordered that the rule be discharged.

ATMORE *et al.* v. WALKER *et al.*¹

(Circuit Court, D. Delaware. May 8, 1891.)

1. WILLS—CONSTRUCTION—VESTING OF ESTATE.

A testator gave the interest of \$5,000 to his wife for life, and after her death the fund to be divided between his two step-daughters, providing that, in case of the death of either or both step-daughters within 10 years from the date of his will, his son was to have the use of said \$5,000 by paying the interest to the children of deceased step-daughter or step-daughters, and, if said step-daughters "should die before the expiration of the above mentioned 10 years, at the expiration of the above mentioned 10 years, in case either or both of the" step-daughters "die, the money shall be divided" among their children. *Held*, while the collocation of words used by the testator in unnecessarily repeating the conditions attached to the payment of the \$5,000 might import a contingent remainder, yet, as the general scheme of the will showed an intention that the testator's widow and her daughters were to have successively the use of the \$5,000, and that the principal sum should be divided equally between said daughters' children ultimately, this condition in the will attaches to the time of payment of the legacy only, and it vested *instantly* in the children of the step-daughters, the time of payment being postponed.

2. SAME—LEGACIES CHARGED ON THE LAND.

A testator devised two legacies, which vested *instantly*, but were payable in the future, and a residuary devise "of all his estate, real and personal, * * * after the above" legacies "are paid, or secured to be paid." *Held*, as there had been no express trust to pay the legacies, and as a general residuary disposition of the estate was made, the legacies will be a charge on the land.

3. EXECUTORS—SUFFICIENCY OF BOND.

Where legacies are "to be paid or secured to be paid," and the time of payment is uncertain, and may not be for many years, the executor's statutory bond, which is limited to six years, is not a proper security.

Bill in equity by Jane Atmore, administratrix, and the heirs at law of Ann Jones, deceased, a legatee under the will of Joseph Dean, against John H. Walker, administrator *d. b. n. c. t. a.* of Joseph Dean, deceased, and the heirs at law of Joseph Dean, and creditors of his estate, to determine whether said legacy was vested or contingent, and, if vested, whether or not a charge upon the real estate owned by Joseph Dean at the time of his death. Joseph Dean, by his will, dated January 6, 1860, directed, *inter alia*, as follows: *First*. That all his debts and funeral expenses shall be paid as soon after decease as possible. *Secondly*. That his wife—

¹Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

"Shall receive the interest five thousand dollars during her life-time, in lieu of her dower at common law, if she shall so elect. * * * On the death of my beloved wife, the interest of said five thousand dollars to be paid to her daughters, Elizabeth Scarborough and Ann Jones, in equal parts during their lives. In case of the death of either or both of the aforesaid Elizabeth Scarborough and Ann Jones before ten years from the date of this will, my son, William Dean, is to have the use of the said five thousand dollars, by paying the interest to the children of the said Elizabeth Scarborough and Ann Jones. After the death of Elizabeth Scarborough and Ann Jones, if they should die before the expiration of the above mentioned ten years, at the expiration of the above mentioned ten years, in case either or both the aforesaid Elizabeth Scarborough and Ann Jones should have died, the money shall be divided in two equal parts, and be divided between their children equally. * * * *Thirdly.* I do give and bequeath to my son, William Dean, after all my debts, funeral expenses, and the above mentioned five thousand dollars are paid, or secured to be paid, the residue of my estate, real and personal, of all and every description, of which I may die seised or possessed."

Ann Jones died more than 10 years after the death of Joseph Dean.

H. Gordon McCouch and *James H. Hoffecker, Jr.*, for complainants.

Benj. Nields and *E. G. Bradford*, for respondents.

WALES, J. The questions raised by the bill and answer are whether the legacy bequeathed to the children of Ann Jones is vested or contingent, and, if vested, whether it is or not a charge upon the real estate owned by the testator at the time of his death. It is claimed by the defendant that the legacy to the children of Elizabeth Scarborough and Ann Jones is made contingent upon the death of one or both of their mothers within 10 years from the date of the will; and that, as both Elizabeth and Ann survived the 10-year limit, the contingency on which the payment of the legacy to their children depended never happened; that William Dean was to retain the use of the principal (\$5,000) until the end of 10 years from the date of the will, and then, provided that Elizabeth or Ann should be dead, to divide that sum among their children; but that, if neither Elizabeth nor Ann should be dead at that time, no division of the fund could be made then, nor at any time thereafter, for the reason that the will is silent as to how a division shall be made under such circumstances. In construing wills of this class, two rules are to be observed: *First*, a remainder will not be construed to be contingent merely from the inaccurate and inartificial use of expressions importing contingency, if the substance and effect of the limitations afford ground for concluding that they were not used with a view to suspend the vesting; *second*, that a legacy will be construed to be contingent, if clearly so expressed, however absurd and inconvenient such a construction may be, and however inconsistent with what may be conjectured was the testator's intention. 2 Pow. Dev. 224. To these may be added a third rule, that, where the question is whether a legacy is vested or contingent, the burden of proof is upon those who claim the latter construction, and a remainder will not be construed as contingent when it can be construed, consistently with the testator's intention, to be vested. *Dingley v. Dingley*, 5 Mass. 535. It is also a canon of construction that

words and limitations may be transposed, supplied, or rejected where warranted by the immediate context or the general scheme of the will. Interpreting the will of Joseph Dean according to these rules, what is the meaning of the instrument? He begins by directing the interest of \$5,000 to be paid to his wife annually during her life, and on her death the interest of the said sum is to be paid in equal parts to her two daughters, Elizabeth and Ann, during their lives, and, on the death of one or both of the daughters, the principal sum is to be divided equally among their children: provided, always, that William Dean, the testator's son, is to have the use of the principal until the end of 10 years from the date of the will; he paying the interest on the same to the children of Elizabeth and Ann, if the latter should die within the 10-year limit. The residuary clause gives all the estate, real and personal, "after all my debts, funeral expenses, and the above mentioned five thousand dollars are paid, or secured to be paid," to William Dean. The general scheme of the will is that the testator's widow and her two daughters are to have successively the annual interest of \$5,000 during their lives, and that the principal sum is to be ultimately and equally divided among the children of these two daughters, with the exception of Robert Kershaw, from whose share \$300 are to be deducted on account of a debt due from him to the firm of Joseph Dean & Son. The testator left a considerable estate. His only son was his principal legatee, and the prominent purpose in the testator's mind when finally disposing of the \$5,000 was to provide against the payment of that sum before the expiration of 10 years from the date of the will, and, in the endeavor to make his meaning clear, he unnecessarily repeats the condition attached to the payment, and thus gives rise to the question whether the gift is vested or contingent. The residuary clause shows that he intended to dispose of all his property absolutely, and that by the use of the words "paid, or secured to be paid," he contemplated the payment of the \$5,000 to the children of Elizabeth and Ann. But in no event was the testator's son to be called on to pay that sum until the end of the 10-year limit. This condition was attached to the time of payment, and not to the legacy, which makes the difference between a vested and contingent remainder. The legacy to the children of Ann Jones, therefore, vested *instantly*, but the time of its payment was postponed. The collocation of words used by the testator may suggest or import a contingent remainder, but there is no such clearly expressed intention in his will, viewed as a whole, as will support the claim of the defendant. The context of the will is inconsistent with such intention.

The second question admits of less doubt than the first one. In *Lewis v. Darling*, 16 How. 1, the court held that whether the legacy was a charge on the real estate depended upon the intention of the testator, to be collected from the residuary clause of the will; the rule being that, where the testator gives several legacies, and then, without creating an express trust to pay them, makes a general residuary disposition of the whole estate, blending the realty and personalty together in one fund, the real estate will be charged with legacies, for in such a case the resi-

due can only mean what remains after satisfying the previous gifts. The court further says that such is the settled law both in England and in the United States; citing *Hill, Trustees*, 360. See, also, *Bank v. Hays*, 12 Fed. Rep. 663; and *Rambo v. Rumer*, 4 Del. Ch. 9. William Dean was to receive the whole estate of the testator, less the "debts, funeral expenses, and the above mentioned five thousand dollars;" which last sum was to be "paid, or secured to be paid," before he could claim the residue. There can be no doubt that the legacy to the children of Elizabeth and Ann is a charge on the real estate.

The statutory bond executed by William Dean on taking out letters testamentary did not, nor was it designed to, secure the payment of this legacy, because the time of its payment was uncertain, while the security afforded by the bond was limited to six years from its date, after which period no action could be brought on it against either the principal or his sureties. In fact, the legacy did not become payable until more than 20 years after the date of the bond, and long after the bond had been barred by the statute of limitations. It follows that the words in the residuary clause, "secured to be paid," must have meant some form or kind of security which would be more permanent and enduring than that furnished by the executor's bond.

UNITED STATES *v.* JELlico MOUNTAIN COAL & COKE CO. *et al.*

(Circuit Court, M. D. Tennessee. June 4, 1891.)

CONSPIRACY—TRUST COMBINATION—INTERSTATE COMMERCE.

An agreement between coal mining companies operating chiefly in one state and dealers in coal in a city in another state, creating a coal exchange to advance the interests of the coal business, to treat all parties to the business in a fair and equitable manner, and to establish the price of coal, and change the same from time to time, by which it was agreed that the price of the coal at the mines should be $4\frac{1}{2}$ cents, the freight being 4 cents, and the margin of the dealer should be $4\frac{1}{2}$ cents, making the price to the consumer 13 cents, and that, whenever the price of the coal is advanced beyond an advance in freights, one-half the advance shall go to the mine owner, and the other half to the dealer, and a penalty was provided by fine, of any member selling coal at a less price than the price fixed by the exchange, and by which it was forbidden for owners or operators of mines to sell coal to any person other than members of the organization, and for dealers to purchase of miners who were not members, but exempting coal used for manufacturing and steamboat purposes from the prices prescribed until all the mines tributary to that market should come into the exchange, or until the exchange could control the prices of coal used by manufacturers, is within the language of Act Cong. July 2, 1890, declaring "every contract or combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several states," and also the monopolizing, or combination with another to monopolize, trade or commerce among the several states, a misdemeanor.

In Equity. On bill for injunction.

John Ruhm, U. S. Atty., *Lee Broock*, Asst. Dist. Atty., and *James Trimble*, for the United States.

Tillman & Tillman, *Henderson & Jourolman*, and *Hill & Granberry*, for defendants.

KEY, J. The petition in this case is filed against the members of the Nashville Coal Exchange. The membership of the exchange is composed of various coal mining companies operating mines in Kentucky and Tennessee, chiefly in Kentucky, and of persons and firms dealing in coal at Nashville, Tenn. It is alleged that the purposes, objects, and agreement of the defendants are in violation of an act of congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," and the petition seeks to restrain and prevent the violations of the act by injunction under section 4 of the law. The first section of the act declares that "every contract or combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, is declared illegal." The second section declares that "every person who shall monopolize, or combine or conspire with another person or persons to monopolize, any part of the trade or commerce among the several states * * * shall be guilty of a misdemeanor." A violation of the first section is a misdemeanor also. By the fourth section jurisdiction is conferred upon the circuit courts of the United States to prevent and restrain violations of the act, and it is made the duty of district attorneys in their respective districts, under the direction of the attorney general of the United States, to institute proceedings in equity to prevent and restrain such violations. The articles of agreement between the defendants provide, among other things, that the objects of this exchange are, "To do all in its power to advance the interests of the coal business at Nashville, to treat all parties to this agreement in a fair and equitable manner, and to establish prices on coal at Nashville, Tenn., and to change same from time to time, as occasion may require." Prices to consumers at Nashville are to be established so as to sell coal at a fair and reasonable price, so as to allow all parties a fair profit for their product. Every person, firm, or corporation owning or operating mines who ship coal to Nashville shall be eligible to membership in this exchange, and all coal dealers in the city of Nashville are also eligible to membership. None others are eligible. Any member of the exchange who may withdraw from it, and continue in the coal trade in Nashville, or ship any coal to Nashville, shall forfeit and relinquish all interest of any and every kind, however obtained or accrued. The exchange will from time to time establish prices at which coal shall be sold in Nashville. Coal classed as No. 1 shall be valued at the mines at $4\frac{1}{2}$ cents minimum price for bushel of 80 pounds lump, and freight being 4 cents, the dealer's margin to be $4\frac{1}{2}$ cents, making the price of lump coal 13 cents per bushel; No. 2 to be valued at 5 cents at the mine; No. 3 at 6 cents; and when the above prices are advanced in excess of the advance in freights, then one-half the advance shall go to the mine owners and one-half to the dealers. Every member found guilty of selling coal at a less price than the price fixed by the exchange, either directly or indirectly, shall be fined 2 cents per bushel and \$10 for the first offense, and 4 cents per bushel and \$20 for the second offense. A majority of all the members shall constitute a quorum for the transaction of business. Owners or operators of mines

shall not sell or ship coal to any person, firm, or corporation in Nashville, or West Nashville, or East Nashville, who are not members of the exchange, and dealers shall not buy coal from any one not members of the exchange. All coal used for manufacturing and steam-boat purposes shall be exempt from prices made by the exchange until all mines tributary to this market shall become members of the exchange, or until the exchange can control prices to govern coal used by manufacturers. No coal shall be sold in any month to be delivered in any following month except at prices fixed for the particular month in which coal so sold is to be delivered. Fines and penalties are declared, so as to enforce the stipulations embodied in the constitution and by-laws of the exchange.

It can hardly be denied that such provisions as these, by a body of persons such as compose this exchange, is a contract or combination in restraint of trade or commerce, or an attempt between different persons to monopolize a part of the trade or commerce, between parties who are citizens of or reside in different states. It is shown that several mining companies in Kentucky engaged in raising coal, and most of the coal dealers of Nashville, Tenn., have entered into the foregoing mentioned arrangement. It is insisted for the defendants that the subject of agreement is not interstate commerce; that the obligation as to the mining companies ends at the mines. The price is fixed and paid at that point, and consequently controversies in regard to the contract as to them belong exclusively to the courts of the state of Kentucky; that, so far as the dealers are concerned, the price of the coal is fixed for its sale at Nashville, and after it becomes their property by delivery to them, and therefore the courts of Tennessee have the jurisdiction as to them. Various authorities are cited, and the debates in the senate of the United States are read, to sustain this view of the case. As I understand the contention of defendants' counsel it is that the agreement is not violative of the terms of the act of July 2, 1890; but, if it is, the act is unconstitutional: *First*. Because the constitution confers upon the courts of the United States in such a case jurisdiction over "controversies between citizens of different states." That the fact that parties to a contract are citizens of different states does not confer jurisdiction. There must be a controversy between the parties to the contract, and this litigation is not a dispute between the contracting parties, but between the government and these parties. *Second*. That the act creates and defines criminal offenses, and the constitution provides that the "trial of all crimes except in cases of impeachment shall be by jury," and that section 4 of the act, so far as it attempts to give circuit courts of the United States equitable jurisdiction over the violations of the act, is unconstitutional. It is insisted the proceeding authorized is, in substance, an information in equity charging defendants with a misdemeanor.

I shall not enter into a discussion of the constitutionality of the law. A court, especially an inferior one, should hesitate long and consider carefully before it should declare an act of congress, passed after deliberation and debate, and approved by the president, unconstitutional. The

reasons for such a decision in such a case should be clear and undeniable. If doubtful or questionable, the doubt should be resolved in favor of the law. The arguments against the validity of the act have been urged with great plausibility and strength, and an array of authorities have been read as sustaining the views of defendants' counsel. The positions of defendants' counsel have been met with equal force and ability by those representing the government, and many authorities have been referred to in support of the power of congress to pass the law; and without nicely adjusting and weighing the opposing views of counsel, enough appears to prevent me from declaring the act, or any part of it, as outside of the powers granted to congress by the constitution.

The remaining question is whether the agreement and regulations between the defendants are a "contract or combination in restraint of trade or commerce between states;" are they evidence of a combination to monopolize "any part of the trade or commerce" between the states of Tennessee and Kentucky? The coal mines are in Kentucky, and the coal is to be mined there for a certain price, and the agreement contemplates its shipment to Nashville. To be sure it is not to be transported thither by the defendants or any of them, but the price for which it is to be shipped is fixed or stated, and becomes a part of the price for which the coal is to be sold at Nashville; and when the prices fixed "are advanced in excess of the advance in freights, the one-half of the advance shall go to the mine owners and one-half to the dealers." In making the agreement the transportation of the coal from Kentucky to Nashville was a necessary incident to and element in the arrangement, and its execution would have been impossible without it. The instrumentality of transportation did not belong to nor was it controlled by them, but it was used by them and paid by them for services rendered. The contract provided for the sale of coal in Kentucky, its shipment to Nashville, Tenn., to dealers there, for its retail to consumers. It was, to all intents and purposes, a traffic, trade, commerce between states. Was the purpose of the exchange to monopolize a part of this trade, or to combine in restraint thereof? The exchange does not propose to be governed and controlled by the public markets arising from competition and the operations of the laws of supply and demand. On the contrary, it announces that its purpose is "to establish prices on coal at Nashville, Tenn., and to change the same from time to time as occasion may require," and in carrying out this object it asserts that—

"The exchange will establish prices at which coal shall be sold in Nashville, subject, however, to the following conditions and basis: Coal classed as No. 1 to be valued at the mines at $4\frac{1}{2}$ cents minimum price per bushel of 80 pounds for lump, and freight being 4 cents, the dealer's margin to be $4\frac{1}{2}$ cents, making the price of lump coal 13 cents per bushel; No. 2 to be valued at 5 cents at the mines, No. 3, 6 cents; and when the above prices are advanced in excess of the advance in freights, then one-half of the advance shall go to the mine owners and one-half to the dealers. Any member found guilty of selling coal at a less price than the price fixed by the exchange, either directly or indirectly, shall be fined 2 cents per bushel and \$10 for the first offense, and 4 cents a bushel and \$20 for the second offense."

These provisions, so far as this combination could do so, fixed the lowest price of coal to consumers in and near Nashville at 13 cents per bushel, and prevented coal being sold there at a cheaper rate, no matter how much less it might cost in an open and unobstructed market. Nor is this all. The exchange ordains that "owners or operators of mines shall not sell or ship coal to any firm, person, or corporation in Nashville or West Nashville or East Nashville who are not members of this exchange, and dealers shall not buy coal from any one who is not a member of the exchange." The coal trade is confined, so far as the market supply is concerned, to transactions between the miner and dealer, the prices are fixed by them, and the miner and dealer only are eligible to membership. The miners of the concern cannot sell to any dealer in or near Nashville who is not a party to the agreement, nor can such dealer purchase coal of any miner anywhere who is not a member of the body. The operations of both are confined within the membership. So far as Nashville is concerned, they cannot go to cheaper or more favorable markets, or deal with those who would give more favorable terms. The restraint is positive and undeniable. Moreover, in the first section of the by-laws of the exchange it is asserted that "all coal used for manufacturing and steam-boat purposes shall be exempt from prices made by this exchange until all mines tributary to this market shall become members of the exchange, or until the exchange can control prices to govern coal used by manufacturers." This clearly indicates the purpose of the association to be to control the price of coal in the Nashville market used in manufacturing and in steam-boats whenever it could; that the mines of coal tributary to Nashville were all expected to become members of the exchange, whereupon the prices of coal could be fixed absolutely, and the necessary inference from this declaration and the entire organic structure of the body is that it felt strong enough already to regulate and establish the prices of domestic coal in that market, to a large extent, at least, and that this exchange might now monopolize the business of dealing in domestic coal in the Nashville market, and in the future monopolize by and confine to its membership the entire trade in coal at that point. It seems to me that the purposes and intentions of the association could hardly have been more successfully framed to fall within the provisions of the act of July 2, 1890, had the object been to organize a combination, the business of which should subject it to the penalties of that statute, and that there is no need of authorities to sustain such view of the case. Regarding the act as constitutional, I see no way for the defendants to escape its condemnation.

Proof has been taken, on one hand, to establish that the people of Nashville have been and are being injured by the high prices which have been and are being paid for coal, and the extent of the injury. On the other hand, defendants have introduced proof to show that the higher freight rates to Nashville, and the want of facilities for transportation by railroad and water, are the causes for the higher prices of coal at Nashville than at Louisville or Memphis, but it is needless to enter upon this branch of dispute. "The attempt to monopolize or combine" is de-

nounced by the second section of the act, and the first section declares that "every contract or combination * * * in restraint of trade or commerce among the several states * * * is hereby declared illegal." The attempt—the contract to do the thing prohibited—is enough to incur the penalties of this law.

I conclude that the defendants, by the organization of the Nashville Coal Exchange, and their operations under it, have been, and at the time of filing the petition in this cause were, guilty of a violation of sections 1 and 2 of the act of July 2, 1890, and should be enjoined from further violations of the law, as provided by the fourth section thereof.

The petition will be dismissed as to such of the defendants as are not, or were not, members of the exchange at the time of the filing of the petition.

GLIDDEN v. WHITTIER *et al.*

(Circuit Court, D. Idaho. June 1, 1891.)

1. ATTACHMENT—MOTION TO DISSOLVE.

Motion to discharge, under statute of Idaho, may be for the irregularity of its issue, even after the attached property has been redelivered to the defendant upon his giving the counter-undertaking provided for by statute.

2. SAME—SUFFICIENCY OF AFFIDAVIT.

Affidavit is sufficient which alleges that plaintiff has no security by mortgage or lien upon real or personal property, although it omits the other statutory clause, "or pledge of personal property."

(*Syllabus by the Court.*)

At Law. Motion to discharge attachment.

John R. McBride and *Albert Allen*, for plaintiff.

W. B. Heyburn, for defendants.

BEATTY, J. This action was commenced in the state court for the county of Shoshone on the 31st day of July, 1891, and on the same day the plaintiff caused certain ores, the property of the defendant, to be attached. Two days thereafter the defendants made their appearance in the cause, and moved for the release and redelivery to them of the attached property, upon the execution of a proper undertaking, in pursuance of section 4320, Rev. St. Idaho, and thereafter, on the 4th day of August, upon the hearing of such motion, the undertaking having been given, the judge of such court ordered the redelivery to defendant of all such property. On the 9th day of August the defendant moved said state court "to discharge the writ of attachment, and exonerate the makers of the undertaking heretofore given, and to release from the operation of attachment the property attached," on account of the irregularity in the affidavit upon which the attachment was originally issued. This motion does not appear to have been determined in such state court, and is now here renewed.

The first question involved is whether the defendants, by the execution of the bond for the release to them of the attached property, waived their right to move the discharge of the attachment. It will be found upon an examination of the limited decisions on this subject that they are contradictory, chiefly, perhaps, from a difference in the statutes upon which they are based. It is provided by section 4319, Id., "that upon the execution of the undertaking mentioned in next section, an order may be made, releasing from the operation of the attachment all the property attached," and for its delivery to the defendant. It is evidently the design of this statute that the attached property shall pass into the absolute possession and control of the defendant on his execution of the proper bond. The plaintiff's claim or lien upon the property by virtue of his attachment is absolutely annulled, and it is entirely released from all claim of the law, and, in lieu of his attachment lien, plaintiff must rely upon the undertaking given by defendant. This undertaking would seem to be a new and independent contract, into which the defendant and his sureties enter, regardless of plaintiff's desire in the premises, but for his security. Generally when so made any irregularities in plaintiff's attachment proceedings are known to the defendant, and certainly in this case those now complained of were fully known to defendants. It would seem clear upon principle that an undertaking entered into under such circumstances should be held a new and independent contract, and should operate as a waiver of all defects in, and objections to, the original attachment proceedings which the defendant could have made. So it would be held in this case if the statutes above referred to were not qualified by the next section, (4321,) which provides that "the defendant may also at any time, either before or after the release of the attached property apply on motion to the court that the writ of attachment be discharged, on the ground that the same was improperly or irregularly issued." This section, immediately following the two in which the mode of releasing property from attachment and redelivering it to the defendant is defined, must be construed with them, and it does clearly continue in the defendant the right to move the discharge of the writ of attachment for any irregularity in its issue, notwithstanding he may have before released his property by the execution of a proper undertaking. The defendants in this case have not waived their right to insist upon this motion for the discharge of the writ. Was it improperly or irregularly issued? The defendants allege it was, because plaintiff's affidavit, upon which it was issued, only alleges that the payment of the debt sued for "has not been secured by any mortgage or lien upon real or personal property," whereas section 4303 of the statutes requires the additional allegation, "or any pledge of personal property." Does the omission of this clause render the affidavit void, or can the affidavit be construed to have stated all required by the statute? It is evident that the design of the statute is to give the creditor the privilege of securing his debt by attachment only when he has not already acquired some security by mortgage or lien upon real or personal property, or by a pledge of personal property. The important fact to

be shown by his affidavit is that he has not security for his claim. A pledge of property cannot exist without its possession being placed under the control of the pledgee, and such pledge and possession give to such pledgee a lien upon such property. A lien upon personal property may exist without controlling its possession, or without its being pledged, but a pledge cannot exist without creating a lien. If the plaintiff had stated in his affidavit only that he had no security by a pledge of personal property, it would not follow that he might not have security by a lien; but the declaration that he has no lien does negative all possibility of his having a pledge. It is therefore concluded the affidavit satisfies the requirements of the statute.

It is also objected that the undertaking on attachment is informal, but on comparing it with the statutory requirements it seems to be in exact compliance therewith. It is frequently urged that attachment proceedings, being in derogation of the common law, must be strictly construed. Whatever reason may have ever existed for the application of different rules of construction to different laws, or what such rule would require, need not be investigated here. Section 4, Rev. St. Idaho, provides that such rules of construction shall have no application to such statutes, and that their provisions, and all proceedings under them, are to be "liberally construed, with a view to effect their objects and promote justice." The motion to discharge the attachment is overruled.

BERRY *et al.* v. KNIGHTS TEMPLARS' & MASONS' LIFE INDEMNITY CO.

(Circuit Court, W. D. Missouri. May 9, 1891.)

1. FOREIGN LIFE INSURANCE COMPANY—LEX LOCI CONTRACTUS—STIPULATION AGAINST SUICIDE—VALIDITY.

A life insurance company chartered in the state of Illinois carried on its business in the state of Missouri through agents appointed for that purpose. The method of doing business was this: The agent in Missouri would solicit and receive from citizens of that state applications for insurance, which he would forward to the home office of the company at Chicago. When an application was approved, a policy was filled up, dated, and signed by the officers of the company at Chicago, and transmitted by mail to the agent of the company in Missouri, who, upon the payment to him by the applicant of the first premium, called in this case an "entrance fee," delivered the policy to the assured. Upon these facts, *held*: (1) That the company was "doing business" in the state of Missouri within the meaning of those words in section 5982 of the Revised Statutes of that state; (2) that the policy was a Missouri, and not an Illinois, contract, and that the validity and legal effect of its stipulations must be determined by the laws of Missouri; (3) that a stipulation in such a policy that "in case of the self-destruction of the holder of this policy, whether voluntary or involuntary, sane or insane, * * * this policy shall become null and void," is void under section 5982 of the Revised Statutes of Missouri, which declares such a stipulation in a policy issued by "any company doing business in this state shall be void;" (4) that the statute is mandatory and absolute, and cannot be waived or suspended by convention of the parties, or by any device whatsoever.

2. SAME—DOING BUSINESS CONTRARY TO LAW—VALIDITY OF POLICY—ESTOPPEL.

If a life insurance company of one state does business in another state without doing those things which the law of the state requires to be done by a foreign insurance company to qualify it to do business therein, the company and its officers

and agents incur the prescribed penalties, but its policies are binding on the company, and may be enforced by the holder in the same manner and with like effect as if it had qualified itself to do business in the state. In a suit by a policy-holder the company is estopped to deny that it was authorized to do business in the state.

3. SAME—LIFE INDEMNITY COMPANY.

"The Knights Templars' & Masons' Life Indemnity Company," a corporation of the state of Illinois, is not "a co-operative benevolent insurance society," nor "a fraternal brotherhood having a community interest,"—whatever these phrases may mean,—but is an incorporated life insurance company on the co-operative or assessment plan, not for mutual benevolence, but for mutual insurance, and as such it comes within the purview of the statutes of the state of Missouri relating to life insurance companies.

At Law.

George Hall, E. M. Harber, and F. H. Bacon, for plaintiffs.

Luther Collier and Huston & Parrish, for defendant.

CALDWELL, J. On the 6th day of July, 1885, the defendant, a corporation created under the laws of Illinois and doing business in this state, issued to John B. Berry, then a resident and citizen of this state, a policy of insurance on his life for the sum of \$5,000, subject to conditions which will be hereafter noticed. On the 7th day of November, 1889, Berry committed suicide by hanging. The holders of the policy, the present plaintiffs, made due proof of Berry's death, and demanded payment of the policy. The company refused to pay, upon the ground that the policy was void by reason of the following condition contained therein, viz.: "In case of the self-destruction of the holder of this policy, whether voluntary or involuntary, sane or insane, * * * this policy shall become null and void." The plaintiffs thereupon brought this suit to recover the amount of the policy. The company pleads the suicide of the assured, and the above-recited condition of the policy, in bar of the action. The plaintiffs reply that a statute of this state, in force at the date of the policy, renders that provision of it void. The statute reads as follows:

"In all suits upon policies of insurance on life hereafter issued by any company doing business in this state, it shall be no defense that the assured committed suicide, unless it shall be shown to the satisfaction of the court or jury trying the cause that the assured contemplated suicide at the time he made his application for the policy, and any stipulation in the policy to the contrary shall be void." Section 5982, Rev. St. Mo.

If this statute is applicable to the policy in suit, it puts an end to the company's defense. The defendant contends that it is not applicable for several reasons.

1. It is said the policy is an Illinois contract, and to be construed by the laws of that state. But clearly this is not so. The company established an agency, and carried on its business, in this state. It was through that agency the assured, who was a citizen and resident of the state, made his application and received his policy. The fact that the policy was signed by the officers of the company in Chicago has no significance. It was transmitted to the company's agent in Missouri, who received the premium, called, in this case, an "entrance fee," and de-

livered the policy to the assured, at his home in this state, and it took effect at that place and from that date. Corporations are artificial creations, and have no natural rights, and their constitutional and legal rights, in some respects, fall short of those of natural persons. A state cannot deny to the citizens of other states the right to do business within its limits, but it may deny such right absolutely to corporations of other states, or may admit them to do business on such terms and conditions as it is pleased to prescribe. And when an insurance company of one state does business in another, the laws of the latter state prescribing the terms and conditions upon which it is allowed to do business in the state are obligatory upon it. These conditions may extend to the form and legal effect of the company's policies, and if, in the course of its business in the state, it issues policies on the lives or on the property of the citizens of the state which contain conditions prohibited by or in contravention of the laws of the state, such conditions are void. Doing business in the state brings the policy within the operation of its laws, notwithstanding the policy may be signed, and the loss made payable, in another state. In such cases the company cannot, by any contrivance or device whatever, evade the effect and operation of the laws of the state where it is doing business. *Wall v. Society*, 32 Fed. Rep. 273.

2. It is contended that the provision in the policy, declaring that it shall be void if the assured commits suicide, is a waiver or nullification of the statute which declares such a stipulation in a policy "shall be void." The statute is mandatory and obligatory alike on the insurance company and the assured. Its very object was to prohibit and annul such stipulations in policies, and it cannot be waived or abrogated by any form of contract or by any device whatever. The legislative will, when expressed in the peremptory terms of this statute, is paramount and absolute, and cannot be varied or waived by the private conventions of the parties.

3. The next contention of the defendant is that, although it was doing business in the state at the time the policy was issued, it had not then done those things which by the laws of the state were conditions precedent to its right to do business in the state, and "that, therefore," in the language of its counsel, "the defendant did not in any way submit to the jurisdiction of the state," and is in no manner bound by its laws. The state laws referred to were enacted for the benefit of the state, and the protection of the policy-holders. By failing to comply with them, the defendant and its agents incurred the prescribed penalties; but such failure does not affect the validity of its policies, or in any manner operate to the prejudice of its policy-holders. By the fact of doing business in the state it asserted a compliance with the laws of the state, and, after enjoying all the benefits of that business, and receiving the money of the assured, it will not be heard to say that it never submitted "to the jurisdiction of the state." It can reap no advantage from its own wrong. To sustain this defense would be giving judicial sanction to

business methods much below the standard of common honesty. *Ehrman v. Insurance Co.*, 1 Fed. Rep. 471, 1 McCrary, 123; *Fletcher v. Insurance Co.*, 13 Fed. Rep. 528, 4 McCrary, 440; *Insurance Co. v. Elliott*, 5 Fed. Rep. 225, 7 Sawy. 17; *Wall v. Society*, 32 Fed. Rep. 273; *Insurance Co. v. McMillen*, 24 Ohio St. 67; *Clay, etc., Ins. Co. v. Huron Salt, etc., Co.*, 31 Mich. 346; *Insurance Co. v. Walsh*, 18 Mo. 229; *Lamb v. Bowser*, 7 Biss. 315, 372; *Insurance Co. v. Matthews*, 102 Mass. 221.

4. It is next contended that the defendant is not a life insurance company, and therefore not subject to the laws of the state applicable to life insurance companies, and particularly that section 5982 of the Revised Statutes of the state has no application to its policies. The company is variously styled in the answer and brief of its counsel "a corporation for benevolent purposes," "a fraternal brotherhood, having a community interest," and "a co-operative benevolent insurance society." The defendant was incorporated under the general incorporation laws of the state of Illinois on the 5th day of May, 1884. Its character as a corporation is disclosed by its charter, the policies it issues, and its mode of conducting business. Its charter provides:

"ARTICLE I.

"Section 1. This company shall be known as the 'Knights Templars' and Masons' Life Indemnity Company.'

"Sec. 2. The object of this company shall be to furnish life indemnity or pecuniary benefits to the widows, orphans, heirs, relatives, devisees, or legatees of deceased members, according to the regulations and provisions herein-after specified.

"Sec. 3. The principal office of the company shall be at Chicago, Illinois, but the board may establish branch offices elsewhere.

"ARTICLE II.

"Section 1. The officers of this company shall be a president, vice-president, second vice-president, and medical director, to be chosen annually by the board of directors.

"Sec. 2. The affairs of the corporation shall be managed by not less than five nor more than nine directors, who shall be elected from and by the members.
* * *

"ARTICLE III.

* * *
"Sec. 2. The board of directors shall have power to employ any agent, agents, or other service, for such time, and on such terms, and with such powers, as in their judgment will best promote and conserve the interests of the company. * * *

"ARTICLE IV.

* * *
"Sec. 3. Policies of membership may be issued upon a basis of benefits ranging in amounts to five thousand dollars. * * *

"Sec. 4. Upon the death of any member, an assessment, increasing with age, shall be made upon the surviving members, provided an assessment is needed, according to the following table of rates. Said table is drawn for \$1,000, which shall be the unit in determining all other amounts:

"Table of Rates—Assessments per \$1,000.

Years of age, inclusive,	21 to 30,	-	-	-	-	-	\$0 50
" " "	31 to 35,	-	-	-	-	-	60
" " "	36 to 40,	-	-	-	-	-	65
" " "	41 to 45,	-	-	-	-	-	80
" " "	46 to 50,	-	-	-	-	-	95
" " "	51 to 55,	-	-	-	-	-	1 20
" " "	56 to 60,	-	-	-	-	-	1 50
" " "	61 to 65,	-	-	-	-	-	2 00
" " "	66 and upwards,	-	-	-	-	-	2 55

—But no assessment shall be made so long as the money in the death fund will pay the maximum loss in full."

Its sources of revenue are an entrance free of from \$6 to \$12, depending on the amount of the policy, paid by each member on the acceptance of his application, fixed annual dues, at the rate of \$1 dollar for each \$1,000 of insurance, and assessments on its members, according to the fixed rule in the charter, to pay death losses. Three-quarters of the money derived from assessments to pay death losses is placed to the credit of the death fund, to pay policies. The remaining fourth of the money derived from that source, and all the moneys derived from entrance fees and annual dues, in the language of the charter, constitute "a contingent fund, out of which the expenses and emergencies are to be met." The policies issued by the company provide that on the death of the assured the policy-holder shall receive the amount of the policy, and the money "paid on the policy in assessments, subject to the limitation, as to the amount of such payment, as provided in section one of article seven" of the charter, which reads as follows:

"A policy of membership for five thousand dollars shall be good for all the money in the death fund arising from one assessment, provided it shall not exceed five thousand dollars and all the money paid on the policy in assessments; and a certificate for four thousand dollars shall be good for four-fifths of all the money in the death fund arising from one assessment, provided it shall not exceed four thousand dollars and all the money paid on the policy in assessments; and so on in the same proportion as to all certificates."

If the money in the death fund arising from one assessment to pay a policy of a given amount is sufficient for that purpose after deducting therefrom 25 per cent. for the "contingent fund," as provided by article 5 of the charter, the full amount of the policy is paid; if not, the policy-holder loses the deficiency, the company, unlike regular mutual companies, having no reserve fund. If the assured fails to pay promptly his annual dues or assessments, the policy becomes void; and there are numerous other conditions relating to the place of residence, travel, occupation, habits, and the like, of the assured, upon the violation of any one of which the policy is forfeited, being in this and other respects similar to the policies usually issued by life insurance companies. The manager testifies that the company does business in a good many states, and that the bulk of its business is done by and through agents, who are paid by the company for their services. Upon the organization of the company by its charter members, it was understood that members of

the Masonic order only should be admitted to membership, and the practice has conformed to that understanding, though there is no provision to that effect in the charter or policy. When the company was incorporated in 1884 there were but six charter members or corporators, each one of whom became a director and officer of the company immediately upon its organization, and has continued to be such from that time down to the taking of the depositions in this case, with the exception of one, who died, and the surviving directors elected a person to fill the vacancy thus created. All the officers and agents of the company enjoy remunerative salaries and commissions; the commissions of the manager amounting, at times, to as much as \$1,000 per month. The company has no affiliation, and sustains no official relation or connection, with the Masonic order, or any lodge or body belonging to that order. No Masonic body has the power of visitation, or any other jurisdiction or authority, over it, nor is any Masonic body responsible for the conduct of its business, or its debts or obligations. The Masonic feature of the company is limited to its name, and the restriction of its membership to Masons, and the employment of Masons as its agents. The success of the company attests the wisdom of its founders in this regard in a business point of view. By these means its agents have the *entrée* to Masonic lodges and other Masonic bodies. The advantages accruing from this privilege in the solicitation of membership and business are obvious. There are corporations in which the element of insurance is so mingled with benevolent, charitable, social, or other ends that it is difficult to tell whether they should be classed as insurance companies or benevolent societies. But that difficulty does not arise in this case. It is apparent, from an examination of its charter, and its method of doing business; that the defendant is a mutual life insurance company on the assessment plan. Its business is insurance, and nothing else. There is not a social, charitable, or benevolent feature in its organization, or the conduct of its business. It has no lodges, pays no sick dues, and distributes no aid, and gives no attention, to members in distress or poverty. It deals with its members on the strictest business principles. The policy-holders get nothing for which full value has not been paid by the assured, but the assured may pay much, and the policy-holder receive nothing, by reason of the forfeiture of the policy for a violation of some one of its numerous conditions. It would be a curious sort of benevolence which would withhold from innocent children the insurance effected for their benefit on the life of their father because he committed suicide. But that is the kind of benevolence the defendant wants to practice in this case. The assumption of a Masonic name does not make it a Masonic institution. A popular or captivating name often performs a useful office as a business advertisement, but it goes for nothing in determining the legal character of the corporation adopting it. The law is not to be cheated by any gloss of words. It judges things by what they are in fact, and not by their names.

The learned counsel for the defendant say in their brief that their client manifests its "benevolence by contract, and through contractual

relations, instead of mere voluntary, and therefore uncertain, gifts." That is precisely the kind of benevolence practiced by all insurance companies as long as they continue to pay their honest losses. The defendant is not "a co-operative benevolent insurance society," nor "a fraternal brotherhood, having a community interest," (whatever these phrases may mean,) but is an incorporated life insurance company on the co-operative or assessment plan, not for mutual benevolence, but for mutual insurance, and as such it comes within the purview of the statutes of this state relating to life insurance companies. *State v. Association*, 6 Mo. App. 171; *State v. Critchett*, (Minn.) 32 N. W. Rep. 787; *Furmer v. State*, (Tex.) 7 S. W. Rep. 220; *Walter v. Society*, (Minn.) 44 N. W. Rep. 57; *McConnell v. Association*, (Iowa,) 43 N. W. Rep. 188; *Com. v. Association*, (Pa.) 18 Atl. Rep. 1112; *Com. v. Wetherbee*, 105 Mass. 149; *Golden Rule v. People*, 118 Ill. 492, 9 N. E. Rep. 342; *State v. Society*, 72 Mo. 146; *Wall v. Society*, 32 Fed. Rep. 276. The clause in the policy declaring it void in case of the suicide of the assured is itself void under the section of the Revised Statutes heretofore quoted. Let judgment be entered for the plaintiffs.

NOTE. Since the opinion in this case was filed, the supreme court of the United States has decided the case of *Equitable Life Assurance Soc. v. Pettus*. The opinion of the circuit court in that case is reported under the title of *Wall v. Society*, 32 Fed. Rep. 273. The supreme court affirmed the judgment of the circuit court, and say: "Upon this record, the conclusion is inevitable that the policy never became a completed contract, binding either party to it, until the delivery of the policy and the payment of the first premium in Missouri; and consequently that the policy is a Missouri contract, and governed by the laws of Missouri." Referring to the Missouri statute prescribing the rules for the commutation of life policies upon which two full annual premiums had been paid, the court say: "The manifest object of this statute, as of many statutes regulating the form of policies of insurance on lives or against fires, is to prevent insurance companies from inserting in their policies conditions of forfeiture or restriction, except so far as the statute permits. The statute is not directory only, or subject to be set aside by the company with the consent of the assured; but it is mandatory, and controls the nature and terms of the contract into which the company may induce the assured to enter." It follows that the insertion in the policy of a provision for a different rule of commutation from that prescribed by the statute, in case of default of payment of premium after three premiums have been paid, as well as the insertion in the application of a clause by which the beneficiary purports to "waive and relinquish all right or claim to any other surrender value than that so provided, whether required by a statute of any state or not," is an ineffectual attempt to evade and nullify the clear words of the statute. The opinion was delivered May 11, 1891, and will probably appear in volume 140 of United States Reports.

DOZIER v. FIDELITY & CASUALTY CO. OF NEW YORK.

(Circuit Court, W. D. Missouri, W. D. June 8, 1891.)

ACCIDENT INSURANCE—SUN-STROKE.

"Sun-stroke or heat prostration," contracted by the decedent in the course of his ordinary duty as a supervising architect, is a disease, and does not come within the terms of a policy of insurance against bodily injuries, sustained through external, violent, and accidental means," but expressly excepting "any disease or bodily infirmity."

At Law. On demurrer to petition.

This is an action on an accident insurance policy. The assured, Willoughby L. Dozier, on the 26th day of April, 1890, took out a policy of insurance in the defendant company, which, by its terms, would expire on the 26th day of April, 1891. The assurance was "against bodily injuries sustained through external, violent, and accidental means." It did not cover "any disease or bodily infirmity." The insured was, by occupation, a supervising architect. The petition, by his wife, the named beneficiary, alleges that the assured, while in the discharge of his ordinary avocation, and without any voluntary exposure on his part, came to his death on the 23d day of June, 1890, "by sun-stroke or heat prostration." To this petition the defendant demurs, on the ground that the petition does not state facts sufficient to constitute a cause of action, in that it shows on its face that the alleged injury was not accidental, within the meaning of the policy.

John L. Pealk, for plaintiff.

Warner, Dean & Hagerman, for defendant.

PHILIPS, J., (*after stating the facts as above.*) The question to be decided is whether or not death resulting from sun-stroke or heat prostration comes within the means of injury insured against. This precise question does not appear to have been passed upon by any American court, but it is not too much to say, perhaps, that it may be regarded as settled in the negative in England by the opinion of Chief Justice COCKBURN in *Sinclair v. Assurance Co.*, 3 El. & El. 478. The policy there assured against "any personal injury from, or by reason or in consequence of, any accident which should happen to him upon any ocean, sea, river, or lake." The assured was master of the ship Sultan, and in the course of his voyage he arrived in the Cochin river, on the southwest coast of India, and in the usual course of his vocation he was smitten by a sun-stroke, from the effect of which he died. On full consideration, it was held that his death must be considered as having resulted from a natural cause, and not from accident, within the meaning of the policy. The policy there did not, as here, contain the words "external, violent," and yet the learned chief justice held that the term "accident," as used in the policy, involved necessarily some violence, casualty, or *vis major*. He says:

"We cannot think disease produced by the action of a known cause can be considered as accidental. Thus disease or death engendered by exposure to heat, cold, damp, the vicissitudes of climate, or atmospheric influences, cannot, we think, properly be said to be accidental; unless, at all events, the exposure is itself brought about by circumstances which may give it the character of accident. Thus, by way of illustration, if, from the effects of ordinary exposure to the elements, such as is common in the course of navigation, a mariner should catch cold and die, such death would not be accidental; although if, being obliged by shipwreck or other disasters to quit the ship, and take to the sea in an open boat, he remained exposed to wet and cold for some time, and death ensued therefrom, the death might properly be held to be the result of accident. It is true that, in one sense, disease or death through the direct effect of a known natural cause, such as we have referred to, may be said to be accidental, inasmuch as it is uncertain beforehand whether the effect will ensue in any particular case. Exposed to the same malaria or infection, one man escapes, another succumbs. Yet diseases thus arising have always been considered, not as accidental, but as proceeding from natural causes. In the present instance, the disease called 'sun-stroke,' although the name would at first seem to imply something of external violence, is, so far as we are informed, an inflammatory disease of the brain, brought on by exposure to the too intense heat of the sun's rays. It is a disease to which persons exposing themselves to the sun in a tropical climate are more or less liable, just as persons exposed to the other natural causes to which we have referred are liable to disastrous consequences therefrom. The deceased, in the discharge of his ordinary duties about his ship, became thus affected, and so died."

According to this high authority, a disease produced by a known cause cannot be considered as accidental. This conclusion has been accepted as authoritative by text-writers. Bliss, Ins. § 399; May, Ins. (3d Ed.) § 519. If sun-stroke or heat prostration is properly classified among diseases, it is expressly excepted from the operation of this policy. It is discussed in works on Pathology under the head of diseases of the brain. Niemeyer in his work on Practical Medicine, (vol. 2, pages 181, 182,) treats of it under the head of "Diseases of the Brain." He asserts that the investigations and experiments of so renowned a specialist as Obernier have entirely exploded the once common notion that sun-stroke, or *insolatio*, depends on hyperæmia of the brain, induced by the action of the sun's rays on the head. The rays of the sun are not essential to it. "It is now known that in this disease there is a serious derangement of the heat-producing function, and a great rise in the bodily temperature, which, in extreme case, may reach 109 degrees or 110 degrees Fahr." And he concludes that, while nothing is yet known of the anatomical lesions upon which sun-stroke depends, yet "the disorder has a definite material basis." A standard Encyclopædia (Britannica, vol. 22, p. 666) terms it a "disease," and prescribes its methods of treatment. From this and other standard works we collate the following facts: That it is a term applied to the effects upon the central nervous system, and through it upon other organs of the body, by exposure to the sun or to overheated air. "Although most frequently observed in tropical regions, this disease also occurs in temperate climates during hot weather. A moist condition of the atmosphere, which interferes with the cooling of

the overheated body, greatly increases the liability to suffer from this ailment." The common notion that sun-stroke or "heat prostration," as it is termed in the petition, comes like a stroke of lightning from a piercing ray of the sun, is utterly at fault. It affects persons frequently during the night. It often results from overcrowding in quarters, as in the case of soldiers in barracks, and to persons in poorly ventilated rooms. Also persons whose employment exposes them to heat more or less intense, such as laundry workers and stokers, are apt to suffer from this in hot seasons. "Causes calculated to depress the health, such as previous disease, particularly affections of the nervous system, anxiety, worry, or overwork, irregularities in food, and, in a marked degree, intemperance, have a predisposing influence; while personal uncleanness, which prevents, among other things, the healthy action of the skin, the wearing of tight garments, which impede alike the functions of heart and lungs, and living in overcrowded and insanitary dwellings, have an equally hurtful tendency." Longmore, in his reports of cases occurring in the British army in India, where it is quite prevalent, attributes it much to the foul air and badly ventilated quarters, and he also speaks of its pathological conditions. In all its forms, ranging from "heat syncope" and "heat apoplexy" to "ardent thermic fever," it is subjected to medical treatment as a disease, and its fatality is estimated at 40 to 50 per cent. With what propriety for accuracy, therefore, can this malady be termed an accident, any more than cholera, small-pox, or yellow fever, or apoplexy? It may be an accident that a person is exposed to it, but the conditions under which the human system may be affected by it, certainly belong to natural causes, which may reasonably be anticipated, as they come not by chance. The term "accident," as used in the policy, is presumed to be employed in its ordinary, popular sense, which means "happening by chance;" "unexpectedly taking place;" "not according to the usual course of things." So that a result ordinarily, naturally, flowing from the conduct of the party cannot be said to be accidental, even where he may not have foreseen the consequences.

It is not deemed essential to a vindication of the correctness of the conclusion reached to review the various American decisions illustrating the application of the term "accidental" employed in such policies further than to note the palpable distinction between them and the case at bar. Death by drowning is accidental, as there is present the *vis major*, external and violent, producing asphyxia, and in the act producing the injury there is something unforeseen, unexpected, and unusual. May, Ins. § 516. In *Association v. Barry*, 131 U. S. 100, 9 Sup. Ct. Rep. 755, the assured, after two other persons had jumped from a platform five feet from the ground with safety, also jumped therefrom, followed, as to him, with serious consequences, producing a stricture of the duodenum, from which death ensued. In that case the deceased intended to, and thought that he would, alight safely, and it was a question for the jury to say whether or not it was an accident that he did not. The court say:

"If the death is such as follows from ordinary means voluntarily employed in a not unusual or unexpected way, it cannot be called a result effected by

accidental means; but if in the act which precedes the injury something unforeseen, unexpected, unusual occurs, which produces the injury, then the injury has resulted through accidental means."

In *Association v. Newman*, 84 Va. 52, 3 S. E. Rep. 805, the assured was found dead in his bed early in the morning, caused evidently by inhaling coal gas. The case turned upon the question whether or not this gas was a poison or poisonous substance, within the meaning of the exception contained in the policy. The controversy among the experts was as to whether death resulted from carbonic oxide or carbonic acid, and as to their resultant poisonous power, both causing death by suffocation. Such a death clearly came within the term "accidental," and it was left to the jury to determine whether or not carbonic oxide is poisonous within the meaning and intent of the words "poison" and "poisonous" as used in the policy. This course was pursued by the court in view of the conflict in the testimony as to whether such gases were strictly "poisonous" in the ordinary acceptance to be imputed to such term in the policy. These cases do not present the question of an accident and disease as in the case at bar. In *Bacon v. Association*, (Ct. App. N. Y. Oct. 14, 1890,) 25 N. E. Rep. 399, it was held that death resulting from a malignant pustule, caused by the infliction upon the body of diseased animal matter containing *bacillus anthrax*, is death from disease, and not within the terms of an accident policy similar to the one under consideration. It was likened to what is called "wool sorter's disease," because it happens to people who handle wool and hides, such as tanners, butchers, and herdsmen. Although the medical experts admitted that this species of malady belonged to pathology, yet they attempted to except this instance from the classification of diseases by defining it as "a pathological condition, and succumbing of the body to the infliction of this particular poison." But the court held that a pathological condition "means neither more nor less than a diseased condition of the body," and therefore, as the policy expressly excepted bodily infirmity or disease, there could be no recovery. The court say: "No abrasion of the skin is needed to produce the contact of the *bacilli*, and what follows from such contact seem to be as plainly a disease as in the case of small-pox or typhoid fever." Sun-stroke seems to be recognized by the courts in New York as a disease. In *Boos v. Insurance Co.*, 6 Thomp. & C. 364, the contention was as to whether the court should take judicial cognizance of the fact that sun-stroke was "a serious disease," within the terms of the policy. There seemed to be no question made that it was not a disease, but whether the fact of its seriousness should be left to the determination of the jury. Courts may take cognizance of facts generally known and recognized in nature, science, and history. They will take notice of processes in art and science, the results of which are matters of common knowledge. *Brown v. Piper*, 91 U. S. 37. They will take notice of the art of photography, and its production of correct likenesses. *Udderzook's Case*, 76 Pa. St. 340; *Cozzens v. Higgins*, 1 Abb. Dec. 451. Also, that coal oil is inflammable. *State v. Hayes*, 78 Mo. 318. So should courts take notice that fever in its multiform grades is a dis-

ease, and I apprehend, in view of the universal assignment of apoplexy in pathology among the diseases of the brain, that it would not be seriously questioned that courts in trials before juries may assume it to be a bodily disease.

It is suggested in argument by the learned counsel for plaintiff that at some time anterior to the issuance of this policy the defendant's policies contained an express exception against injury by sun-stroke, and that in its circulars distributed at the time the policy in question was issued it asserted that practically all the old conditions had been expunged from its policies. It is therefore argued that this was tantamount to an assurance on its part that sun-stroke would thenceforth be regarded by it as expressed within the terms "external, violent, and accidental." What the facts are touching this assertion the court cannot know, and what the law arising thereon may be the court is not required on this issue to say, as no such facts appear in the petition. The court can look alone to the petition in passing on the demurrer. The demurrer admits only such facts as appear on the face of the petition, and such as are well pleaded.

It results that the demurrer is sustained.

WILLIAMS *et al.* v. NEELY *et al.*

(Circuit Court, D. South Carolina. May 30, 1891.)

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—EXPENSE OF ADMINISTRATION—MORTGAGES.

Where by an assignment for benefit of creditors members of a creditor firm were made assignee and agent for creditors, and it appears upon the settlement of their accounts that a number of mortgages, both of chattels and real estate, had been made to their firm by the insolvent, the expenses of realizing upon the chattel mortgage are properly charged to the creditor firm, since by such mortgages the chattels became the property of the mortgagees, and the only interest which passed to the assignee was the right to demand any surplus remaining on foreclosure; and the expenses of foreclosing the mortgages of real estate were properly charged against the estate, since a mortgage of realty is in South Carolina a mere security, and the title remains in the mortgagor, and passed by the assignment for benefit of creditors.

2. SAME—EXPENSES OF ASSIGNEE.

Where the bulk of the assigned estate consisted of lands in South Carolina, and the assignee and agent for creditors both resided in New York, traveling and living expenses in going to and from their homes are not legitimate items of expense to be charged against the estate.

3. SAME—COMMISSIONS.

Notwithstanding the assignee and agent for creditors are members of a creditor firm, they are nevertheless entitled to commissions on so much money as was paid the firm from the mortgaged realty.

At Law.

John C. Haskell, for plaintiffs.

C. E. Spencer and W. B. Wilson, Jr., for defendants.

SIMONTON, J. The case comes up on the final report of the assignee and agent of creditors of J. M. Ivy, and exceptions thereto. Ivy, a mer-

chant of Rock Hill, in this state, being in insolvent circumstances, on the 5th day of September, 1885, made an assignment for the benefit of his creditors to Francis W. Williams, of the city of New York. The assignment contains a very general description of property, real and personal, and refers to and makes part of it a schedule containing a description of the real property. This schedule contains 22 tracts or parcels of land, all of which, but a Texas tract, are in South Carolina. The large majority of these have a memorandum attached, "Mortgaged to Williams, Black & Co." Another schedule contains a list of creditors, and the amounts due to them, 31 in number, of whom Williams, Black & Co. are put down for \$195,000. It appears that Ivy did his business chiefly with this firm, and that in order to secure them he had executed to them a mortgage covering many parcels of real estate, assigned to them valuable choses in action, and gave them a great many chattel mortgages. Williams, the assignee, was one of the firm of Williams, Black & Williams, and R. P. Williams, another member of the firm, also resident in New York, was elected agent of creditors. They proceeded to administer the estate, have realized the assets, and now file their account. As we have seen, the assigned estate consisted of lands for the most part under mortgage, of choses in action, and personalty, also largely mortgaged. The choses in action and the chattels mortgaged to Williams, Black & Williams, the conditions having been broken, were their property. In them was the legal title, and the only interest conveyed in the assignment was the right in the assignee to demand and receive an account for any surplus remaining after Williams, Black & Williams were paid in full. The assets, real and personal, held by them as security have been realized and applied, and leave a large deficit. Every expense attending the collection of these choses and the foreclosure of these chattel mortgages, including the commissions for collecting them, must fall on Williams, Black & Williams, and cannot be charged against the assigned estate. With the realty is a different condition of things. In South Carolina a mortgage is a bare security for debt. The legal title and the use and possession of the property remain in the mortgagor, the mortgagee having no interest whatever, even in the rents and profits, until he forecloses. *Seignious v. Pate*, 32 S. C. 134, 10 S. E. Rep. 880; *Bredenberg v. Landrum*, 32 S. C. 1, 10 S. E. Rep. 956. In the present case the assignee necessarily took possession as such of the realty. All sales *in pais* must have been made by him, all taxes paid by him, as owner, and all moneys collected must have been collected by him, and applied to the special debts. All expenses incident to the realty and its proceeds are chargeable upon the assigned estate. In this account are also charged certain items of expenses of the assignee and agent. Both of them were residents of New York. All of the property which was visible was in South Carolina, except the lands in Texas. The assigned estate is liable for all expenses incident to its business. It cannot be made liable for the traveling expenses of the assignee and agent, incurred simply in going from their homes to the place where the business of the assigned estate was conducted; in other words, the general creditors can-

not be made to pay beyond the usual commissions for traveling and living expenses of the assignee. If these were residents of the state of South Carolina, they could not charge the assigned estate for their household expenses and for railroad or car fares in going to and from their homes and their offices. So, being residents of New York, they cannot charge the assigned estate for the expense of going to and returning from the town in which the business of the estate was transacted. Any special expense attending the business of the estate, looking after its property, and collecting or securing its assets, would be a proper charge. It is impossible to ascertain from the accounts filed what, upon these principles, must or must not be charged against the assigned estate.

Notwithstanding that the assignee and the agent of creditors were members of the firm of Williams, Black & Williams, and so creditors of the estate, they are entitled to commissions on so much money as was paid to that firm from the mortgaged realty. In South Carolina an executor who is debtor of the estate is allowed commissions upon notes due by him to the testator, and paid by operation of law. *Griffin v. Bonham*, 9 Rich. Eq. 71. An administrator who purchased property of the estate at his own sale was allowed commissions for receiving the money from himself. *Vance v. Gary*, Rice, Eq. 2. An administrator who became the guardian of a distributee was allowed commissions as administrator for paying to himself as guardian, and for receiving as guardian from himself as administrator. *Ex parte Witherspoon*, 3 Rich. Eq. 13. The money was received by the assignee and agent in a fiduciary capacity, and paid to their firm as creditors. There is no law requiring the assignee and agent of creditors to invest funds in their hands. They are not liable for interest on balances in their hands. But where it appears that they have used the trust moneys or treated them as their own, like all other trustees, they must account for interest. In this account they charge themselves with interest. This is an admission that they have used the funds in hand. As we are governed by the law of South Carolina in this regard, they must account for interest at the rate of 7 per cent., and not at 6 per cent. Let the case be recommitted, and the accounts stated, in accordance with this opinion.

HALTERN *v.* EMMONS *et al.*

(District Court, D. Alaska. April 12, 1890.)

UNGRANTED LANDS IN ALASKA—POSSESSORY ACTION.

The treaty of cession of Alaska March 30, 1867, included all ungranted lots in Sitka, but it did not include private dwellings, warehouses, ice-houses, etc., which were left subject to the control of their owners. Held that, where there was an ungranted lot on which there was an ice-house at the time of the transfer, the ownership of which, as well as the possession of the lot, subsequently passed to the plaintiff, he acquired thereby such a legal estate in the premises as would enable him, under the laws of Oregon, to maintain a possessory action therefor.

At Law.

Charles S. Johnson, Dist. Atty., for plaintiff.

A. Hew Gamel, for defendants.

BUGBEE, J., (*charging jury*.) This is an action brought by Theodore Haltern against George T. Emmons and Otto Nelson, to recover the possession of a certain lot of land lying within the town of Sitka; also for damages for the unlawful withholding thereof. It is the duty of the court to give you all necessary information as to the law; but you are instructed that you are the exclusive judges of all questions of fact, no matter what statement the court may make in regard to them. Nevertheless, the court's instructions as to law should control you. The action is brought under the statutes of Oregon, applicable to this district, which provide, in substance, that any person who has a legal estate in real property, and a present right to the possession thereof, may recover such possession, with damages for withholding the same, by an action at law. Such action must be commenced against the person in the actual possession of the property at the time, and was properly brought in this case against the defendant Emmons and against the defendant Nelson, his landlord, who is the person who was acting as the owner of the land. The defendant Emmons has pleaded that he was only in possession as tenant of the defendant Nelson, disclaiming any other interest in the premises himself; and your verdict in this case will, in effect, be for or against the plaintiff, or for or against the defendant Nelson alone. If your verdict be for the plaintiff, it should find that he is entitled to the possession of the property described in the complaint, and should find the nature and duration of his estate, with damages for withholding the property, up to the time of your verdict, exclusive of the use of permanent improvements made by defendants. And if you find that defendant Nelson, or those under whom he claims, have made permanent improvements upon the property in good faith, holding under color of title adversely to the claim of plaintiff, the value of such improvements at the time of trial must be allowed by you as a set-off against such damages. The nature and duration of the estate to be found by you must be such nature and duration as were recognized by the treaty between Russia and the United States, the articles of transfer, and subsequent acts of congress; for further than this it will be impossible to go under existing circumstances. Of course, if you do not find any damages in favor of the plaintiff, the value of improvements made by defendant cuts no figure in the case. If your verdict be for the defendant, it must find that the plaintiff is not entitled to the possession of the property described in the complaint, or any part thereof. This is merely a possessory action, but, to maintain it, plaintiff must have a legal interest in the property and a present right of possession, which existed at the commencement of the suit.

It is not necessary that plaintiff should show a perfect title, but he must recover on the strength of his own title, and not on the defects of that of his adversary. Plaintiff must have had a legal estate at the time

of the commencement of the action, as contradistinguished from an equitable title; and, so far as any one could have a legal estate other than an estate in fee-simple in Alaska, he must be considered to have had such, if the same could have been derived from his grantors and predecessors in interest. A legal title may be acquired by adverse possession for such a length of time that the statute of limitations may be invoked to sustain it; that is to say, undisturbed possession may ripen into a legal title, and as against one party a person may have a legal title, though as against the government it may not have been perfected. The title to land in Alaska is in an anomalous position. With the exception of some few titles in fee-simple, which were recognized by the treaty between Russia and the United States, there is no such thing as private ownership of land in fee-simple in the territory. Plaintiff's legal interest, if he has any, was acquired in the following manner, and under the following circumstances: The land in dispute is part of the territory ceded by the imperial government of Russia to the United States, pursuant to the treaty of March 30, 1867. That cession included all ungranted lots of ground in Sitka, (and it is not claimed by either party that this land has ever been granted by the Russian government to any one,) but it did not include private dwellings and warehouses, ice-houses, etc.; these having been left subject to the control of their owners. This property is claimed to have been occupied prior to and at the time of the cession by plaintiff's grantors as an ice-house, and, if you find such to be the fact, the buildings so used were not transferred to this government by the treaty, but such buildings remained subject to the control of their owners, who retained also a possessory right to the land on which they were erected, such possessory right being naturally essential to the enjoyment of their property, but such owners had no title in fee to the land in dispute, it not being one of the granted lots, as I have stated. When the actual transfer of the territory was made, on October 26, 1867, the commissioners of the respective governments attached to their certificate or articles of transfer certain inventories of public and private property in Sitka, embracing that which was actually transferred as well as that which remained in individual ownership. One of these inventories was marked "D," and was designated: "Inventory of private property in the city of New Archangel, (Sitka,) with the numbers and letters indicating the situation of dwelling-houses, establishments, and lots of ground as marked on the plan of the city attached to the protocol of transfer." There was also a map, which has been offered in evidence here as the plan of the city referred to in the inventory. The inventory and map show that lot numbered 55 on the plan was described as an ice-house. This is the lot in dispute in this action.

Plaintiff claims that prior to and at the time of the transfer the ice-house was the property of J. Mora Moss and Charles Baun, their ownership having been certified to, prior to the transfer, by the governor of the Russian colonies in America; that Moss and Baun assigned their interest therein to plaintiff, who took possession thereof and fenced in the lot prior to 1885; that in 1887 one Clark, the defendant's grantor,

wrongfully entered upon the lot, and in place of the ice-house, which had been blown down, erected a house, which at the time of the commencement of the action was occupied by the defendant Emmons. Defendant denies any transfer to Moss and Baun by the governor, the transfer to plaintiff by Moss and Baun, and that the premises were ever listed or marked as private property by the commissioners of the two governments, but admits the entry by Clark and his sale to defendant Nelson, and claims that at the time of the execution of the treaty the premises were occupied by and belonged to the Russian American Company, a corporation existing under a charter from the Russian government, and that under the provisions of that treaty all the rights, grants, privileges, and franchises of said company within Alaska were extinguished, and this property in question was transferred to the United States, and thereupon became subject to entry and occupation as "unused and unoccupied" domain of our government, (although no evidence has been offered as to that,) and that as such "unused and unoccupied" land Clark rightfully entered upon and took possession of it, and erected a dwelling-house thereon.

If you should find that at the time of the cession the property in dispute was in fact the ice-house on lot numbered 55 on the plan, that the same was owned by said Moss and Baun, and that they, or either of them, transferred their right to plaintiff, and that he has not parted therewith, and that his possession was prior to that of defendant, then it follows, as a matter of law, that plaintiff had such a legal estate in the property as, under the statute, would entitle him to maintain the action, and, unless defendant can show a better title and a present right of possession, plaintiff is entitled to a verdict at your hands. The interest and estate held by Moss and Baun was held by them in common. It has not been shown that plaintiff succeeded to the interest of Moss by any regular conveyance, Moss having died, and the deed of his executrix and executor being insufficient to convey his interest. But a deed from Baun to plaintiff has been put in evidence, the legal effect of which is to make plaintiff a tenant in common with the heirs or devisees of the deceased, and as such tenant in common plaintiff is entitled to maintain this suit against the defendant; and if you find that plaintiff has so succeeded to the title of Baun, then you may, if other circumstances permit, find a verdict for plaintiff for the entire interest, notwithstanding the fact that he is the owner of only an undivided interest in common, and that his co-tenant is not joined.

Although defendant sets up in his answer that the premises in dispute were at the time of the cession the property of a corporation, he does not claim to have succeeded to its interest, and does not in fact set up, nor has he attempted to prove, any legal estate whatever, but relies upon his right to occupy and possess the land as "unused and unoccupied" domain of the United States. In order to defeat the plaintiff, defendant must show that his right to occupy and possess the land is superior to that of plaintiff; that is, he must show that the premises were unused and unoccupied public domain at the time he entered into possession. If they

were used and occupied by plaintiff at that time, and the plaintiff was an owner in common as successor to Baun, defendant's grantor, Clark, as against the plaintiff, was a mere intruder, without any rights whatever, and whatever buildings he erected were erected at his own risk, and your verdict must be for plaintiff.

As I have stated, under the existing laws neither plaintiff nor defendant can claim a fee-simple title to the land in controversy. The treaty and acts of cession recognized absolute title only to the building which was on the land, the right to possession of which is in dispute here. But that right to possession was distinctly affirmed by the "Organic Act," passed May 17, 1884, which said "that the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation, or now claimed by them, but the terms under which said persons may acquire title to such lands is reserved for future legislation by congress."

If plaintiff or his grantor, Baun, at the time of the passage of the organic act, was actually in the use or occupation of the land in dispute, or claimed it, whether in their own right or as tenants in common, the government could not disturb him, and he and his tenant in common were and are, unless they abandoned all claim, the only persons who could obtain title by future legislation, and, as against the defendant, he or his co-tenant or both have the only legal estate in the property which is recognized by the organic act, so far as there can be any legal estate. If you should find for plaintiff, it is your duty to consider and admeasure what, if any, damages he has sustained by reason of the wrongful occupation by the defendant of the premises; but against these you may offset, so far as it may be, the value of the improvements put on the premises, if you believe such improvements were made in good faith. The fact that defendant's grantor was a lawyer, and advised defendant that his title was good, has nothing to do with your verdict, except in so far as it may show defendant's good faith in the matter.

VAN HOOREBEKE v. UNITED STATES.

(District Court, S. D. Illinois. January Term, 1891.)

1. DISTRICT ATTORNEYS—COUNSEL FEES.

Under Rev. St. U. S. § 824, which provides that "when an indictment for crime is tried before a jury, and a conviction is had, the district attorney may be allowed a counsel fee in proportion to the importance and difficulty of the case, not exceeding \$30," the accounting officers of the treasury department have no power to reduce or disallow such counsel fees when they have been allowed by the district court in which the trials were had.

2. SAME—JURY TRIAL.

Under Rev. St. U. S. § 824, cl. 1, which allows a district attorney in a trial before a jury a fee of \$20, the fact that the jury disagreed does not deprive the district attorney of his right to such fee.

3. SAME—MILEAGE.

Where a district attorney goes from a place where he is engaged at the district court to a place whither he is officially called to appear before a commissioner, he

is entitled to mileage for the distance so traveled, where such distance is less than that from his home to the place where the commissioner sits.

4. SAME—ATTACHMENT FOR CONTEMPT.

An attachment for contempt, in which a district attorney properly and necessarily appears for the government, is an independent suit, in which he is entitled to his statutory fees.

5. SAME—PRESENTATION TO TREASURY DEPARTMENT.

The act of congress, which requires the accounts of district attorneys to be forwarded "when approved" to the proper accounting officers of the treasury department, does not make presentation to such officers a condition precedent to an action against the government on such an account. Following *Erwin v. U. S.*, 37 Fed. Rep. 470.

At Law.

G. Van Hoorbeke, in pro. per.

James A. Connolly, for the United States.

ALLEN, J. The petitioner, late United States district attorney for this district, files his petition in this case against the government under the act of congress of March 3, 1887, to recover in the aggregate \$548.75. This sum is made up from various items for services performed by him during his term as district attorney, and for money paid by him for telegrams in connection with his official duties, and for money for freight and charges paid, laid out, and expended upon goods, wares, and merchandise shipped to the several places of holding courts in the district. These accounts, it seems, were all satisfactorily proved in open court, and were, except one class, afterwards presented to the accounting officers of the treasury department, where the disallowances occurred.

The first question, according to the order in which the account is made out, arises upon items 48, 61, and 67, fol. 6; 66, 87, and 111, fol. 7; 55, 65, and 67, fol. 8; 170, fol. 9; and 26, fol. 10. These 10 items present the same question, under the following clause of section 824 of the Revised Statutes of the United States:

"When an indictment for crime is tried before a jury, and a conviction is had, the district attorney may be allowed, in addition to the attorney's fees herein provided, a counsel fee in proportion to the importance and difficulty of the cause, not exceeding thirty dollars."

The district court, upon proper proof, and with a personal knowledge of the importance and difficulty of the cases, allowed a counsel fee of \$30 in each. The accounting officers of the treasury department arbitrarily cut down the allowance to \$15 in each case. Upon what ground this action was taken no plausible theory has been advanced. It certainly would not be safe to admit that these officers have the supervisory power to reduce a fee allowed by the court, for this would include the power to increase such fee, in the absence in either case of any knowledge of the circumstances under which the court acted in making the allowance. The powers and duties of the accounting officers do not go to this extent. These items will be allowed on the authority of *U. S. v. Waters*, 133 U. S. 208, 10 Sup. Ct. Rep. 249.

Items 24 and 26, fol. 10, belong to the class already considered, only differing as to their facts in the suspension by the accounting officers in

this instance of the entire counsel fee allowed by the court, \$30 in each case, while in the cases of the items first mentioned there was simply a reduction in each instance of \$15. Items 24 and 26, fol. 10, will therefore be allowed.

No reason is apparent for the disallowance of items 14 and 110, fol. 9; 28, fol. 11; and 63, fol. 14. Judgments in favor of the government were regularly entered in these cases upon pleas of guilty, and it is understood to have been the uniform practice of the accounting officers heretofore to allow them. They will be allowed.

Items 90 and 144, fol. 10; 20, fol. 12; and 63, fol. 14,—the petitioner seems clearly entitled to under the first clause of section 824 of the Revised Statutes. Under this statute, the district attorney, in a trial before a jury, is entitled to a fee of \$20. The disallowance of these items by the accounting officers rests on the fact that there were no verdicts in the cases, the jury in each case having been discharged by the court after all reasonable effort to make a verdict had been exhausted. The failure of the juries to make verdicts had nothing to do with the labor of the district attorney in the preparation and trial of the cases, and he is as clearly entitled to a fee, where a disagreement of the jury occurs, as where a verdict is promptly returned into court. The items will be allowed.

Items 23 and 25, fol. 10, will be allowed. They were allowances for services rendered in cases tried by juries where there were verdicts of guilty. The statute before quoted is explicit in fixing the fee of the district attorney in such cases at \$20, and no reason has been suggested or explanation offered to justify the action of the accounting officers in suspending the claims.

Items 8½, 10, and 18, fol. 13; 5, fol. 14; and 39, fol. 15,—are for mileage traveled by the petitioner while he was district attorney from the place of his abode to Cairo, a place of holding court in the district, and to the places of examination before commissioners of persons charged with crime. The ninth clause of section 824 of the Revised Statutes fixes the compensation for such services at "ten cents a mile for going and ten cents a mile for returning." The proof in support of these items was full, and not controverted. The only suggestion offered against the allowance of any of them applied to one or two of the items where the petitioner, while acting as district attorney, and being engaged at a district court in session at Cairo or Springfield, charged from these points to the places where he was officially called to appear before commissioners, and not from the place of his abode, Carlyle. In these instances, however, the distance was shorter, and, of course, the mileage less, than had he charged from his home. The proof showed that, on being notified, he went directly from Cairo or Springfield to the place of examination. If, in such cases, the distance to the point of examination had been greater than from the place of his abode, the objection to the allowance of the items might be well founded; but, where there was a saving to the government by the course pursued, it should not be heard in complaint. The items will be allowed.

The accounting officers also rejected, it seems, items 33, fol. 12, and 31, fol. 14. Upon what ground this ruling was made it is difficult to understand. The cases were attachments for contempt. They were new and independent suits, in which the petitioner properly and necessarily appeared for the government. In *Hayes v. Fischer*, 102 U. S. 121, Chief Justice WAITE, delivering the opinion of the court, said:

"If the proceeding below, being for contempt, was independent of and separate from the original suit, it cannot be re-examined either by writ of error or appeal. This was decided more than 50 years ago in *Ex parte Kearney*, 7 Wheat. 38, and the rule then established was followed as late as *New Orleans v. Steam-Ship Co.*, 20 Wall. 387."

To the same effect is *Goodrich v. U. S.*, 42 Fed. Rep. 392-395. These items will be allowed.

Item 46, fol. 11, is also allowed. It is clearly covered by section 824.

Item 9, fol. 14, must be allowed. There was a trial by the court, a jury being expressly waived, and judgment in a case at law where the United States was a party. The second clause of the act of congress, providing for the "fees of attorneys, solicitors, and proctors," gives a fee of \$10 in such cases.

The petitioner files with his petition a long, detailed, itemized account, including every item, however small, on which he asks for judgment. This account includes items for money paid out by him for telegrams on government business relating to his official action, and for money paid for express packages in connection with the performance of his official duties. On the trial these various charges, found on folios 17 to 22, inclusive, were fully proven; but the present district attorney interposed the objection to their allowance by this court that they had not been, previous to commencement of this suit, forwarded by petitioner to the proper accounting officers of the treasury department, under the act of congress of February 22, 1875. I was inclined at the time to think the objection well taken, but, on examination, have yielded to the rulings in *Ravesies v. U. S.*, 21 Ct. Cl. 243, and *Erwin v. U. S.*, 37 Fed. Rep. 470, where the doctrine is upheld that the act of congress requiring that the accounts of district attorneys, marshals, clerks, etc., shall be forwarded, "when approved," to the proper accounting officers of the treasury, does not make presentation to the accounting officers a condition precedent to an action. On the authority of these cases, the items are allowed. The petitioner having sustained the items of the bill of particulars by satisfactory proof, I am of opinion that a fair construction of the statute entitles him to judgment against the United States for \$548.75, and costs.

RICHARDS v. INDEPENDENT SCHOOL-DIST. OF ROCK RAPIDS *et al.*

(Circuit Court, N. D. Iowa, W. D. June 8, 1891.)

SCHOOL FUNDS—JUDGMENTS—ORDERS ON TREASURER.

Orders on the treasurer of a school-district, directing him to pay certain judgments, issued under Code Iowa, § 1787, providing that, "when a judgment has been obtained against a school-district, the board of directors shall pay off and satisfy the same from the proper fund by an order on the treasurer," are not evidences of debt independent of the judgments on which they are based, and payment cannot be enforced without reference to the ownership of the judgments; and a demurrer to a petition thereon by an assignee, in which it is not averred that the judgments have been paid or canceled, on the ground that it fails to state a cause of action, must be sustained.

At Law. On demurrer to petition.

J. M. Parsons, for plaintiff.

McMillan & Van Wagenen, for defendants.

SHIRAS, J. It is averred in the petition that, on the 11th day of December, 1883, two judgments were rendered in the district court of Lyon county, Iowa, against the independent school-district of Rock Rapids, in favor of the Bank of Rock Rapids, Iowa, one for the sum of \$2,988, and the other for the sum of \$519.88; that on the 14th day of April, 1884, the said school-district, in order to pay off and satisfy said judgments, issued to said bank an order in the following form:

"\$2,874.14.

STATE OF IOWA, ROCK RAPIDS, April 14, 1884.

"The Treasurer of the Independent District of Rock Rapids, in Lyon County: Pay to Bank of Rock Rapids, or bearer, the sum of two thousand eight hundred & seventy-four 14-100 dollars from the judgment fund, for judgment rendered Dec. 11, 1883, with interest at six per cent. from date.

"By order of board of directors.

E. C. ROACH, President.

"H. SEEKLER, Secretary."

—and a further order in the same form, for the sum of \$504.95; it being averred in the said petition that said orders have not been paid, and that the same are now the property of the plaintiff, John N. Richards. It is not averred in the petition that the judgments for which these orders were issued have been in fact paid or canceled. Had the orders in question been paid, such payment would have been a payment of the judgments; but the mere drawing of the order upon the secretary, and the delivery thereof to the judgment creditor, although done for the purpose of paying off the judgment, does not in fact pay off or satisfy the same; in other words, the facts averred in the petition do not show that it was the intent of the parties that these orders should be received as payment of the judgments, so that the latter, as evidence of indebtedness, became merged in the former. These orders were issued under the provisions of section 1787 of the Code of Iowa, which provides that, "when a judgment has been obtained against a school-district, the board of directors shall pay off and satisfy the same from the proper fund, by an order on the treasurer."

In *Stevenson v. District Tp. of Summit*, 35 Iowa, 462, it was held by the supreme court of Iowa that the issuance of an order under this section would not amount to a payment of the judgment, and that the latter remained in force. Under the averments of the petition, the order described therein must be held to be simply the statutory means for directing payment to be made from the treasury of the district, and not as instruments evidencing in themselves a cause of action against the district. The judgments rendered against the district remain in force, and constitute the evidence of the indebtedness due from the district to the Bank of Rock Rapids. It is not averred in the petition that the judgments have been assigned to or become the property of the present plaintiff, but, on the contrary, so far as appears, these judgments remain the property of the bank, and are uncanceled and unsatisfied upon the record. Should judgment be now rendered in this court upon these orders, the result would be that there would be outstanding two judgments against the district for the same consideration, the one being owned by the bank and the other by the plaintiff. If the theory of the plaintiff is that these orders sued upon are independent evidences of indebtedness, which can be enforced without regard to the ownership of the judgments upon which they are based, then the answer is that upon the face thereof it appears that they are merely orders issued under the provisions of the statute of Iowa, as a means of authorizing the treasurer to pay the judgments described therein out of the proper fund, and are not intended to create or evidence a new or independent claim against the district, and cannot, therefore, be held to be an independent cause of action against the district. On the other hand, if the theory is that the transfer or delivery of these orders by the bank to the present plaintiff in effect transfers the claim or debt due the bank to the plaintiff, then the judgments, which are the evidence of the debt, have in fact become the property of the plaintiff, and these must be made the foundation of the action. Upon either theory the averments in the petition fail to disclose a cause of action, and the demurrer to the petition is therefore sustained.

UNITED STATES v. PATTON *et al.*¹

(District Court, E. D. Pennsylvania. May 7, 1891.)

1. CUSTOMS DUTIES—ENTRY AND CLASSIFICATION—CHANGE BY CUSTOMS OFFICER.

The action of the customs officer in placing goods in a class other than that in which they were entered, in deciding that they were altered from the ordinary condition in which they were customarily imported in 1858, and that such alteration was made to evade duty, is *prima facie* evidence of each of these facts.

2. SAME—"WOOL WASTE."

"Wool waste," as employed in the tariff acts, signifies such parts or particles of wool as are thrown off in the several processes of manufacture of wool in wool or worsted fabrics, and does not include wool which has been prepared for spinning,

¹Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

and artificially and intentionally made into a form like such parts or particles, even if sometimes called "waste" by the trade.

3. SAME—"WOOL TOPS."

"Wool tops" torn up into fragments are not a "manufacture of wool."

4. SAME—"WOOL SCAURED."

If wool is imported scoured, although in a form not commercially known as "scoured wool," and if its condition is different from that in which wool was customarily imported prior to the date of the act of 1883, it is dutiable as "wool scoured, other than ordinary conditions."

5. SAME—CHANGE TO EVADE DUTY—DOUBLE DUTY.

Where wool imported has been changed from one condition to another for the purpose of evading duty, whether the condition in which it was entered was a customary condition in which wool was imported prior to the date of the act of 1883, or not, it is subject to double duty.

At Law.

This was an action for the recovery of an alleged balance of customs duties due upon importations of so-called "wool waste" entered by the defendants into the port of New York upon November 26, 1888, November 30, 1888, and January 15, 1889. The goods were entered as wool waste under T. I. New, par. 361, Act March 3, 1883, woolen rags, shoddy, mungo, and flocks, ten cents per pound, and were returned as "broken top," "scoured wool," first class, in other than ordinary condition, under T. I. New, par. 356, sixty cents per pound. Plaintiffs produced in evidence depositions of witnesses taken in Bradford and Liverpool, England, on behalf of the plaintiff, testifying that the article in question was made by breaking by hand the "top" into small pieces about 12 inches in length, so as to resemble wool waste, and that it required the work of two or three men for several days to so break the "top," for the importation in suit. These depositions also tended to show that such a practice had grown up since 1888 only, and that it was established for the purpose of exportation to this country. Some of the witnesses also testified that the commercial name of the article was "broken top waste," and others that it was known as "broken top." The plaintiff also produced the testimony of wool merchants of this country that the condition of the article in question was not the ordinary condition in which wool was imported into the United States at or about March 3, 1883; that it was not known as "wool waste" at that period, and that it could be used either directly through the gilling-machine or upon the carding-machine without being first scoured. Defendant produced witnesses who testified that the article was bought, sold, and used in trade under the name of "waste."

William Wilkins Carr, Asst. U. S. Atty., and *John R. Read*, U. S. Atty., for plaintiff, presented the following points:

(1) If you believe that the article in suit was not bought, sold, and used in trade in March, 1883, under the name of "wool waste," then your verdict should be for the plaintiff. (2) If you believe that the article in suit is in any other than the original condition in which wool was imported prior to the passage of the act of March 3, 1883, then your verdict should be for the plaintiff. (3) If you believe that the article in suit is wool, and was changed in its character or condition for the purpose of evading the duty upon importation to this country, then your verdict should be for the plaintiff. (4) If you believe that the trade meaning of "wool waste" is that which is thrown off in the manufact-

ure of wool into woollen fabric, and if you believe that the article in suit is not so thrown off but is broken up by hand from wool top, and is no legitimate or natural product of the process of woollen manufacture, then your verdict should be for the plaintiff. (5) If you find that the article in suit was something materially more than and different from the article usually known in the trade and commerce by importers and large dealers in this country under the trade designation of "woollen waste" in March 3, 1883, then your verdict should be for the plaintiff. (6) The verdict in this case should be for the plaintiff.

Frank P. Prichard and *John G. Johnson*, for defendant, presented the following points:

(1) The evidence of both plaintiff's and defendants' witnesses being that the article imported was not scoured wool, it was not liable to duty as such, and your verdict should be for defendant. (2) There being no evidence that the article imported was scoured wool put into extraordinary condition for importation, but, on the contrary, the evidence on both sides being that the article imported was an article known as "waste" or "broken top," manufactured by breaking up another article of commerce, known as "wool-top," which had been manufactured for general purposes by a series of processes from wool, your verdict should be for defendant. (3) The words "woolen rags, shoddy, mungo, waste, and flocks," used in the tariff act, are to be interpreted in their commercial sense, and whether the destruction of the wool tops was accidental or intentional, if the resultant product was commercially known as "waste," it was dutiable as such. (4) Even if the imported article was not produced before the tariff act of 1883 was passed, yet if when produced it was, according to the commercial understanding, included in the commercial designation of "waste," it was dutiable as such. (5) If the imported article was intentionally manufactured from wool, then even though that fact took it out of the legal definition of the word "waste" as used in the tariff act, it would be dutiable only as a "manufacture of wool," and your verdict must therefore be for defendant.

BUTLER, J., (*charging jury orally.*) It is very unsatisfactory that the court, at the close of a trial such as this, should be called upon to submit the case to the jury, involving, as it does, important questions of law, without greater opportunity for examination than is afforded. I must, however, submit the case to you upon the impressions which have been made on my mind while listening to the testimony and to the addresses of counsel. The importation in question was brought to this country by the defendants, and entered at the custom house as "wool waste." On examination by the proper customs officers, it was classified as "wool scoured," which is liable to a duty of 30 cents per pound, and was assessed at double that sum,—to-wit, 60 cents per pound,—under the following provisions of paragraph 356 of the tariff act of 1883:

"The duty upon wool * * * which shall be imported in any other than ordinary condition as now and heretofore practiced, or which shall be changed in its character or condition, for the purpose of evading the duty, * * * shall be twice the amount to which it would otherwise be subject."

In other words, these officers of the government decided that the importation was "wool scoured," brought here in "other than the ordinary condition" in which it was the practice to import such wool at the date of the statute, March, 1883, and previously, and also decided that its

condition had been changed to evade the payment of duty. The defendants having paid the amount to which the wool was liable as "waste," only, the government sued, and is now seeking to recover the balance due according to the decision and assessment stated. The only question for consideration is: Was the assessment right? The decision of the customs officers must be regarded as right, and allowed to stand, until shown to be wrong. The burden of showing this is on the defendants. They must show it, or pay what is now demanded.

The defendants assert, *First*, that the article is "wool waste;" *secondly*, that if it is not, it is a "manufacture of wool;" *thirdly*, that if it is neither of these articles it is not "wool scoured." If either of these assertions is proved, the defense is made out, and the government cannot recover. Does the evidence prove it to be "wool waste," within the meaning of this term as employed in the statute? The interpretation of the statute is for the court; and I instruct you that the term "wool waste," as there employed, signifies such parts or particles of the wool as are thrown off in the several processes of its manufacture into woollen and worsted fabrics. According to the testimony on both sides such alone was known as "wool waste" at the date of the statute, and prior thereto. The importation in question, though called "wool waste," seems to be so called only because of its resemblance to what was formerly known by this designation. It does not consist of refuse or broken particles thrown off in the process of manufacture, as before described, but is made, intentionally, by tearing up what are called "wool tops," which consist, as you have seen, of wool which has been put through several processes, and prepared for spinning. The term "waste" as the statute employs it, does not embrace this commodity. Is it a "manufacture of wool," such as the term "manufacture," used in the statute, contemplates? In the judgment of the court it is not. Without undertaking to define particularly what this term does embrace, it is sufficient to say that it does not include these torn fragments of "wool tops." It may be questioned, possibly, whether "tops" themselves, are embraced; whether the term includes anything short of a fabric virtually completed for use. But granted that it embraces "tops," it does not embrace their fragments, when destroyed. Such fragments cannot, therefore, be said to constitute a "manufacture," within the meaning of the language, as employed in the statute. It would be useless to enlarge on the subject.

We come now to the third of defendants' allegations—that the article is not "scoured wool." It seems clear, from the testimony, that it is not what is commercially so designated. But the language of the statute which refers to wool imported "scoured," and in some other than the ordinary condition in which such wool is commonly imported, is not intended to describe what is commercially designated "scoured wool." The change worked upon it, to produce the new condition at once distinguishes it. It is no longer in the condition to which the term, commercially used, applies. If it came in the condition of what is commercially known as "scoured wool," it necessarily would not fall within the

provision imposing a double duty. Congress contemplated that such wool might be changed by additional work or manipulation, and brought here in other than the ordinary condition in which it was customarily brought, and therefore imposed the penalty of a double duty, where this is done. If therefore this wool was imported scoured, and in a condition other than that in which such wool was customarily imported in March, 1883, and previously, it fell within the provision referred to, and the duty assessed is right. It would follow from what the court has said (though the case is submitted to you on the evidence) that the plaintiff is entitled to recover the amount of its claim.

It is agreed by the parties that if the jury finds for the plaintiff, it shall also find specially and separately, whether the tops which were broken into fragments constituting this importation, were so broken for the purpose of changing the condition of the wool from tops into the fragments resembling waste, for the purpose of evading the duty to which the wool, in the form of tops, would be subjected on importation to this country, or evading duty to which the importer believed the tops would be liable. Thus you are in addition to pass separately upon the question stated. It is in writing, will be sent out, and you will know how to answer it. The decision of the customs officers not only determined, *prima facie*, that the wool imported was in other than the condition in which such wool was imported in 1883 and before, but, also, that it was changed from one condition to another for the purpose of avoiding duty. This latter you will observe is a different question from the one considered in the remarks made to you a few moments ago. As respects this it is unimportant whether the wool is brought here in a condition other than that in which it was before imported. It may have come habitually in the same condition before, and yet if it has been intentionally changed from another condition to this for the purpose of evading duty,—that is, to get it in free of duty, or at a reduced rate,—the importation falls within the provision of the statute imposing a double duty. Here the wool was changed from the condition of “wool tops” to that in which you see it, resembling waste. If the object of so changing its condition was to avoid the payment of duty such as would be levied on tops, or as the importer supposed would be levied on tops, the assessment made by the customs officers was right. What was the object of changing the condition of this wool from tops to the fragments in which you see it? Why were the tops torn up after having been made? You have heard the evidence. You have heard the British witnesses who were examined, and who tell you of the custom which has arisen there of tearing up tops within a few years for importation to this country. You will judge what the object is. You must determine whether it is to avoid the duty to which it was believed the tops would be subjected,—whether it is to get this wool in as “waste” at a lower rate of duty. There is no suggestion that the tops torn up to make this importation were imperfect or damaged. Witnesses have testified that when such tops are torn up it is with a view to transportation here. They have also testified that the tops are worth more in this country, in

the sound condition in which you see the top before you, than in the fragments after being torn up. It is for you to say what the object of tearing these tops up was. If you find they were torn for the purpose of avoiding duty, you will say so in answering the question put by the agreement. If you find that they were not torn up dishonestly, that they were not torn up with a view to evading duty, you will then say so.

I disaffirm the first point presented by the defendant. I cannot affirm any of the points in terms, and I think they are sufficiently answered in what is said in the general charge. The verdict was in favor of the plaintiff, and the jury found as a special fact that the article was broken into the form in which it was imported for the purpose of evading the duty.

UNITED STATES *v.* PHILLIPS.¹

(District Court, E. D. Pennsylvania. May 7, 1891.)

CUSTOMS DUTIES—REAPPRAISEMENT—RECOVERY OF BALANCE DUE.

Heavy goods were appraised on the wharf and delivered to the importer upon payment of duty as invoiced, and the execution of a bond to return the goods, if required, within 10 days, no samples being retained, and no demand within the 10 days being made. Afterwards the valuation was raised, and an additional duty was assessed upon the goods, by the assessor's return, and the importers notified thereof, who made a demand for a reappraisement. A merchant appraiser having been appointed, and not reporting, and the general appraiser having stated that, owing to the lack of samples, a reappraisement was impossible, a liquidation was made in accordance with the original return. *Held*, that the liquidation was invalid, and no suit was maintainable for balance shown thereby.

At Law.

Assumpsit by the United States against Ferdinand Phillips *et al.*, trading as Phillips, Townsend & Co., to recover the sum of \$2,224.75 for an alleged balance of customs duties due upon an importation of steel wire rods, imported into the port of Philadelphia upon October 3, 1889. The merchandise consisted of 9,663 coils and 9,842 coils, and were entered at the valuation of \$14,825, at 45 per cent. *ad valorem*. Upon October 7, 1889, the entry was made and the estimated duties paid and a permit to deliver the goods after appraisement and examination given to the defendants' custom-house broker. The entry and invoice under treasury regulation No. 449, relating to bulky articles was indorsed that the examination should be made upon the wharf, and no packages were specified as examination packages. Upon receipt of the invoice at the appraiser's office, examination of the goods was made, and subsequently upon October 14, 1889, upon presentation of the permit to deliver, all of the goods passed into the defendants' possession. At this time the usual bond for the return of the goods within 10 days after appraisal, if

¹ Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

required by the collector, was executed by the defendant. No request for the return of the goods was made within the 10 days, and they were afterwards consumed in the importer's factory. Upon October 30, 1889, the appraiser returned upon the lot of 9,663 coils an advance in value of 15 6-10 per cent., and under Rev. St. § 2900 an additional duty at 20 per cent. was thereupon exacted, amounting to the sum of \$2,224.75 for which the suit was brought. Upon November 4, 1889, notice of the additional duty exacted was sent to the importer from the custom-house pursuant to treasury regulation 462, and upon the same day notice was received from the importer claiming reappraisement under Rev. St. § 2930. The collector in accordance with treasury regulations asked for a special report of reappraisement by the appraisers, which report was made November 7, 1889, affirming the former appraisement. The collector after successively appointing several merchants as merchant appraisers, all of whom declined to serve, selected a merchant who consented to serve, and February 21, 1889, was fixed for the merchant appraisement. No report was ever signed by the merchant appraiser, but upon February 21, 1889, the general appraiser wrote to the collector that a reappraisement was impossible because of the importer's omission to keep samples of the importation, and upon March 14, 1890, a liquidation in accordance with the examiner's original return was made by the collector of the port, showing the balance to be due for which the suit was brought. Upon March 22, 1890, a protest by the importer was filed, claiming that no advance in value could be made which does not carry the right to a reappraisement pursuant to Rev. St. § 2930; that in order that a valid reappraisement could be made samples of the goods must be then and there examined; that it was the government's duty to retain and preserve samples, and that inasmuch as the importer had requested a reappraisement under Rev. St. § 2930, it was the duty of the government officials to take every step necessary in order to effectuate a valid reappraisement, and that whether the goods were to be examined upon the wharf or not, it was the duty of the collector of the port upon entry thereof, to specify examination packages which should thereupon be retained.

Wm. Wilkins Carr, Asst. U. S. Atty., and *John R. Read*, U. S. Atty., contended—

That the permit to deliver all of the goods was issued upon October 7, 1889, at the importer's request, and the inspector, upon presentation of that permit by the importer upon October 14, 1889, had no discretion to return samples for a subsequent reappraisement, and that it was the importer's place to retain samples if thereafter he intended to apply for a merchant's reappraisement under Rev. St. § 2930.

Frank P. Prichard and *John G. Johnson*, for defendant.

No liquidation can be made while a merchant appraisement is pending. *Tucker v. Kane*, Taney, 146-151. No reappraisement is valid unless made on inspection of the goods or the examination packages. *Greeley v. Thompson*, 10 How. 225; *Converse v. Burgess*, 18 How. 413; *Iron Co. v. Redfield*, 23 Fed. Rep. 650. It was the duty of the collector either to retain examina-

tion packages or to ask for their return, in accordance with the condition of the bond; and if because of his failure to retain them no reappraisement can be had, the additional duties cannot be collected.

BUTLER, J. Judgment of nonsuit entered.

UNITED STATES *v.* ONE HUNDRED AND TWENTY-NINE BALES OF MERCHANDISE.¹

(*District Court, E. D. Pennsylvania. May 12, 1891.*)

1. CUSTOMS DUTIES—FORFEITURE—FRAUDULENT VALUATION.

In an information by the government for the forfeiture of goods on account of fraudulent undervaluation, the burden of proof is on the government to show, first, that the representations made in the invoice, affidavits, etc., were false, and, second, that they were known by the claimant to be so, and were made to defraud the government.

2. SAME—BURDEN OF PROOF.

Where goods were entered as "cattle hair," and represented to be such by the claimant, the burden of proof in a suit on information to forfeit them for fraudulently designating them as such is on the government, which must show that they are in fact something else, and that the claimant so knew, and entered them as hair to defraud the government.

At Law.

Information for forfeiture under the provisions of section 9 of the act of June 10, 1890, for entry of merchandise by false invoices, affidavits, etc. Entry was made of 129 bales of so-called "cattle hair" upon August 25, 1890, per steam-ship *British Prince* by the claimant, and also upon September 22, 1890, per steam-ship *Ohio* 24 bales of so-called "cattle hair," and afterwards upon October 27, 1890, per steam-ship *British Prince* 12 bales. Upon the trial the defendant's books and papers, and the invoices and letters and memoranda concerning the importation from the sellers, Nathan & Co., of Paris, were produced by the defendant Henry Schmidt. The testimony of the plaintiff tended to show that the prices set down in the invoice at 1 franc, 37 centimes, per kilogram were not the actual prices paid to the seller by the claimant, and that the article was not cattle hair but wool, and that the oath was false as made by the seller that there was no other invoice than the consular invoice in existence. It was also shown that in the case of one of the importations the merchandise was sold upon arrival under the name of "pulled wool" and not cattle hair, and in the same way in which wool is sold with the tare off, and not gross for net, as is the usage in regard to hair. Testimony was produced by experts that the article was bought, sold, and used in trade as wool. The testimony of the defendant tended to show that the price stated in the invoice was the actual cost of the goods at the place of purchase exclusive of charges, while

¹Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

the actual price paid was a price free on board at the seaport, including commission, inland freight, town dues, etc.; that the actual cost exclusive of charges was stated in the invoice because so required by law; that the only differences between the invoices was the statement of these charges; that the sale of the merchandise as wool was made by a salesman without instructions, and did not in fact deceive any one, as the purchaser said at the time it was hair and not wool, and paid only a hair price. The defendant also produced experts who testified that the merchandise was common goat hair which under the practice of the customs officials was classed in entries and appraisements as "cattle hair," that being the term employed generally for common hair.

W. Wilkins Carr, Asst. U. S. Atty., and *John R. Read*, U. S. Atty., contended that if the jury believed that the invoice was not in all respects correct and true, the goods having been obtained by purchase, and did not state the actual cost thereof and all charges thereon, then the verdict should be for the plaintiff.

Frank P. Prichard and *John G. Johnson*, for claimant, contended that as the evidence showed that the importer had acted in entire good faith, the plaintiff could not recover; that the goods were not liable to forfeiture for an honest mistake, but only for a fraudulent act.

BUTLER, J., (*orally charging jury*.) The government having seized the merchandise involved in this suit, is here seeking a judgment of forfeiture on the ground, as charged, that the owner was guilty of fraudulent practices connected with its importation to this country. The information or statement of the charges, contains four counts. The first charges, in substance, "That the defendant did make and attempt to make the entry of the merchandise by means of fraudulent and false invoices of the same, contrary to the act of congress." The second, "That he did make entry of the merchandise by means of fraudulent and false affidavits, papers, written statements, contrary to the act of congress." The third, "That he did make and attempt to make an entry of the merchandise by means of false and fraudulent invoices, affidavits, letters, and papers and written statements, which falsely and fraudulently designated and represented the said merchandise to be cattle hair, contrary to the act of congress." Fourth, "That he did make entry of the merchandise by means of false and fraudulent practice and willful act of omission, by means whereof the United States was deprived of lawful duty accruing upon the said merchandise, in that he, the said defendant, falsely and fraudulently designated and described the said merchandise as cattle hair, contrary to the statute."

The substance of the charges contained in the several counts just read, may be arranged under two heads. They have been so arranged by the counsel on both sides, and the subject thus discussed: *First*, that the defendant undervalued the merchandise; that is, that he represented, by the invoices and written papers, and entry, that it was of less value than it cost him, less value than its actual worth. *Secondly*, that he entered the merchandise as "cattle hair" instead of "wool," which the govern-

ment says it was. The burden of proof is on the government. You must be satisfied from the evidence, fully satisfied in view of the character of the case, that the charges are true; first, that there were representations made in the letters, affidavits, or invoices, respecting the value of the merchandize, which were untrue. If the representations were true that branch of the case fails. If they were untrue the evidence must go further and satisfy you that the defendant did not believe them to be true; in other words that he made the representations intending to impose on the government a false understanding of the value of the goods; that his conduct in this respect was a fraud. An innocent misrepresentation of the kind, or an innocent omission of anything from these papers which should have been stated, would not render the defendant liable to a forfeiture. So that to sustain this first branch of the case,—the charge of fraudulent undervaluation,—the evidence must satisfy you not only that he undervalued the goods, as charged, but that he did it fraudulently, and not through mistake.

Then as respects the other branch,—that he entered the merchandise as "cattle hair" instead of "wool,"—here again you must be satisfied that this was wool, and not cattle hair. He entered it as cattle hair. It was classified by the government as hair, simply; and as you have been told by the witnesses, "cattle hair" and "hair" are terms used synonymously by merchants, and understood to mean the same thing. The government so classified it. One of the officers who made this classification now tells you that he did it carelessly. Nevertheless he represented the government. He was bound by his duty to examine, and determine what it was. He pronounced it hair; as the defendant entered it. But even if it had not been so classified by the government, the burden would be upon the plaintiff to prove that the representation was not true; that the merchandise was not cattle hair as represented, but wool. Now, has that fact been proved? Can you say to-day whether this should be called hair or wool? There have been before you, on both sides, gentlemen of high character, of great intelligence, and very extensive experience in wool and hair, dealers in it, manufacturers of it, raisers of it, and these men differ in opinion about this article. Much the larger number, however, of these witnesses, testify that it is hair. But can you say with certainty whether it is wool or hair? Unless you find it to be wool this branch of the case fails. If you find it to be wool, still the charge is not sustained unless you also find that it was called hair fraudulently, that is, unless you find that when the defendant entered it as hair he did not believe it to be hair, but wool. It must not only appear to you, satisfactorily, that it is wool, but that the defendant when he represented it as hair did so with a fraudulent purpose, not believing it to be hair. Does the evidence satisfy you of this,—not only that the article is wool, but that the defendant believed it to be wool and represented it as hair for the purpose of defrauding the government? Unless you do, I repeat, the charge fails. I will not dwell upon the case. The defendant is charged with having made false representations respecting the value of this merchandise, in the invoices and other papers connected with the

importation, and is also charged with having made false representation respecting the character of the merchandise, a false entry of it, as hair, instead of wool. It is for you to judge, in view of the testimony and the comments of counsel, whether or not the government's case is sustained. Unless it is proved, fully and clearly, your verdict must be for the defendant. His goods should not be forfeited unless you are satisfied that he is guilty of the fraudulent conduct charged against him. If the evidence, on the other hand, satisfies you that he is guilty of intentionally making misrepresentations, as charged, then you should sustain the claim of the government, by a verdict in its favor. The case is important, as all such cases are. It is important that the revenue laws of the government be sustained. It is equally important to the defendant. It involves a large amount of property, and also involves character. The plaintiff's points I cannot affirm; what I have said I regard as a sufficient answer to them.

HAYNES v. BREWSTER, Collector.

(District Court, W. D. Texas, San Antonio Division. May 4, 1891.)

CUSTOMS DUTIES—ACTION TO RECOVER.

The right of action to recover duties and charges illegally exacted (Rev. St. U. S. § 3011) is purely statutory. Id. §§ 2931, 2932, require the importer, as a condition precedent to the maintenance of suit, to duly file his protest upon each entry, and seasonably prosecute his appeal from the decision of the collector to the secretary of the treasury. *Held*, that a stipulation made between the importer and deputy-collector, after due protest and appeal in the case of one entry, that the duties and charges in succeeding entries should be controlled by the decision of the secretary therein, is not a substantial compliance with the requirements of the statute, and the importer could not maintain suit after a decision in his favor by the secretary, and a refusal of the collector to abide by the stipulation.

At Law.

Duval West, for plaintiff.

A. J. Evans, Dist. Atty., for defendant.

MAXEY, J. Suit is brought by the plaintiff against the collector of customs to recover the sum of \$582.95, which, it is alleged, was unlawfully exacted by the collector as weigher's fees on certain importations of bars of lead and copper ore entered by the plaintiff at the port of Laredo at the several dates named in the petition during the months of January and February, 1890. Upon the argument it was admitted by the plaintiff's attorney that the item of \$24.15, of date February 15th, was refunded by the collector prior to the submission of the cause. The other items of the account embrace weigher's fees on six entries, extending from the 8th to the 30th of January; and for these fees, aggregating \$558.80, recovery is now sought by the plaintiff. It appears from the allegations of the petition that the lead and copper ore were entered at the Laredo port for warehousing and transportation to Galveston, whence

they were to be finally exported; that the weigher's fees demanded were illegal; that they were paid in order to obtain possession of the property; and that protest was duly filed by the plaintiff with the collector "upon each and every entry," specifying the grounds of his objection to the fees demanded.

Although it is disclosed by the petition that a distinct protest as to each entry was filed with the collector, there was a failure on the part of the plaintiff to actually take an appeal to the secretary of the treasury, in accordance with the strict letter of the statute. But it is alleged that by virtue of an agreement entered into between the plaintiff and the deputy-collector touching a prior importation, on the 31st December, 1889, the former has brought himself substantially within the terms of the law, and that in pursuance of such agreement it should be ruled by the court that an appeal was actually prosecuted from the decision of the collector as to each of the January importations. In reference to the entry of December 31, 1889, of 641 bars of lead, it is shown by the petition that a weigher's fee of \$18.60 was exacted by the collector, and paid under protest by the plaintiff; that the latter seasonably appealed to the secretary of the treasury, who sustained the appeal, and ordered the amount to be refunded. The agreement relied upon by the plaintiff, and the reason by him assigned for his failure to prosecute an appeal from the decision of the collector as to each of the January entries, are inserted in the language of the pleader:

"Further alleging, your petitioner shows that at the time of the filing of the protest and taking the appeal in regard to this entry, made December 31, 1889, it was agreed and fully understood between your petitioner and the deputy collector of customs, who was acting for and by authority of the defendant herein, that said appeal was to apply to and cover all such collections or charges of weigher's fees that might arise or should be made against or collected from your petitioner at the Laredo port, until a decision of the appeal should be received from or made by the treasury department at Washington; that said appeal was passed upon, and sustained, on February 27, 1890; that then petitioner applied for the amount he had paid for weigher's fees, as shown by the table hereinbefore mentioned, viz., \$582.95, same being the amount of weigher's fees exacted from petitioner pending said appeal, from December 31, 1889, to February, 27, 1890, which amount it was agreed and understood between the deputy-collector and plaintiff would be refunded to your petitioner in case the appeal was well taken. On account of which agreement and understanding, your petitioner says he did not effect his appeal in each special case, considering that such agreement and understanding was, in effect, an appeal in each separate overcharge as set out; but said amount the defendant refused and failed to refund to your petitioner. Your petitioner further shows that he then made application to the secretary of the treasury, as shown by his letter of March, 1890, attached hereto, marked 'Exhibit B,' and prayed to be made a part of this petition, asking that he be allowed the amount of overcharges, which were unlawful and unjust; that the same was refused on the ground that your petitioner had not appealed in each case, though the department admitted that said charges were unauthorized and illegal. All of which appears from department letter before mentioned, and attached hereto, marked 'Exhibit A,' and as is also shown by letter from department to your petitioner dated March 27, 1890, which is hereto attached, marked 'Exhibit C,' and prayed to be made a part of this petition. Your pe-

tioner avers and shows that, by virtue of said understanding and agreement, he did make his appeal against the exactions of weigher's fees in each separate case, and that it was expressly understood by the deputy-collector, acting for this defendant, that such appeal, while pending, was to apply to all subsequent cases of like import."

Exhibits A and C, referred to in the petition, are letters addressed by the acting secretary of the treasury to the collector of customs and the plaintiff, respectively. In the former the secretary writes:

"In view of the provisions of section 2932 of the Revised Statutes, your decision as to the exaction of weigher's fees on the six importations specified above is final and conclusive against all persons interested therein, no appeals having been actually taken from said decision. The department, therefore, declines to take any action on the said six protests, and the same are herewith returned."

The latter embodies the conclusion of the secretary in the following language:

"I have to state that the decision of the collector of customs specified in sections 2931 and 2932. Revised Statutes, is the classification of the goods and ascertainment and liquidation of the duties, and the collection of fees, charges, etc., on each importation; and, unless protest and appeal are duly filed for each entry, such decision is final and conclusive, under said sections. Your application is therefore denied, inasmuch as you failed to appeal from the exaction of fees on the six entries covered by your protests."

The district attorney, in behalf of the defendant, demurs to the petition on the ground that the plaintiff failed to prosecute an appeal from the decision of the collector. The legal conclusion asserted by the plaintiff in his petition, that the agreement and understanding between himself and the deputy-collector of customs dispensed with the necessity of an appeal in each case from the decision of the collector, interposes no obstacle to the determination of the questions involved in the controversy, on demurrer. "Matters of fact well pleaded are admitted by a demurrer, but it is equally well settled that mere conclusions of law are not admitted by such a proceeding." *U. S. v. Ames*, 99 U. S. 45. As the demurrer admits the exaction of weigher's fees to have been made without lawful authority, it becomes unnecessary to inquire into the legality of the charges demanded. The controlling question in the case, and the one to which the argument was confined, is this: Was it necessary for the plaintiff, in order to maintain his suit, to take an appeal in each case to the secretary of the treasury from the decision of the collector demanding a weigher's fee upon the several importations? It is insisted by the plaintiff that, in view of his agreement with the deputy-collector, he is not debarred from bringing suit by the provisions of sections 2931 and 2932 of the Revised Statutes. It is the present established doctrine of the courts that suits brought by an importer against the collector of customs for the recovery of duties or dutiable charges illegally exacted are founded upon and regulated by express statutory provisions. From an examination of the adjudicated cases, it appears that under some of the earlier statutes a common-law action was maintainable. *Elliott v. Swart-*

wout, 10 Pet. 137. "This common-law right of action to recover back money illegally exacted by a collector of customs as duties upon imported merchandise rested," as declared by the supreme court, "upon the implied promise of the collector to refund money which he had received as the agent of the government, but which the law had not authorized him to exact." *Arnson v. Murphy*, 109 U. S. 240, 3 Sup. Ct. Rep. 184. "To correct the public inconveniences resulting from the state of legislation existing prior to 1839, the act of March 3, 1839, was passed, the 'egal effect of which, as construed by the court in *Cary v. Curtis*, 3 How. 236, was to take from the claimant all right of action against the collector, by removing the grounds on which the implied promise rested." *Arnson v. Murphy*, *supra*. In the case last cited it is further said by the court that—

"Congress, being in session at the time that decision was announced, [*Cary v. Curtis*,] passed the explanatory act of February 26, 1845, which, by legislative construction of the act of 1839, restored to the claimant his right of action against the collector, but required the protest to be made in writing at the time of payment of the duties alleged to have been illegally exacted, and took from the secretary of the treasury the authority to refund conferred by the act of 1839. This act of 1845 was in force, as was decided in *Barney v. Watson*, 92 U. S. 449, until repealed by implication by the act of June 30, 1864."

See, also, *Curtis v. Fiedler*, 2 Black, 461; *Davies v. Miller*, 130 U. S. 284, 9 Sup. Ct. Rep. 560; *Davies v. Arthur*, 96 U. S. 148.

The court further says that the provision of the act of 1845, which construed the act of 1839 so as to restore to the claimant a right of action, now appears as section 3011 of the Revised Statutes, and proceeds:

"From this review of the legislation and judicial history of the subject, it is apparent that the common-law action is recognized as appropriate by the decision in *Elliott v. Swartwout*, 10 Pet. 137, has been converted into an action based entirely on a different principle,—that of a statutory liability, instead of an implied promise, which, if not originated by the act of congress, yet is regulated, as to all its incidents, by express statutory provisions; and among them are the conditions which fix the time when the suit may begin, and prescribe the period at the end of which the right to sue shall cease. Congress having undertaken to regulate the whole subject, its legislation is necessarily exclusive."

Arnson v. Murphy, 109 U. S. 243, 3 Sup. Ct. Rep. 188; *Porter v. Beard*, 124 U. S. 433, 8 Sup. Ct. Rep. 554; *Arnson v. Murphy*, 115 U. S. 579, 6 Sup. Ct. Rep. 185; *Nichols v. U. S.*, 7 Wall. 126.

The action being one which must be regulated, as to all its incidents, by express statutory provisions, the question recurs, has the plaintiff so far complied with those provisions as to authorize him to maintain his suit? It is provided by section 2932 of the Revised Statutes that the decision of the collector of customs as to all fees, charges, etc.,—

"Shall be final and conclusive against all persons interested in such fees, charges, or exactions, unless the like notice that an appeal will be taken from such decision to the secretary of the treasury shall be given within ten days from the making of such decision, and unless such appeal shall actually be taken within thirty days from the making of such decision; and the decision of the secretary of the treasury shall be final and conclusive upon the matter

so appealed, unless suit shall be brought for the recovery of such fees, charges, or exactions within the period as provided for in the preceding section in regard to duties."

The words, "unless the like notice that an appeal will be taken," etc., appearing in section 2932, refer to the requirements of notice contained in the preceding section of the Revised Statutes, (2931.) It is there provided that—

"On the entry of any vessel or of any merchandise, the decision of the collector of customs at the port of importation and entry as to the rate and amount of duties to be paid on the tonnage of such vessel or on such merchandise, and the dutiable costs and charges thereon, shall be final and conclusive against all persons interested therein, unless the owner, master, commander, or consignee of such vessel. * * * or the owner, importer, consignee, or agent of the merchandise, in case of duties levied on merchandise, or the costs and charges thereon, shall, within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, * * * give notice in writing to the collector on each entry, if dissatisfied with his decision, setting forth therein distinctly and specifically the grounds of his objection thereto, and shall, within thirty days after the date of such ascertainment and liquidation, appeal therefrom to the secretary of the treasury."

It is not deemed material to consider that clause of section 2931 imposing a limitation as to the time within which suit must be brought. The question involved is whether suit is maintainable at all, where the party has failed to appeal from each decision of the collector of customs within the time prescribed by the statute. It is evident that protest and appeal are required by both sections; and the "like notice of appeal," prescribed by section 2932, demands that the steps necessary to enable the party to avail himself of the right to recover, conferred by the statute, (section 3011,) should be taken conformably to the requirements of section 2931. If, therefore, protest and appeal be enjoined as to "each entry" by the last-named section, they are also required as to each by section 2932. In the absence of protest and appeal, the decision of the collector under sections 2931 and 2932, which are substantially sections 14 and 15 of the act of 1864, is final and conclusive as to all parties interested, and by section 3011 no recovery can be had by suit unless such protest and appeal are taken. Whether, therefore, the rights of the plaintiff be tested by sections 2931 and 2932 alone, or by those in conjunction with section 3011, (*U. S. v. Schlesinger*, 120 U. S. 113, 7 Sup. Ct. Rep. 442; *Arnson v. Murphy*, 115 U. S. 584, 585, 6 Sup. Ct. Rep. 185,) the like result must follow; that is, the inevitable failure to maintain his suit, if he had failed to protest against the exactions of the collector, and prosecute his appeal in terms of the law. But it was contended by the plaintiff, upon the argument, that, having filed a protest and taken an appeal as to the December importation, the appeal then taken, considered in connection with the verbal agreement had with the deputy-collector set forth in the petition, should be construed into a continuing appeal, applicable to future like entries, in analogy to the principle of prospective protests, at one time recognized by the courts. It is true that, under the statutes in force prior to the act of 1864, pro-

spective protests received judicial sanction. *Marriott v. Brune*, 9 How. 619; *Herman v. Schell*, 18 Fed. Rep. 891; *Fauche v. Schell*, 33 Fed. Rep. 336; *Bodart v. Schell*, Id. 825. But it has been expressly held that they have no place under the last-named act. Upon this point the supreme court, citing *Ullman v. Murphy*, 11 Blatchf. 354, uses this language:

"The act of 1864, by requiring the notice of dissatisfaction to be given on each entry, necessarily prevents such a notice as to any goods from being given before the entry thereof, and precludes a prospective protest, covering future entries or importations." *Davis v. Miller*, 130 U. S. 288, 9 Sup. Ct. Rep. 560.

Under sections 2931 and 2932, notice of dissatisfaction must therefore be given on each entry; and it is equally clear that a distinct appeal is required in each case to the secretary. *Arnson v. Murphy*, *supra*, appears conclusive of the question which this suit involves. The court, speaking through Mr. Justice BLATCHFORD, says:

"The statute makes the decision of the collector final and conclusive as to the rate and amount of duties, unless there is a specific protest made to the collector within ten days after the liquidation, and an appeal taken to the secretary of the treasury within thirty days after the liquidation. * * * We are of opinion that it is incumbent upon the importer to show, in order to recover, that he has fully complied with the statutory conditions which attach to the statutory action provided for. He must show not only due protest and appeal, but also a decision on the appeal. * * * But the statute sets out with declaring that the decision of the collector shall be final and conclusive against all persons interested, unless certain things are done. The mere exaction of the duties is necessarily the decision of the collector; and, on this being shown in any suit, it stands as conclusive till the plaintiff shows the proper steps to avoid it. These steps include not only protest and appeal, but the bringing of a suit within the time prescribed. They are all successively grouped together in one section, not only in section 14 of the act of 1864, but in section 2931 of the Revised Statutes; and the 'suit' spoken of in those sections is the 'action' given in Rev. St. § 3011." 115 U. S. 583, 585, 6 Sup. Ct. Rep. 185; *Wedemeyer v. Lancaster*, 30 Fed. Rep. 671.

From an examination of the statutes and authorities bearing upon the question in hand, the court is of the opinion that sections 2931 and 2932 of the Revised Statutes require the importer, as a condition precedent to the maintenance of suit, to duly file his protest upon each entry, and seasonably prosecute his appeal from the decision of the collector in each case to the secretary of the treasury. That a protest as to each of the January importations was filed by the plaintiff in this case is admitted by the demurrer; but it is apparent from the allegations of the petition that such protests were not followed by appeals, unless the alleged agreement of the deputy-collector can be held to supersede and annul the express requirements of law. The suggestion that statutes may be thus abrogated is without merit, and entitled to but little consideration. If the treasury department, which is invested with enlarged powers by the customs laws in the formulation of rules and regulations, cannot by a regulation repeal a statute, (*Merritt v. Cameron*, 11 Sup. Ct. Rep. 178.) it will not be seriously contended that subordinate officials of that department are clothed with authority to annul laws. The plain-

diff, having failed to prosecute an appeal from the decision of the collector to the secretary of the treasury, has not placed himself in a position to maintain his suit. It is proper to add that the present suit is not affected by the repeal of sections 2931, 2932, and 3011 by the recent act of congress, (St U. S., 1st Sess. 51st Cong. p. 142, § 29.) The demurrer will be sustained, and it is so ordered.

In re JOHNSON.

(Circuit Court, D. Massachusetts. June 8, 1891.)

1. INDICTMENT—RES ADJUDICATA—HABEAS CORPUS.

Where a prisoner has been sentenced by the district court having jurisdiction, after the sufficiency of the indictment has been questioned by motion in arrest of judgment, the sufficiency of the indictment cannot be again questioned upon petition for the prisoner's release on *habeas corpus*.

2. JURISDICTION—STATE AND FEDERAL COURTS.

When a prisoner confined under sentence of a federal court is released by virtue of a writ issued out of a state court, he may be rearrested on order of the federal court, since the state court had no authority to release him.

3. CRIMINAL LAW—SENTENCE—HABEAS CORPUS.

A prisoner sentenced to simple imprisonment for an offense of which the punishment is imprisonment at hard labor may be released on *habeas corpus*.

Habeas Corpus.

Benjamin F. Butler, for petitioner.

Frank D. Allen, U. S. Dist. Atty.

NELSON, J. This case was a writ of *habeas corpus* directed to the warden of the reformatory prison for women at Sherborn, to bring before the court the body of Clarietta Johnson, alleged to be illegally restrained of her liberty in that prison. At the hearing in this court a record of the district court of the United States for this district was produced, from which it appeared that the prisoner was convicted in that court upon an indictment charging her with the crime of perjury, committed in violation of the laws of the United States, and was, upon her conviction, sentenced by the court to pay a fine of \$10, and to be imprisoned for the term of six months in the reformatory prison for women at Sherborn, and to stand committed until said sentence be performed; and that, in pursuance of the sentence, a warrant of commitment issued in the usual form, upon which she was taken to the prison by the marshal, and delivered into the custody of the warden. The prisoner now asserts that her present imprisonment under this sentence is illegal. The prisoner was tried and sentenced in the district court by Judge CARPENTER holding the court by assignment of the circuit judge, and in accordance with the practice and usage of this court, a proceeding of this nature, in which the validity of a sentence pronounced by Judge CARPENTER is called in question, would ordinarily be heard by him, either alone or with another judge sitting at his request. It is, therefore, proper to state that it is only after conferring with Judge CARPENTER, and upon his expressing a preference that this case should be heard by me, that I have consented to hear the case at all. It should be also added that

there appears to be nothing in the case to call for a revision of any matter that was specially called to the attention of Judge CARPENTER in the district court.

The first objection taken by the prisoner is that her alleged offense was not set forth in the indictment with such a degree of certainty as to give the court any jurisdiction to try her, and that it was the same as if she had been tried and sentenced without any presentment by the grand jury. The record discloses that she was tried upon an indictment in which was set forth with more or less clearness of language the crime with which she was charged. It also appears by the record that this objection was taken to the indictment in the district court by motion in arrest of judgment, and was overruled. Upon this point it is only necessary to remark that as the district court had jurisdiction to try the prisoner for perjury committed against the laws of the United States, its rulings upon the sufficiency of the indictment are not subject to revision in this court by a writ of *habeas corpus*. If the prisoner were aggrieved by any ruling of the district court upon her motion in arrest of judgment, her remedy is by a writ of error, and not by a writ of *habeas corpus*.

The prisoner was committed to the prison on the 21st of April last. On the 7th of May, she sued out of the superior court for Middlesex county a writ of personal replevin, directed to the sheriff of the county, commanding him to replevy the prisoner, who, it was alleged, was taken and detained by the duress of the warden of the prison, so that she might appear before the superior court to be holden at Cambridge on the first Monday of June, then and there to demand justice against the warden for her duress and imprisonment, and to prosecute her replevin as the law directs: provided, the prisoner first gave a bond to the warden in such sum as the sheriff should deem reasonable, with sureties to be approved by him, for her appearance at court and to prosecute her replevin, and gave the writ to the sheriff for service. Armed with this document, the sheriff on the 14th of May proceeded to the prison, and having received from the prisoner a bond in the sum of \$1,000 as directed by the writ, took her out of the custody of the warden and set her at liberty. The doings of the sheriff having been brought to the notice of the district judge of the district, by his order a warrant for the rearrest of the prisoner was issued, under which the prisoner was again taken into custody by the marshal and brought before the court, and she was thereupon by the order of the court returned to the prison as an escaped or rescued convict, to serve out the rest of her sentence, and she has since remained in the custody of the warden of the prison. Copies of the writ of replevin, the sheriff's return thereon, and the bail-bond are given below.

COPIES OF REPLEVIN WRIT, RETURN THEREON, AND BAIL-BOND.

REPLEVIN WRIT.

Commonwealth of Massachusetts, Middlesex, ss.: [L. s.]

To the Sheriffs of our Several Counties, or Their Deputies, Greeting: We command you that justly, and without delay, you cause to be re-

plevied Clarietta Johnson, who, as it is said, is taken and detained at Sherborn, within our said county, by the duress of Ellen C. Johnson, that said Clarietta Johnson may appear at our superior court next to be holden at Cambridge, on the first Monday of June next, within our county aforesaid, then and there in our said court to demand right and justice against said Ellen C. Johnson for the duress and imprisonment aforesaid, and to prosecute her replevin as the law directs: provided, that said Clarietta Johnson shall before her deliverance give bond to said Ellen C. Johnson in such sum as you shall judge reasonable, with at least two sureties, having sufficient within your county, and with condition to appear at our said court, to prosecute her replevin against said Ellen C. Johnson, and to have her body there ready to be delivered, if thereto ordered by said court, and pay all such damages and costs as shall be then and there awarded against her. Then, and not otherwise, are you to deliver her. And if said Clarietta is by you delivered at any day before the sitting of our court, you are to summon said Ellen C. Johnson, by serving her with an attested copy of this writ, that she may appear at our said court to answer to said Clarietta Johnson.

Witness ALBERT MASON, Esquire, at Cambridge, the seventh day of May, in the year of our Lord one thousand eight hundred and ninety-one.

THEO. C. HURD, Clerk.

RETURN.

Middlesex, ss.:

MAY 14th, 1891.

By virtue of this writ, I this day took from the within-named Clarietta Johnson a bond to the within-named Ellen C. Johnson in the sum of one thousand dollars, with two sureties having sufficient within said county, with the condition within directed, which bond I herewith return. I then replevied and delivered the within-named Clarietta, and on the fifteenth day of said May I summoned the said Ellen C. Johnson to appear at court, as within directed, by giving her in hand a true and attested copy of this writ.

HENRY G. CUSHING, Sheriff.

BAIL-BOND.

Know all men by these presents, that we, Clarietta Johnson, as principal, and James W. Bennett and Patrick Lynch, of Lowell, in the county of Middlesex, as sureties, are holden and stand firmly bound unto Ellen C. Johnson in the sum of one thousand dollars, to the payment of which to the said Ellen C. Johnson, or her executors, administrators, or assigns, we hereby jointly and severally bind ourselves, our heirs, executors, and administrators. The condition of this obligation is such that, whereas the above-bounden Clarietta Johnson, on the seventh day of May, sued out a writ of replevin, returnable before the superior court to be holden at Cambridge within and for the county of Middlesex, on the first Monday of June next. Now, if the above-bounden Clarietta Johnson shall prosecute said action of replevin to final judgment, and shall pay such damages and costs as the said Ellen C. Johnson shall recover against her, and shall have her body there to be redelivered in case such shall be the final judgment, then this obligation shall be void; otherwise it shall be and remain in full force and virtue.

In witness whereof we hereunto set our hands and seals this seventh day of May, A. D. 1891.

CLARIETTA JOHNSON.	[L. s.]
JAMES W. BENNETT.	[L. s.]
PATRICK LYNCH.	[L. s.]

May 14th, 1891.

The above-named sureties are approved.

HENRY G. CUSHING, Sheriff.

The prisoner now claims that her discharge from prison by the sheriff was authorized by law, and her rearrest illegal.

I have said that the prisoner sued out her replevin writ from the superior court for the county of Middlesex. This expression might do injustice to the learned judges of that court by implying that the writ issued by some express order of the court. Such, however, was not the case. An inspection of the papers shows that the replevin writ was nothing more than a common writ of attachment, such as can be purchased as of right of the clerk for five cents, but having on it the name of the chief justice, the seal of the court, and the teste of the clerk, altered over into what is claimed to be a writ of personal replevin, such as is authorized by the provisions of chapter 185, §§ 40-55, of the Public Statutes of the state. No other formality whatever preceded the delivery of the writ to the sheriff for service. The prisoner now claims that a writ manufactured in this way conferred authority on the sheriff to take out of prison and set at liberty a convict sentenced by a United States court for an offense against the United States. But by the very terms of the statute itself, the writ does not extend to persons "in the custody of a public officer of the law by force of a lawful warrant or process, civil or criminal, issued by competent authority," (section 40;) and as the prisoner was held under process issued by a court of the United States, exclusive jurisdiction to determine as to the scope and validity of the process was vested in the courts of the United States, and could not be exercised by the superior court. This is perfectly well settled by a long line of decisions of the supreme court of the United States, and is a rule recognized and acted upon by both state and federal courts everywhere. *Ableman v. Booth* and *U. S. v. Booth*, 21 How. 506; *Turble's Case*, 13 Wall. 397; *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. Rep. 355; *Robb v. Connolly*, 111 U. S. 624, 4 Sup. Ct. Rep. 544; *Ex parte Royall*, 117 U. S. 241, 6 Sup. Ct. Rep. 734. All, therefore, that the superior court could do when it was shown that the prisoner was held under the process of the district court would be to remand her to prison. It could have no authority whatever to discharge her. The process under which she was held was perfectly valid until set aside or pronounced insufficient by a court of the United States. That there is a writ known to the law of Massachusetts that can be sued out as of right, by which a convict sentenced by a court of the United States can be taken out of prison and set at liberty by a sheriff or a deputy-sheriff, taking bail at his discretion for the prisoner's appearance at court, is a proposition that is simply absurd, and was never heard of until this case. The writ was an absolute nullity, and conferred upon the sheriff no authority to set the prisoner at liberty. The whole proceeding was an audacious abuse of the process of the state court, and an outrage on the administration of justice in this district. The rearrest of the prisoner and her recommitment to prison after her escape, was a proper exercise of the authority of the district court, and as far as the replevin writ is concerned the prisoner is lawfully held in prison.

The last point taken in behalf of the prisoner is one of much more serious character. By Rev. St. § 5392, the punishment prescribed for perjury is a fine of not more than \$2,000 and imprisonment at hard labor not more than five years, with incapacity to give testimony in the courts of the United States. It was held by the supreme court in *Ex parte Karstendick*, 93 U. S. 396, that in cases where the statute makes hard labor a part of the punishment, it is imperative upon the court to include that in the sentence. See, also, *In re Graham*, 138 U. S. 461, 11 Sup. Ct. Rep. 363. Here hard labor was not made a part of the sentence, though expressly required by the statute. Again, by Rev. St. §§ 5541, 5542, in every case where any person convicted of any offense against the United States is sentenced to imprisonment for a period longer than one year, or to imprisonment and confinement at hard labor, the court by which the sentence is passed may order the same to be executed in any state jail or penitentiary within the district or state where such court is held; the use of which jail or penitentiary is allowed by the legislature of the state for that purpose. Under these sections, it was decided by the supreme court in *In re Mills*, 135 U. S. 263, 10 Sup. Ct. Rep. 762, that where the statute prescribing the punishment does not expressly require that the accused should be confined in a penitentiary, a sentence to the penitentiary without hard labor for a period that does not exceed one year is illegal. The statute of perjury does not expressly require that the imprisonment shall be in a penitentiary. The reformatory prison for women at Sherborn is the state-prison for the reformation and punishment of female offenders sentenced to hard labor by the courts of the state and of the United States, and is undoubtedly a state penitentiary within the meaning of sections 5541, 5542. Pub. St. c. 215, § 15; Id. c. 221, § 43; St. 1887, c. 426. The sentence here was without hard labor, and for six months only. In view of these decisions of the supreme court, it is impossible to escape the conclusion that the district court exceeded its authority in sentencing the prisoner to the reformatory prison for six months only, without hard labor, and that she is entitled to be discharged from imprisonment under the sentence.

It was suggested at the hearing by the district attorney that, if the court should come to the conclusion that the sentence was erroneous, the prisoner might be held for a new sentence in the district court. But it was decided by the supreme court in *Ex parte Lange*, 18 Wall. 163, that an erroneous sentence, after it has been partly executed, cannot be revised by the court and a new sentence imposed, even at the same term of the court.

An order is to be entered discharging the prisoner.

Ex parte MARTIN.

(District Court, D. Alaska. September 8, 1890.)

JUSTICES' COURTS—ASSAULT AND BATTERY—JURISDICTION.

By Justices' Code Or. c. 1, § 2, subd. 2, jurisdiction is given to a justice's court of assaults and battery not charged to have been committed with intent to commit a felony, or in the course of a riot, or with a dangerous weapon, or upon a public officer in the discharge of his duties. The punishment for such an assault under Crim. Code, § 537, is imprisonment in the county jail not less than three months nor more than one year, or by a fine not less than \$50 nor more than \$500. But by the above act conferring jurisdiction on justices it is provided that a punishment may be imposed by fine of not less than \$5 nor more than \$50. *Held* that, though the circuit court and the justice have concurrent jurisdiction of the offense, the former cannot impose a fine of less than \$50, nor the latter a fine of more than \$50, nor a sentence of imprisonment.

On *Habeas Corpus*.

Delaney & Gamel, for petitioner.

BUGBEE, J. The return of the marshal to the writ of *habeas corpus* issued herein August 21, 1890, by Hon. W. R. Hoyt, United States commissioner for Alaska, residing at Juneau, states that he had not on September 1st, the date of the return, nor had he since the said 21st day of August, the said Al. Martin in his custody or power, or under his restraint, but it represents that on the 16th day of August, one Frank H. Poindexter, then a duly-qualified and acting justice of the peace within and for the district and territory of Alaska, delivered the commitment herein and the petitioner to a deputy United States marshal; that under and by virtue of, and in obedience to the command of, such commitment, petitioner was held in custody until the 21st day of August; that while at Juneau, awaiting a steamer for transportation to Sitka, the writ herein was issued by the commissioner on a petition filed before him; that at the time of issuing such writ the commissioner ordered that said Al. Martin give bond in the penal sum of \$200, with sufficient surety, for his appearance at the time and place and in the manner mentioned in the writ; that on last-named day petitioner executed a bond before said commissioner as required, and that thereupon petitioner was released from custody and had not since been in the custody or power or under the restraint of the marshal or his deputies. Annexed to and made part of the return are the writ, the order admitting to bail, the bail-bond, and the commitment, which latter is as follows:

"IN JUSTICE COURT AT CHILCAT, ALASKA, AUGUST 16, 1890.

"*To Orville T. Porter, U. S. Marshal, District of Alaska, or his Deputy.*

"UNITED STATES vs. AL. MARTIN.

"The above-named Al. Martin having this day been brought before me upon a charge of assault and battery committed upon the person of Flora, (an Indian woman,) at Chilcat, Alaska, on the 16th day of August, A. D. 1890, and the said Al. Martin having pleaded guilty to the charge, and he having been sentenced by me to three months' imprisonment in the district jail at Sitka, you are hereby commanded to take charge of said prisoner, Al. Martin, and keep him in custody until the expiration of said sentence.

"FRANK H. POINDEXTER,

"Justice of the Peace."

The writ herein commands the marshal to have the body of petitioner before the United States district judge for the district of Alaska at the court-room at Sitka on August 28th, or as soon thereafter as the regular mail steamer from Juneau should arrive at Sitka; and on September 1st, immediately upon the arrival of such steamer, petitioner appeared in person at the court-room, and submitted himself to the jurisdiction of the court, but without counsel. His counsel, residing at Juneau, had, however, in writing presented in his behalf this single point: That the justice had, under the Oregon laws, which are applicable to this territory, no power to inflict any punishment other than a fine, and that the sentence and commitment were therefore beyond his jurisdiction, and void. The return is not demurred to nor controverted, and no evidence other than that made part of the return is before the court. But the return assumes the validity of the order admitting to bail, and proceeds upon the theory that because of the admission to bail prisoner is not in the custody of the marshal. This view is incorrect, for the reason that the order admitting to bail was and is void; and, in the eye of the law, the petitioner, from the time of the commitment, must be deemed to have been in the custody of the marshal. It appears from the commitment that petitioner was, upon a plea of guilty, convicted of the crime of assault and battery by the justice at Chilcat. There is no provision for admission to bail after conviction, unless defendant has appealed, or when there is a stay of proceedings, neither of which conditions appears here, (Gen. Laws Or. 1843-72, p. 373, § 258;) nor even then except by the court, or judge thereof, in which the judgment appealed from is given, (Id. § 260;) and here the order admitting to bail was made by the commissioner at Juneau. It is, however, unnecessary to amend the return. The petitioner is in court, and has submitted himself to the custody of the marshal. It can make no difference that in his return the marshal disclaimed the petitioner's custody. Petitioner has a right to insist on a final adjudication. *Pomeroy v. Lappeus*, 9 Or. 363.

The only point to be considered, then, is whether the justice had power to sentence to imprisonment. Subdivision 2, § 2, c. 1, of the Justices' Code of Oregon, passed December 19, 1865, gives to the justice's court jurisdiction of the crimes of assault and assault and battery not charged to have been committed with intent to commit a felony, or in the course of a riot, or with a dangerous weapon, or upon a public officer in the discharge of his duties. This would confine the jurisdiction to cases where a person, not being armed with a dangerous weapon, assaults or commits an assault and battery upon another, the punishment for which, under the statute passed October 19, 1864, (section 537, Crim. Code Or.) was and is imprisonment in the county jail not less than three months, nor more than one year, or by a fine not less than \$50, nor more than \$500, (Gen. Laws 1843-72, p. 410.)

The jurisdiction of the justice's court was therefore concurrent with the circuit court of Oregon in all cases of assault and battery or assault not charged to have been committed with intent to commit a felony, and in the other cases mentioned. *State v. Sly*, 4 Or. 278. The same act that conferred the jurisdiction contained a proviso (subdivision 6) that,

"in case of assault and assault and battery over which a justice's court has jurisdiction, a punishment may be imposed by fine of not less than five nor more than fifty dollars." From a judgment imposing such punishment no appeal lies. Gen. Laws, p. 478, Justices' Code, § 120. The jurisdiction of this court is similar to that of the circuit court of Oregon in such cases. The anomaly is thus presented that the two courts having concurrent jurisdiction of a crime differ so widely in the mode of punishment that this court must either sentence to imprisonment, or a fine not less than \$50 nor more than \$500, while for a precisely similar offense a justice of the peace may impose a fine of not less than \$5, but may not impose one of more than \$50. Is this small fine the limit of the punishment a justice may inflict? Is he denied the power of imprisonment which is given to this court? Is he denied the power which this court has of imposing a fine greater than \$50? These questions must be answered affirmatively. Under the constitution of Oregon a justice of the peace may be vested with only limited powers. Art. 7, § 1. He has only the authority which the statute in express terms gives to him. *Smith v. King*, 14 Or. 10, 12 Pac. Rep. 8. He has the power to imprison in cases of larceny where the punishment may be imprisonment in the county jail; in cases of injuries to fruit trees, fences, monuments, mile-stones, lamps, signs, etc., of trespasses upon improved lands, of disturbing religious meetings or public assemblies, discharging ballast unlawfully, obstructing roads, tearing down posted notices, selling liquor to minors, issuing illegal license to marry, and of offenses against the act of October 17, 1872. Justices' Code, § 2, subd. 8. If it be asked what reason existed for denying him the power of imprisonment in cases of simple assault and assault and battery, it may as well be asked what reason existed for denying him the power to fine to a greater extent than \$50. No reason is apparent. He is certainly limited to a fine not exceeding \$50, and the statute does not in express terms, nor does it by necessary implication, give him any power to imprison. This, it would seem, under the constitution, prohibits him from exercising any power of imprisonment in cases of assault and battery. There are cases of assault so trivial in their nature that the smallest punishment this court can inflict would seem cruel; and, although this court has concurrent jurisdiction over them, and must punish the offender with severity, having no discretion otherwise, they properly belong in the inferior tribunal, and may receive the merited punishment there, and are ended, there being no right of appeal. If, under the peculiar wording of the law, the justice may punish the most aggravated case of assault or assault and battery with a fine of from \$5 to \$50, though it merits punishment such as only this court may inflict, it is an unfortunate result of the law as it stands on the statute-books, with which this court has nothing to do. When in his opinion the offense deserves greater punishment than he is entitled to inflict, the justice may pursue the simple course of holding the prisoner to answer, as may be done in other cases of misdemeanor.

It follows that the jurisdiction of the justice of the peace in this instance has been exceeded, that the commitment is not authorized by any valid judgment, and that the prisoner must be discharged.

Ex parte KIE.

(District Court, D. Alaska. 1891.)

COMMISSIONERS—JURISDICTION—LARCENY.

Under the organic act of Alaska (section 5) commissioners of the United States exercise the jurisdiction, civil and criminal, conferred on justices of the peace by the general laws of Oregon. By the Justices' Code of Oregon, (section 2, subd. 1,) a justice has jurisdiction of larceny only where the punishment is imprisonment in the county jail or fine. *Held*, that a commissioner has no jurisdiction of a larceny committed "in any ship, steam-boat, or other vessel," which by Crim. Code Or. § 553, "shall be punished by imprisonment in the penitentiary not less than one nor more than seven years."

On Habeas Corpus.

Willoughby Clark, for petitioner.

BUGBEE, J. The return to the writ shows that petitioner is detained by the United States marshal, by virtue of a commitment issued by Hon. James Sheakley, United States commissioner at Wrangel, on the 5th day of June, 1890, in a criminal action, for the crime of larceny, the amount stolen being less than \$35, whereof prisoner was adjudged guilty, and sentenced to imprisonment in the jail at Sitka for a period of one year. The transcript of the commissioner's docket, which is before me as part of the case of petitioner, shows that there was a "complaint filed on oath of W. W. Card, accusing the above-named Kie, an Indian, of the crime of larceny, by stealing a lady's satchel and contents from his room on board the steam-ship Geo. W. Elder, while in the port of Wrangel, the value of which is about thirty dollars." That on a plea of not guilty the prisoner was tried by the commissioner, and, the amount stolen being found to be less than \$35, he was convicted and sentenced. The crime charged undoubtedly comes under the provisions of section 553 of the Criminal Code of Oregon, which provides that, if any person shall commit the crime of larceny "in any ship, steam-boat, or other vessel, * * * such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than one nor more than seven years," and it makes no difference in such case whether or not the property stolen exceeds the value of \$35. A justice's court under the laws of Oregon has jurisdiction of the crime of larceny only where the punishment therefor may be imprisonment in the county jail or by fine. Justices' Code, § 2, subd. 1, c. 1. The commissioners for Alaska exercise all the duties and powers, civil and criminal, conferred at the time of the passage of the organic act on justices of the peace under the general laws of Oregon, so far as the same may be applicable in this district, and may not be in conflict with the organic act or the laws of the United States. Organic Act, § 5. The crime complained of, and of which, from all that appears to the contrary, he was convicted, was not one where the punishment might be imprisonment in the county jail or by fine, and was therefore not within the jurisdiction of the commissioner. It is therefore ordered that the prisoner be, and he is hereby, discharged.

KIRK v. DU BOIS.

(Circuit Court, D. Pennsylvania. March 31, 1891.)

1. INFRINGEMENT OF PATENTS—DAMAGES.

An infringer is liable only for profits or savings actually realized by him from the use of the patented invention, and shown by clear and definite proof.

2. COSTS ON ACCOUNTING.

Where a master, acting under a decree for an account of profits and damages, reports that the defendant has made no profits, and that the plaintiff is entitled only to "nominal damages, with costs," the court, in confirming his report, allowed full costs to the plaintiff.

In Equity.

W. Bakewell and *W. L. Pierce*, for complainant.

W. P. Jenks, *Geo. A. Jenks*, and *T. H. B. Patterson*, for respondent.

ACHESON, J. At the former hearing the grounds of defense set up and relied on were fully considered, and the conclusion reached that the plaintiff was entitled to an injunction and an account. The views of the court upon the case as then presented are distinctly set forth in the opinion of Judge McKENNAN, 33 Fed. Rep. 252. No reason is perceived for doubting the soundness of that opinion. But our former decree is not now regularly open to review, even were it conceded (as the defendant earnestly contends) that new proofs were adduced before the master upon the accounting, which impugn the right of the plaintiff to maintain his bill; for, if the defendant desired to reopen the questions heretofore passed on by the court, it was his business to apply for a rehearing, which, if granted at all, would have been upon terms securing to the plaintiff an opportunity of putting in additional rebutting evidence. We turn, then, to the consideration of the only matters properly before us. The plaintiff offered no evidence of any substantial damages sustained by him by reason of the defendant's infringement of the patent in suit, and the case before the master resolved itself into the question, what profits or gains were made by the defendant from his use of the plaintiff's invention? The conclusion of the master was that the defendant had derived no such profits or gains, and therefore he found that the plaintiff is entitled to nominal damages only, with costs. The report of the master is able and exhaustive, and relieves me from the necessity of discussing the case at any great length. The plaintiff's invention relates to movable dams, and consists of improvements therein merely. The claims of the patent are no less than 10 in number, but the defendant's infringement was of one of them only, the sixth claim, namely: "A bear-trap dam, having a relieving or open sluice extending from under the gates, so as to relieve them from unnecessary pressure, substantially as and for the purposes described." The operation of this relieving device is automatic, and the purpose is, when the water has reached a certain height or pressure under the gates, to permit all water not required to sustain the gates to escape from under them, and prevent the lower leaf from being forced out from under the upper leaf,

which would endanger, and might wreck, the dam. The bear-trap dam itself was an old and well-known structure, long in practical and successful use. The plaintiff and his main witness testified, in substance, that to accomplish the beneficial result obtained by this relieving device without its use would require constant manual service,—the employment of a skilled watchman day and night at each dam,—the plaintiff estimating the cost of this manual labor at \$1,500 a year for each dam; and upon that basis it was claimed that the defendant was chargeable with profits. No other evidence of profits or gains was offered. But it seems to me from the proofs that the plaintiff and his witness lacked practical knowledge of the working of bear-trap dams, at least as the same are used in the defendant's business. Their expressed views on this subject were largely conjectural and speculative, and I agree with the master that they are inadmissible as the basis for an accounting in this case. *Mayor, etc., v. Ransom*, 23 How. 487. It is a familiar and well-settled principle that an infringer is liable only for profits or savings actually realized by him from the use of the patented invention, and shown by clear and definite proof. *Dean v. Mason*, 20 How. 198; *Philp v. Nock*, 17 Wall. 460; *Garretson v. Clark*, 111 U. S. 120, 4 Sup. Ct. Rep. 291; *Rude v. Westcott*, 130 U. S. 152, 9 Sup. Ct. Rep. 463. Now, the defendant's infringing dams were small bear-trap dams, erected and maintained in a small private and unnavigable stream, and were used exclusively for raising artificial floods for log-driving purposes, except two dams at the saw-mill, where a pool was maintained for floating and handling the logs. The height of the dams was but from $4\frac{1}{2}$ to $5\frac{1}{2}$ feet; the cost of construction of each dam only about \$500; and the cost of replacing the lower leaf, if swept away, but from \$25 to \$30. In fact, the defendant's dams were provided each with side stops or cleats, fastened on the sides of the dam or leaf chamber, which was an old protecting device; and the proofs are direct and clear that these side stops, as used on the dams of the defendant, were sufficient to withstand all pressure to which the gates of the dam were subjected, and that the side stops, when used alone, afford as adequate protection to the defendant's dams as the plaintiff's automatic relieving device could do. Such, in substance, is the master's finding on this branch of the case, and it is fully justified by the proofs. The plaintiff's theory that the use of his automatic relieving device effected a saving to the defendant in the matter of manual service was completely overthrown by proved facts, and the evidence is strong and persuasive that the defendant realized no profits or saving whatever from its use. There are other special findings of fact by the master, going to sustain his general conclusion that the plaintiff is entitled only to nominal damages, which I will not discuss nor recite. It is enough for me to say that I am not convinced that there is any error in any of his findings. In the result reached by the master I fully concur. Upon the subject of costs little need be said. I do not agree with the defendant's counsel that by virtue of section 973 of the Revised Statutes costs are to be denied the plaintiff for want of a partial disclaimer. The words found in the body of the specification, "If de-

sired, the discharge opening may be controlled by a valve operated by a float," do not import that the patentee was the inventor of the float, or its application to operate a valve; and certainly no such matter is embraced in any claim of the patent. The master, who was perfectly familiar with the course of the litigation as conducted before him, has included in his finding the allowance of full costs to the plaintiff, and I am disposed to adopt his recommendation in that regard. Let a final decree be drawn in accordance with the master's report.

VERMONT FARM MACH. CO. v. GIBSON.

(Circuit Court, D. Vermont. May 22, 1891.)

1. PATENTS FOR INVENTIONS—ANTICIPATION—PROCESS FOR RAISING CREAM.

Letters patent No. 187,516, issued February 30, 1877, to William Cooley for a "process of treating milk for raising cream by sealing with water and air the cover applied directly to the vessel containing the milk," was not anticipated by earlier patents for coolers for preserving milk by a similar process, since the latter process was not designed and never used for raising cream.

2. SAME—INFRINGEMENT.

A purchase of a creamery from the patentee, with cans for raising cream by his process, gives the purchaser no right to practice the process by water-sealing other cans purchased from a different manufacturer.

In Equity.

William Edgar Simonds, for orator.

G. G. Frelinghuysen, for defendant.

WHEELER, J. This suit is brought upon the first claim of patent No. 187,516, dated February 30, 1877, and granted to William Cooley for an improvement in obtaining cream from milk, which covers "the process of treating milk for raising cream by sealing with water and air the cover applied directly to the vessel containing the milk, substantially as set forth," and has now been heard upon a motion for a preliminary injunction. This claim has been sustained by an elaborate opinion from Judge McCrARY, (*Boyd v. Cherry*, 4 McCrary, 70.) Some patents said not to have been shown in that case have been produced here. They are all for apparatus, and none for this process. One, No. 59,993, dated November 27, 1866, and granted to William Garrard for a cooler for preserving, among other things, milk, describes sealing with water the cover applied directly to the vessel containing the milk. That cream would rise from milk so held in this apparatus is said; and that therefore this patent shows this process is said. But, if cream would be so raised, the patent does not show that this result was intended or understood, but rather the contrary, for the apparatus was for preserving milk, not for raising cream from it. No use of this apparatus, and consequently no observation of any raising of cream by it, is shown. This patent did not give this process to the public, and is not in any sense an anticipa-

tion. Under the reasoning of Judge McCrary, this, and the other patents now shown, would have fallen with those which were before him.

The defendant appears to have purchased from the orator a creamery, with four cans for raising cream by this process. The Barden Cream Separator Company refitted it for him with six new cans of their make. These cans, as placed in this creamery, operated in raising cream by sealing with water the cover applied directly to the vessel containing the milk, although since then the water has been lowered, so as not to so operate. The defendant insists that the purchase of the creamery from the orator brought with it the right to practice that process with the cans bought with it, and with any others, more or less in number, that might be put into it. This process is practiced by water-sealing the cans, which might be done as well by placing them in water elsewhere as in water in the creamery. The sale of the creamery without cans would have carried no right to practice the process; the sale of the cans without the creamery would carry the right to use them as fully as the vendor could, which would include the right to practice the patented process with them. This right was carried by operation of law with the cans, and attached to them. They could be repaired, and their identity and that right would remain. When replaced by others, their identity was gone, and the right to use the process was gone with them. *Wilson v. Simpson*, 9 How. 109; *The Co. v. Simmons*, 106 U. S. 89, 1 Sup. Ct. Rep. 52. No right to use the process apart from the things sold follows from the sale merely of the things. The Barden cans are not in themselves infringements of this claim, but their use by the defendant when water-sealed, as he has used them, appears to be an infringement, against which the orator appears to be entitled to an injunction.

The motion is granted as to further use of the process with any of the six cans.

THE VEENDAM.¹

AMERICAN PETROLEUM Co. v. THE VEENDAM.

(District Court, S. D. New York. June 5, 1891.)

SALVAGE—BROKEN SHAFT—TOWAGE—FOG—SERVICE ENDED BEFORE REACHING PORT.

The steam-ship V., with cargo and freight worth \$375,000, and 600 passengers, on a voyage from Rotterdam to New York broke her shaft 900 miles east of Halifax. La F., in answer to signals of danger, took her in tow for 3 days, when the V., having repaired her shaft, steamed ahead, outran La F., and became lost in the fog about 9:30 P. M., not renewing signals, or seeking to keep La F.'s company. The next morning La F., not being able to find the V., and supposing her to have gone ahead, resumed her voyage. A half hour after the V. disappeared in the fog her shaft again gave way, and after 24 hours delay it was again repaired, so as to enable her to steam into port. La F. was worth \$200,000. The towage was in part through fog, and in circumstances of special danger. *Held*, (1) that the service

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

rendered was of a salvage nature; (2) that the acts of the V. amounted to a termination by her of the salvage service before reaching port; that La F. fulfilled her duties; that there was no abandonment by her of the salvage service; and \$3,500 was awarded her.

In Admiralty.

Wheeler, Curtis & Godkin, for claimant.

Wing, Shoudy & Putnam, for libellant.

BROWN, J. The above libel was filed to obtain compensation for salvage services rendered by the libellant's steam-ship *La Flandre*, a three-masted tank steam-ship of about 1,509 tons net register, valued at \$200,000, to the respondent's mail and passenger steam-ship *Veendam*, on a voyage from Rotterdam to New York in May, 1891. The *Veendam* is a large steamer, 432 feet long by 40 feet beam, and of 2,209 tons net register. Her value, with cargo, freight, and passenger money, was \$375,000. On this voyage she had 600 passengers, besides officers and crew about 100. At about 2:30 p. m. of May 15th her shaft broke, when she was about 1,350 miles from New York, and about 900 miles due east from Halifax. Preparations were made to attempt to repair the shaft, and signals for help were given. On the morning of May 16th, the lights of *La Flandre* being reported, additional signals of distress by rockets and by flags asking assistance were displayed. In answer to these signals, *La Flandre* went along-side of the *Veendam*, and was requested to take her in tow. One end of the *Veendam's* hawser of about 90 fathoms was drawn to *La Flandre*, and the other end was shackled to the *Veendam's* anchor cable. The compressor of the *Veendam's* windlass broke, causing 150 fathoms of the anchor chain to run out before it could be stopped, and the outboard weight was too great for the *Veendam's* windlass to heave it in again. At 9:30 a. m. on the 16th *La Flandre* commenced to tow, making about 4½ knots per hour, her speed being impeded by the great drag of the anchor chain. The weather was hazy, the sea favorable. The towing continued until half past 10 o'clock p. m. of Sunday, May 17th, when, it appearing by soundings that they had reached the Grand Bank, they stopped, and the *Veendam* took in 100 fathoms of chain. After an hour's delay the towing was resumed. There was then thick fog, which grew more dense towards morning. Fog-horns on fishing vessels were heard, sometimes close aboard, and the most careful watch was necessary. At 5 a. m. on Monday, the 18th, a fishing vessel was so close under *La Flandre's* port bow as to require her to port her helm. The *Veendam* also ported hard, and before they came into line again the towing hawser parted. The fog was then so thick, and the danger of going on so great, that both vessels anchored, about three lengths apart. The distance towed during the previous 48 hours was about 191 miles. During all this time endeavors to repair the *Veendam's* shaft had been going on, and at half past 11 on the 18th it was reported to *La Flandre* that the temporary repairs would soon be complete, and that an attempt would be made by the *Veendam* to start under her own steam, which was done at 3:30 o'clock that afternoon.

Captain Roggeveen, of the Veendam, signaled La Flandre to follow him, which she did, making about one knot per hour less speed than the Veendam. At 6 P. M. the latter, to avoid stopping her engine, returned towards La Flandre, and signaled that her engine worked well. At 9:30 P. M. a light fog coming on, the Veendam was lost sight of. No other signals for assistance being seen or heard, La Flandre continued during the night on a course W. by S., as directed by the Veendam's master. At daylight the Veendam was not to be seen, and, after steaming about for over an hour, the master of La Flandre, concluding that the Veendam required no further assistance, and had gone ahead of him, resumed her course to Philadelphia, where she arrived on May 24th, having lost a little over two days' time in the performance of these services. In fact, however, about 10 P. M. of the 18th, half an hour after the Veendam was lost sight of in the fog, one of the repair couplings gave way, compelling another stop of about 24 hours, when, the couplings being again repaired, and secured by additional chains, the Veendam resumed her course, and, making about 8½ knots per hour, arrived without further difficulty in New York at 10 A. M. of May 25th.

1. I cannot doubt that the services rendered in this case were of a salvage nature, as distinguished from ordinary towage. That subject has been several times considered in this court. Such services are treated as salvage when rendered to a disabled ship with the obvious purpose of relieving her from circumstances of danger, either present or reasonably to be apprehended, and not merely to expedite her passage. *The Saragossa*, 1 Ben. 552; *The Emily B. Souder*, 15 Blatchf. 185; *McConochie v. Kerr*, 9 Fed. Rep. 50, 53; *The Plymouth Rock*, Id. 413, 416. The sails of the Veendam were not sufficient for safe navigation in her situation. She was 900 miles from the nearest port, and during the 12 hours before La Flandre was sighted she made only about 1½ knots per hour under sail. Her ability to make repairs to her shaft secure enough to proceed under her own steam-power was evidently uncertain, and could only be determined by trial, and she had 600 passengers on board. The situation was, therefore, manifestly one of reasonable apprehension of danger. A disabled steamer in mid-ocean is not in a safe place, or in a safe condition. The signals of distress and the call for help so imported, and I cannot doubt that the service which the one party asked and the other gave was understood by both to be of that salvage nature which ordinarily belongs to a towage service rendered in answer to signals of distress to disabled steamers at sea.

2. It is objected that La Flandre did not tow the Veendam into port, or to a place of safety, and that when her shaft gave out the second time she was in as much danger as at first; so that La Flandre is not legally entitled to salvage compensation, because not successful. *The Edam*, 13 Fed. Rep. 135; *The Algitha*, 17 Fed. Rep. 551; *The Aberdeen*, 27 Fed. Rep. 479. The principle invoked is elementary. It is applied when the ship is lost, or when the attempt to rescue her is abandoned. In the cases cited, the salvors voluntarily abandoned the service. Here the

ship was saved, and the service was not voluntarily abandoned. On the contrary, *La Flandre*, from the time she entered upon the service, diligently performed all the duties of her undertaking, and followed strictly the directions of the *Veendam's* master. She lost sight of the *Veendam*, not by any act or neglect of her own, but because the *Veendam* ran away from her, out of sight and out of reach of communication, after receiving all the help she wanted, or was willing to wait for. The *Veendam* thereby terminated the salvage service by her own act, and took the risk of what might follow.

It is not essential to a salvage service that the salvors should attend the vessel aided into port. On principle, it is sufficient that the needed help be given so long as is necessary; that is, until the apprehended danger is overcome, whether the service terminates in port or at sea. The code of the country to which this ship belonged (Netherland Code, § 561) recognizes this principle in providing salvage remuneration where ship and cargo "are brought either to a safe place at sea, or into a safe port." When, as in this case, the peril arises from disabled machinery, and from the doubt whether it is possible for the ship to make temporary repairs, compensation for salvage services is earned if the services are continued as long as the vessel requires them, *i. e.*, until the repairs are so complete that the vessel is no longer in danger, because fully able to take care of herself. In the case of *The Great Eastern*, N. Y. Trans. Nov. 13, 1864, (cited in *The Alaska*, 23 Fed. Rep. 604,) a mechanical engineer, who was a passenger on board, received a salvage award of \$15,000 for making her broken rudder serviceable, which he did in 24 hours after her master and officers had tried in vain to repair it. It would not be contended that the salvor in that case would have been any the less entitled to reward had he come from another vessel, and departed as soon as his service was complete. The main question there arose from the fact that the salvor was a passenger on board, and so remained. The salvaging vessel is not required to attempt to hold possession unnecessarily of the other vessel, or to persist in attending her into port, to the manifest embarrassment and possible danger of both, merely to preserve his right to legal compensation for what he has already earned. Nor can there be any doubt, I think, of the right of the aided vessel, when all danger is really past, to discharge her salvor from further service, without prejudice to the latter's right of compensation, or to the lien therefor, though port is not yet reached. Whether in a given case all danger is past or not, must be for the masters of the vessels themselves to decide. In cases of doubt the salvor might, indeed, be unwilling to relinquish the vessel, though the latter, possibly for the sake of diminishing the salvage compensation, might wish to take the risks of the rest of the voyage, and discharge the salvor from further service; but if the salvor acquiesced, or could not prevent it, the assisted vessel at least could not complain if she terminated the service when she chose. In the present case there was no intent on the part of *La Flandre* to abandon the salvage service, nor was she explicitly discharged by the master of the

Veendam from further service. As respects the right of salvage compensation, however, I think the circumstances are practically equivalent to such a discharge. It is evident from the testimony that when the service was entered upon the amount and duration of the expected service were uncertain. Efforts were making to repair the shaft, which might or might not prove successful. The engineer had reported that it "would be a great job to mend it, but he would try it." La Flandre also had scarcely sufficient coal to tow the Veendam into New York in case bad weather was encountered. The service was undertaken without determining whether, in case the repairs should be ineffectual, La Flandre should tow the Veendam into New York or into Halifax, or transfer her to some other vessel; while, if the repairs should prove successful, she could proceed by her own power. At about half past 11 on Monday morning, after two days' service, and while the vessels were at anchor in the fog, the chief officer of the Veendam came on board La Flandre, and "reported that the repairs were nearly complete, and would be ready for trial some time in the afternoon, and requested La Flandre to wait until that time." Capt. Roggeveen testifies that the officer brought back word that La Flandre "would wait; that we were to try the shaft." On getting up steam about 3 o'clock, they found, after a quarter of an hour's trial, that the shaft worked well, and thereupon went ahead, signaling La Flandre to follow till next morning, and to steer W. by S.

"*Question.* You were uncertain at that time as to whether you would break down again or not? *Answer.* I was uncertain. That same afternoon I went too far out of sight, up to six o'clock; then I went back. I signaled him to follow me, but we went out of sight. He could not steam as fast as we could. *Q.* What did you do? *A.* I went back the same course again, and signaled him our engines worked well. We could not stop. I thought he would think it very strange that we went out of sight, without telling, after I signaled him that he must follow us till the next morning. *Q.* Why could you not stop? *A.* Because it was better for the broken shaft that it should not have any shock. It turned out that it didn't break with the shock. *Q.* But you didn't care to take any chances? *A.* No, sir."

Before starting, the engineer had reported to the captain that "he felt sure about it; it would be a good thing." The captain of the Veendam does not testify that when he went back to La Flandre about 6 P. M. he requested him to follow until the morning, but only that he signaled to La Flandre that "his engines worked well. They could not stop," and he says the reason for going back was because he thought La Flandre "would think it very strange that they went out of sight without telling, after he had signaled to follow him until the next morning." The fair inference from this testimony would be that he turned back to take courteous leave of La Flandre, and to discharge her from further service. The master of La Flandre, however, testifies that when the Veendam came back about 6 P. M., besides signaling that the engines worked well, and that they could not stop, she added, "Follow me on a W. by S. course until the morning." Both agree that the direction to follow on a west by south course was given about the time they started. Whether

or not the same signal was repeated, as the master of *La Flandre* states, when the *Veendam* turned back at about 6 p. m., is perhaps uncertain. It is plain that *La Flandre* acted upon that understanding, and observed it. If the *Veendam*, however, had really desired to keep in company of *La Flandre*, no reason appears why she did not do so by easing slightly the speed of her engines, to accommodate herself to the speed of *La Flandre*, if she did not wish to continue their connection by hawser. The liability to fog at night was obvious, yet no provision was made for the contingency of separation, nor were any signals arranged for a common understanding. At 9 p. m., when the fog again came on, the *Veendam* was four miles away from *La Flandre*, yet no efforts were made to approach her, nor were any signals given to her, such as would then naturally have been given if her longer attendance was desired or expected. Even if the last direction was to follow W. by S. till morning, there could have been but little likelihood that they would again sight each other after being once separated in fog at such a distance, and going at different speeds. The repaired shaft had worked satisfactorily for over six hours, and that was calculated perhaps to strengthen the master's confidence in his ability to proceed without further help. Whether such was his actual intention at that time or not, the conduct of the *Veendam* was practically equivalent to it. She voluntarily ran away from *La Flandre*, and placed herself beyond reach, and beyond communication with her, without any fault on the part of the latter, and while the latter was observing the directions understood to have come from the *Veendam*. The next morning, when the *Veendam*, after an hour's search, was not to be found, *La Flandre* had no reason for going back, and was justified in concluding that the *Veendam* had intentionally parted company, and on her own responsibility had gone on to New York. It was the *Veendam*, therefore, that terminated the salvage service at the time it was terminated, and not *La Flandre*. It was the *Veendam* that took the risk of subsequent accident, if any; and as the *Veendam* reached port in safety in part through the service of *La Flandre*, it does not lie with her to dispute *La Flandre's* right to a reasonable salvage compensation.

3. Had the service in this case been continuous until the arrival of the *Veendam* at New York, either with or without aid from the *Veendam's* engines, the salvage compensation awarded, considering the value of the *Veendam*, with her freight and cargo, and 600 passengers aboard, might have been as much as \$25,000, if the somewhat similar cases of *The Daniel Steinman*, 19 Fed. Rep. 918, and *The Italia*, 42 Fed. Rep. 416, were followed. The much shorter service of *La Flandre*, however, the special circumstances and expectation of both the parties under which the service was begun and rendered, to which I have referred above, as well as the fact that the service was terminated while the *Veendam* was still far from port, materially diminish the amount that should be awarded in the present case. Upon the special facts of each case, the amount should be fixed with reference to these two controlling principles, viz., the com-

pensation must be sufficiently liberal to induce valuable ocean steamers to turn aside willingly, and without hesitation, to aid vessels in distress; but not so large as to lead disabled steamers to run unjustifiable risks of life and property rather than incur the cost of salvage assistance. And so, when a salvage service has been properly sought and rendered, no encouragement should be given to any unseasonable termination of the service by the assisted vessel before reaching port, or to her incurring unjustifiable hazards for the purpose of reducing the salvage award to a minimum, by denying a full and fair measure of compensation for all that the salvor has done. Per Mr. Justice BRADLEY in *The Suliste*, 5 Fed. Rep. 101. *The Daniel Steinman*, 19 Fed Rep. 918, 921; *The Alaska*, 23 Fed. Rep. 597, 613.

The towage of vessels at sea is usually a dangerous service, and in towing amid the fogs of the Grand Bank these dangers are greatly increased. Ordinarily that would be the most perilous part of an entire towage from the place of this accident to New York. The evidence shows the presence of those difficulties and dangers to La Flandre. An award of \$1,000 in this case, as suggested by the claimant's counsel, would be so wholly inadequate, considering the value of the property at risk, both of the salvaged and salvaging vessel, as, if generally adopted, to put an end speedily to all salvage assistance at sea, except from motives of humanity. On the whole, I think that \$8,500 will, in the present case, be a proper award, for which sum a decree may be entered, with costs. Of this award, three-fourths will go to the owners, and one-fourth to the master, officers, and crew. Of the latter, \$500 will go to the master; the remainder to the officers and crew in proportion to their wages.

THE PANAMA.¹

CHESAPEAKE & O. RY. CO. v. THE PANAMA.

(District Court, E. D. New York. May 21, 1891.)

COLLISION—STEAM-VESSELS MEETING—ATTEMPT TO PASS STARBOARD TO STARBOARD—
ASSENT.

Two steam-vessels, the P. and the K., were meeting head on. The P., determining to pass starboard to starboard, blew two whistles, and starboarded, without waiting for the assenting whistle of the K. On perceiving that the K. had not starboarded also, the P. again changed her wheel, and attempted to pass port to port, but the vessels collided. *Held*, that the P. was in fault for attempting to pass contrary to rule, without awaiting the assent of the other vessel.

In Admiralty. Suit to recover damages caused by collision.

Jas. S. Stearns and *George A. Black*, for claimant.

Chas. H. Tweed and *R. D. Benedict*, for libellant.

BENEDICT, J. I am unable to discover any ground upon which the Panama can be relieved from responsibility for the collision which gave rise to this action. If the movements of the Kanawha were as testified to by those who directed her movements, the liability of the Panama is conceded; and, if the movements of the Panama were as testified to by those who directed her movements, and the movements of the Kanawha were as testified to by these same witnesses, a similar result must follow; for the case sought to be made by the Panama is this: The steam-ship Panama and the steam-ship Kanawha were approaching nearly head on, upon opposite courses. The law required the vessels to pass port to port. The Panama determined to pass starboard to starboard. Accordingly she blew a signal of two whistles to the Kanawha, and, without waiting for the assent of the Kanawha, starboarded her wheel, and swung to the eastward. Soon she observed that the Kanawha, instead of starboarding her wheel, had ported. The Panama then ported, but it was too late to avoid collision. This makes a case of fault on the part of the Panama. Contrary to the rule, she starboarded her helm, and swung to the eastward, without any assent from the Kanawha to that method of passing. Not receiving assent, she changed again, and ported, but then it was too late. The time lost in the attempt to pass starboard to starboard made the porting, when it occurred, too late to avoid collision. The libellant must have a decree, with an order of reference.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

SOWLES v. WITTERS.

(Circuit Court, D. Vermont. May 27, 1891.)

FEDERAL COURTS—JURISDICTION—FEDERAL LAWS.

The laws of a state respecting the enforcement of judgments, adopted, pursuant to Rev. St. U. S. § 916, by a rule of the federal district court for the government of judgment liens of such court, and for the guidance of the marshal in levying executions, derive their force from the United States, and not from the state; and a suit involving the question whether or not the marshal's proceedings in levying an execution issued out of the federal court was in conformity with such rule is a question arising under the laws of the United States, and cognizable by the federal courts.

In Equity. On motion to remand.

Edward A. Sowles, for oratrix.

Chester W. Witters, for defendant.

WHEELER, J. This suit was brought in a court of chancery of the state, to relieve the title to land which had been attached and levied upon by the marshal, and sold to the defendant on processes of this court, and attached and levied upon by a sheriff on processes of a state court against the same defendant, and sold to the oratrix, from the cloud created by the marshal's proceedings, which are alleged to be defective for irregularities in them. It has been brought into this court as arising under the laws of the United States, and now been heard on a motion to remand it to the state court. Section 916 of the Revised Statutes of the United States has provided that a party recovering judgment in these courts—

"Shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the state in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of such courts."

These proceedings of the marshal upon the execution were similar to those provided by a law of the state enacted in 1884, which was adopted by the eleventh of the general rules adopted by this court at the May term, 1885. They could be had only in similarity with those of the state law in force when section 916 was first enacted, which was in 1872; or with those enacted by the state afterwards, which had been adopted by general rules of the court. *Lamaster v. Keeler*, 123 U. S. 376, 8 Sup. Ct. Rep. 197. A case arises under the laws of the United States whenever the right of a party, whether plaintiff or defendant, depends upon a correct construction of them, in whole or in part. *Tennessee v. Davis*, 100 U. S. 257. The foundation of the case of the oratrix as made by her bill of complaint is the failure of the marshal to follow the laws of his guidance in his proceedings. Whether he has so followed those laws or not depends upon a correct construction of them. The decision upon this motion must depend upon the question whether they are laws of the United States, or of Vermont. The marshal was an officer of the United States, the execution was a process of the United States, and a natural

supposition would be that the laws of the United States would govern him in serving it. The laws of the state are invoked for his guidance, and therefore the suit is said to arise under those laws, and not under the laws of the United States. In *Wayman v. Southard*, 10 Wheat. 1, counsel for the defendant argued that congress had no power over executions issued on judgments obtained by individuals, and that the authority of the states on this subject remained unaffected by the constitution; that the government of the United States could not by law regulate the conduct of its officers in the service of executions on judgments rendered in the federal courts, but that the state legislatures retained complete authority over them. As to this point Mr. Chief Justice MARSHALL said:

"The constitution concludes its enumeration of granted powers with a clause authorizing congress to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof. The judicial department is invested with jurisdiction in certain specified cases, in all which it has power to render judgment. That a power to make laws for carrying into execution all the judgments which the judicial department has power to pronounce is expressly conferred by this clause, seems to be one of those plain propositions which reasoning cannot render plainer."

Further on in the same opinion he said:

"The question really adjudged is whether the laws of Kentucky respecting executions passed subsequent to the process act are applicable to executions which issue on judgments rendered by the federal courts."

And, after showing that the states had no inherent power, and none conferred by congress to regulate proceedings on such executions, he still further on said:

"It seems not much less extravagant to maintain that the practice of the federal courts and the conduct of their officers can be indirectly regulated by the state legislatures by an act professing to regulate the state courts, and the conduct of the officers who execute the process of those courts. It is a general rule that what cannot be done directly from a defect of power cannot be done indirectly. The right of congress to delegate to the courts the power of altering the modes [established by the process act] of proceedings in suits has been already stated; but were it otherwise, we are well satisfied that the state legislatures do not possess that power."

Under these principles, the laws of the state adopted by general rule of the court pursuant to the laws of the United States for the governing of the liens, and guidance of the marshal in serving executions, derived their force from the United States, and not from the state; and a suit arising upon the proper construction of those laws would seem to arise under the laws of the United States. The laws of the state were not extended over this subject, but were resorted to for expression of what the laws of the United States should be in this behalf. The legislature of Vermont in early times passed, "an act for the punishing high treason and other atrocious crimes as said act stands in the Connecticut law-book." *Slade's State Papers*, 267. Probably no one would claim that a proceeding under this law in Vermont was not a proceeding under the

laws of Vermont. In *Ex parte Siebold*, 100 U. S. 371, an election officer of the state of Maryland had been punished by the United States circuit court for that district for misconduct at an election of members of congress under laws of the state. The objection was made to the proceedings that the punishment was for a violation of state laws. As to this Mr. Justice BRADLEY for a majority of the court said:

"It is true that congress has not deemed it necessary to interfere with the duties of the ordinary officers of election, but has been content to leave them as prescribed by state laws. It has only created additional sanctions for their performance, and provided means for supervision, in order more effectually to secure such performance. The imposition of punishment implies prohibition of the act punished. The state laws which congress sees no occasion to alter, but which it allows to stand, are in effect adopted by congress. It simply demands their fulfillment. Content to leave the laws as they are, it is not content with the means provided for their enforcement. It provides additional means for that purpose, and we think it is entirely within its constitutional power to do so."

This reasoning shows that, when a state law is adopted by or under the authority of congress, it becomes a law of the United States, and that a suit arising under such a law arises under the laws of the United States. This motion has been argued on the part of the oratrix somewhat as if the jurisdiction of this court depends on want of it in the state court. But no question is, or can well be, made about the jurisdiction of that court. If this court has jurisdiction, it is concurrent with that of that court, and the suit might have been brought in either; and, when brought in that, the defendant had the same right to remove it to this that the oratrix had to bring it in this. The suit of *Cutter Co. v. Jones*, was between citizens of the same state, but it arose upon the laws of Vermont relating to attachments and executions, and the service of them, as adopted by the rules of this court, and was maintained in this court without question as arising under the laws of the United States, 21 Blatchf. 138, 13 Fed. Rep. 567. *Lamaster v. Keeler*, 123 U. S. 376, 8 Sup. Ct. Rep. 197, arose upon the laws of Nebraska as adopted by congress and the rules of the circuit court of the United States for the district of Nebraska, and was brought in, or removed into, that court without other apparent ground of jurisdiction. If this ground of jurisdiction had not been sufficient, the cases would not have been retained, but would have been dismissed by the courts *sua sponte*.

Motion denied.

UHLE v. BURNHAM *et al.**(Circuit Court, S. D. New York. June 5, 1891.)***SECURITY FOR COSTS—DELAY.**

A motion for security for costs which is in effect an application for security as to extraordinary disbursements growing out of an order of reference, and which were not in contemplation of either party at an earlier stage of the case, will not be denied on the ground of delay, because not made until after the entry of the order of reference.

In Equity. On motion for security for costs.

Charles Putzel, for plaintiff. *David A. Sullivan*, for defendants.

LACOMBE, Circuit Judge. Were this a motion for the ordinary security for costs, I should be inclined to deny it, on the ground of delay; but it is really an application for security as to extraordinary disbursements, which were not within the contemplation of either party until quite recently. The granting of such a motion at this stage of the case is within the discretion of the court. *Huginin v. Thatcher*, 18 Fed. Rep. 105; *Stewart v. The Sun*, 36 Fed. Rep. 307. Inasmuch as the application was made with reasonable diligence after the entry of the order of reference, the plaintiff should give security in the amount of \$1,000 for so much of the costs and disbursements as may consist of releree's fees and stenographer's charges.

GALBES v. GIRARD *et al.**(Circuit Court, S. D. California. June 1, 1891.)***1. EQUITY—LACHES—EVIDENCE.**

Where a bill in equity showed that the acts complained of occurred from 12 to 16 years before it was filed, and not only that they were matters of record, and open to inspection, but that complainant and his mother, to whose interest he succeeded on her death in 1885, had, as early as 1876, commenced proceedings in the state courts to secure the rights now asserted, and that the last of the suits so brought was dismissed by the court on the stipulation of counsel in 1879, but that "until a long time" afterwards complainant did not know of such dismissal, he will be charged with a knowledge of the act of his counsel, and the bill dismissed for laches.

2. CONSTITUTIONAL LAW—SUITS AGAINST THE STATE.

Const. Cal. art. 20, § 6, provides that "suits may be brought against the state in such manner and in such courts as shall be directed by law;" but, where no law has been passed by the state authorizing such suits, a motion to dismiss as to the state in a suit in which the state is made a party defendant, must be sustained.

In Equity. On motion to dismiss, and demurrer to the bill.

"Bill by Manuel Jesus Galbes, a citizen of Chili, against James N. Girard and others. The bill alleged that Juan Galbes died in California in 1874, owning real and personal property in the state, and leaving surviving him Lorena Gamboa Galbes, his wife, and a son, plaintiff in this action. The bill then alleged that, in pursuance of a conspiracy, letters of administration were in 1874 fraudulently granted to one Howe, without notice to the widow or plaintiff. In 1876 the estate was closed up, and distribution made to Dolores Diaz Menesses and Juana Diaz Menesses. By sundry mesne conveyances from the Menesses, defendant Girard, in 1881, acquired title to the property for an inadequate consideration, and with knowledge of the facts. The bill also alleged that in 1876 the present plaintiff and the widow, who were both unable to speak English, instituted an action in the probate court for San Luis Obispo county, claiming the property, but their petition was dismissed

in 1878. Afterwards, also in 1878, the present plaintiff and the widow instituted an action in the superior court for San Luis Obispo county, alleging their relationship to deceased, and claiming the property. This action was dismissed in 1879, without knowledge of the widow or plaintiff, who supposed the action to be pending until a long time thereafter. In 1883 the state of California brought an action, claiming that the property had escheated to it, and the state was also joined as a party defendant. Defendant Girard demurred to the bill, and the state moved to dismiss as to it."

Ross, J. To the bill in this case the state of California as well as certain individuals are made defendants. So far as the state is concerned, its exceptions to the jurisdiction and motion to dismiss the bill must be sustained, upon the ground that there is no law authorizing such suit to be brought against it. *Hans v. Louisiana*, 134 U. S. 1, 10 Sup. Ct. Rep. 504. It is provided by the constitution of California that "suits may be brought against the state in such manner and in such courts as shall be directed by law." Section 6, art. 20. But the legislature of the state has not enacted any law authorizing the bringing against the state of such a suit as the present. Until it does so, the suit, so far as the state is concerned, cannot be maintained. *Beers v. State*, 20 How. 527.

The demurrer of the individual defendants raises several objections to the bill, but one of which it is necessary to consider. In my opinion, the bill shows on its face such laches that a court of equity should withhold the aid invoked. To call such a court into activity there must not only be conscience and good faith on the part of complainant, but reasonable diligence as well. *Speidel v. Henrici*, 120 U. S. 377, 7 Sup. Ct. Rep. 610, and cases there cited. In the present case the acts which form the basis of complainant's bill occurred from 12 to 16 years before the bill was filed. They were not only matters of record, and open to public inspection, but the bill shows on its face that complainant and his mother, to whose interest in the property in question he is alleged to have succeeded by her death in 1885, as early as 1876 commenced proceedings in the courts of the state to secure the same rights now asserted by complainant. The last suit so brought was dismissed by the court February 3, 1879, on the stipulation of counsel for the respective parties. In the present bill it is alleged that complainant did not know of such dismissal "until a long time" afterwards. But the act of his counsel in that particular was his act, of which he must be held to have had knowledge. A period more than double that allowed by statute in California for the recovery of real property was thereafter allowed to elapse before the institution of the present suit. I think the cause of suit stale, and that it should therefore be held barred by lapse of time. It is therefore unnecessary to decide whether a court of equity should refuse relief upon the ground that the bill shows that complainant's remedy is at law, or as to the sufficiency of the bill in other particulars.

The exceptions and motion filed by the state of California and the demurrer of the individual defendants are sustained, and the bill dismissed, at complainant's cost.

UNITED STATES *v.* SIOUX CITY & ST. P. RY. CO. *et al.*

(Circuit Court, N. D. Iowa, W. D. June 1, 1891.)

PUBLIC LAND—RAILROAD GRANT—FORFEITURE.

By Act Cong. May 12, 1864, public lands were granted to the state of Iowa to aid in building a railroad from Sioux City to the Minnesota state line, and another from McGregor westward, to the total amount of the alternate odd numbered sections within the limit of 10 miles along each side of the railroad. In a proceeding between the two railroad companies it was held by the supreme court of the United States that where they intersected each other, and the limits overlapped, each company took under the grant half the designated lands. One of the companies failed to earn the lands in the overlapping limits by building its road. *Held*, that such lands reverted to the United States, and were added to the unappropriated public domain, and the other road takes no title thereto under the grant.

In Equity.

Bill in equity by the Sioux City & St. Paul Railway Company and the Chicago, Milwaukee & St. Paul Railway Company and certain settlers upon the land in dispute, to adjust certain land grants and cross-bills by the Chicago, Milwaukee & St. Paul Railway Company and by the settlers.

W. H. H. Miller, Atty. Gen., and *E. C. Hughes*, Sp. Asst. Dist. Atty., for the United States.

John W. Carey, for Chicago, M. & St. P. Ry. Co.

W. L. Joy, for settlers.

SHIRAS, J. The original bill in this cause was filed for the purpose of adjusting the rights of the Sioux City & St. Paul Railway Company under the land-grant act of May 12, 1864. A hearing thereon was had, and the conclusions reached are set forth in the opinion of the court reported in 43 Fed. Rep. 617, to which reference may be made for a more full statement of the facts upon which the decree of the court proceeded. The result of the findings upon the hearing was that the Sioux City & St. Paul Company was not entitled to hold the lands in Dickinson and O'Brien counties in the state of Iowa, which the state of Iowa had refused to convey to that company, for the reason that the company had not built the entire line of railway from Sioux City, Iowa, to the Minnesota state line, which was the object sought to be accomplished by the grant made in the act of congress of May 12, 1864, and that for the portion of the line actually built the company had received more lands than it was legally entitled to under the terms of the grant. Upon the announcement of the conclusion reached in that case, the Chicago, Milwaukee & St. Paul Railway Company obtained leave to appear in the case and file a cross-bill, for the purpose of asserting a claim to the lands in Dickinson and O'Brien counties, based upon the fact that the act of May 12, 1864, contained two grants for railroad purposes, *i. e.*, the one in aid of the line from Sioux City to the Minnesota state line, and the other in aid of the line from McGregor westwardly, on or near the forty-third parallel of north latitude, to the point of intersection with

the first mentioned line, and that the Chicago, Milwaukee & St. Paul Railway Company, acting under the authority of the act of the general assembly of the state of Iowa, approved February 21, 1878, had completed the line running westwardly from McGregor, and had thus become entitled to all the lands granted in aid of that line. Without going into the facts at length, it is sufficient to say that the Chicago, Milwaukee & St. Paul Railway Company has established its right to all the lands that by the provisions of the act of congress of May 12, 1864, were granted in aid of the construction of the road running westwardly from McGregor; and, furthermore, that it has not in fact received a quantity of lands equal to the total amount of the alternate odd-numbered sections within the limit of 10 miles along the line of railway constructed by it. It follows, therefore, that if the grant made in the act of 1864 in aid of the line from McGregor westward can be made applicable to the lands in dispute in O'Brien and Dickinson counties, then the title of the Chicago, Milwaukee & St. Paul Company would be made out. What, then, is the true construction of the act of 1864 in this particular? From the terms of that act it is entirely clear that it was the intent of congress to subserve two distinct purposes in making the grants of land therein provided for,—the one being to secure the building of a line of railway from Sioux City to the Minnesota state line, the other to secure the building of the line westwardly from McGregor. The act does not purpose to guaranty the number of acres intended to be appropriated to either object, nor does it make a joint grant of the lands for the common purpose of securing the construction of both lines of railway as parts of one system. Properly construed, it must be held to have been the intent of congress to grant certain lands in aid of the line from Sioux City and certain other lands in aid of the line from McGregor westward. From the fact that these lines of railway intersect at a point in O'Brien county, a question necessarily arose as to the respective rights of the two companies, which had undertaken to build the lines of railway, in and to the lands situated within the overlapping limits of the grants where they intersected each other. For the purpose of determining the rights of the parties the Milwaukee Company brought suit against the Sioux City Company, and the case was finally heard before the supreme court of the United States; the opinion rendered being found in 117 U. S. 406, 6 Sup. Ct. Rep. 790. This opinion, and the decree of partition made in the circuit court in accordance therewith, settled the question of title as between the companies, and, in effect, determined what lands passed under the grant of 1864 to the Sioux City Company, to aid in the building of the line from Sioux City, and to the Milwaukee Company, to aid in the building of the line from McGregor westward. It is admitted that, under the terms of the decree rendered in that case, the lands now sought to be recovered by the Milwaukee Company were not adjudged to belong to that company, but, on the contrary, were adjudged to belong to the Sioux City Company. The right of recovery on behalf of the Milwaukee Company in the present case is sought to be based upon the fact that, upon the original bill filed in this cause, it was adjudged that these lands

had reverted to the United States, for the reason that the Sioux City Company had not built the entire line of railway from Sioux City to the Minnesota state line. It was not, however, adjudged that these lands did not form a portion of those which, by the provisions of the act of 1864, were set apart or donated in aid of the construction of the line from Sioux City. As I construe the true effect and meaning of the decision of the supreme court in the partition case reported in 117 U. S. and 6 Sup. Ct. Rep., it decided that the lands in dispute belonged to and form part of the grant made in aid of the line from Sioux City; and the fact that the Sioux City Company has not yet built the entire line, and has forfeited its right to hold the lands, does not make the lands a part of the independent grant in aid of the McGregor line. The act of congress of 1864 did not grant the lands to either of the companies by name. They were granted to the state of Iowa, to aid in the construction of the named lines of railway, and were donated for a purpose, and not for the benefit of a given corporation or individual person. In effect, the grant in aid of the line from McGregor westward was of the alternate odd-numbered sections not otherwise appropriated. The lands granted in aid of the Sioux City line are otherwise appropriated, and hence the grant to the McGregor line is not applicable thereto.

The fact that the Sioux City & St. Paul Company did not build the entire line from Sioux City to the Minnesota line, and did not, therefore, become entitled to claim all the lands donated for the construction of that line, only defeats the claim of that company to these lands. The company has not earned them, and therefore is not entitled to them; but that does not change the purpose for which they were appropriated. It is still within the power of congress to cause these lands to be applied to the purpose of the original grant; that is, to secure the completion of the line from Le Mars to Sioux City. It is admitted that, if that line had been completed within the time named in the act of 1864, these lands would have belonged to the Sioux City Company. The failure of that company to earn them gives the United States the right to reclaim them, but it does not change the ownership, and make them part of the grant in aid of the line from McGregor.

In regard to grants of the nature of those made by the act of 1864, it has been uniformly held by the supreme court that they are *in præ-senti*, and that, unless they contain an express declaration to the contrary, they are not applicable to the lands which at the date of the grant are reserved or appropriated to some other purpose, and that they cannot be construed to apply to lands which after the date thereof revert to the United States, and thus are added to the unappropriated public domain. *Railroad Co. v. U. S.*, 92 U. S. 733; *Newhall v. Sanger*, Id. 761.

Under the facts appearing in this cause, it must be held that the lands in dispute were part of those originally appropriated by the United States to aid in the building of the line from Sioux City. Hence, without any special clause in the grant to that effect, it would nevertheless be held that, by reason of the appropriation to aid in the construction of the Sioux City line, these lands were excepted from the effect of the general

grant in aid of the McGregor line. The act, however, contains a clause expressly excepting from its operation all lands otherwise reserved or appropriated, and hence it follows that lands appropriated to aid in the construction of the Sioux City line are reserved from the operation of the grant in aid of the McGregor line. Counsel for the Milwaukee Railway Company has made a very able and ingenious argument, based upon the assumption that the lands were granted by the United States to the state of Iowa; that while the state was a trustee, it also had an interest in the lands, and that the state could, in granting the lands to the railway companies, require of the companies the performance of other duties, in addition to the building of the named lines of railroad, and that the state of Iowa had, by the act of the general assembly, granted all of its interest, right, and title in these lands to the Milwaukee Company. It may be true that the state, in dealing with the companies proposing to undertake the building of the lines of railway, in aid of which grants of land were made by the United States, might contract with the companies for the doing of other acts than the building of the named line of railway; but the state had not the right or power to change the purpose for which the lands were donated, nor could it defeat the object of the grant by any contract it entered into with the railway company. The purpose of the grant in aid of the line from Sioux City was to secure the building of that line within the time specified in the act and the state did not have the right to misappropriate the lands, and thereby defeat the object for which the lands were conveyed to the state in trust. As between the railway companies, the decision of the supreme court and the decree of partition has settled the right to these lands, they being adjudged to belong to the Sioux City Company. If the United States had not chosen to assert its right to forfeit the lands, they would have remained beyond the reach of the Milwaukee Company. The ground upon which the United States has succeeded in securing a decree of forfeiture is that the lands were donated in aid of the line from Sioux City, and that the Sioux City & St. Paul Company had failed to build the entire line within the specified time, and therefore the purpose of the donation had not been fulfilled by that company. The failure of that company, however, to earn these lands cannot be deemed to be the equivalent of a regrant of them in aid of the McGregor line. Should congress now pass an act declaring that the forfeiture on part of the Sioux City Company was waived, and that the United States would accept the present line as full performance on part of the railway company, and that the Sioux City Company should be held entitled to all the lands it would have earned under the original grant by building the entire line from Sioux City to the Minnesota boundary, could it be possible that the Milwaukee Company could maintain its claim to these lands in face of the decree already entered? I can see no ground upon which such a proceeding could be successfully maintained. The difficulty with the claim on behalf of the Milwaukee Company is that that company has not a title or right to these lands, but, in effect, it is striving to sustain its claim by reason of the weakness of the title of the Sioux City Company. It must be held,

therefore, that the Chicago, Milwaukee & St. Paul Railway Company has failed to show any right, title, or claim to the lands in question, and that its cross-bill must be dismissed upon the merits. A cross-bill has also been filed on behalf of numerous parties who claim to be settlers upon these lands, and on whose behalf it is asserted that these lands have reverted to the United States, and are open to settlement under the laws of the United States, and that the parties in question have established rights therein by entry and settlement thereon. I shall not undertake an examination of the equities of the settlers upon the record as now presented. When the question of the right of the United States to hold these lands against the claims of the railway companies is finally decided, then the question of the rights of the settlers may arise, but I do not think that question is properly presented in this cause. The cross-bill on behalf of the settlers prays a decree against the railway companies only. Should the finding and decree of this court be sustained, it will result in defeating the title and claim of the railway companies to the lands, and the settlers will have no further concern with them. As between the United States and the settlers no issue is presented, and no decree can be entered in behalf of either party. The cross-bill on behalf of the settlers will therefore be dismissed, without prejudice to further proceedings in their behalf. Upon the amended bill filed on behalf of the United States against the Chicago, Milwaukee & St. Paul Railway Company, the complainant is entitled to a decree quieting the title to the lands in question as against that company.

QUINN *v.* COMPLETE ELECTRIC CONST. CO.

(Circuit Court, S. D. New York. May 23, 1891.)

NEGLIGENCE OF SERVANT—LIABILITY OF MASTER.

Where plaintiff was injured by the negligence of a truck-driver in the employment of defendant, but who was on that day serving another company under a contract which defendant had made with the latter to furnish it daily with a horse, truck, and driver, defendant, and not the other company, is liable for the injury.

At Law. On motion for new trial.

George A. Black, for complainant.

H. Applington, for defendant.

WALLACE, J. The plaintiff was run over by a horse and truck driven by one Murphy, by the negligence of Murphy, who at the time was performing a service for the Western Electric Company, but was in the employ of the defendant, and was driving its horse and truck. The question in the case is whether Murphy was the servant of the defendant or of the Western Electric Company. If he was not the servant of the defendant, the instructions given to the jury on the trial were incorrect, and the verdict for the plaintiff cannot stand. The pertinent facts are

these: Pursuant to a contract by which the defendant was to furnish the Western Electric Company with a horse, truck, and driver daily to do its trucking work for a specified period at a specified price, the defendant each day selected from its men and equipment the horse, truck, and driver which were to be at the disposition of the Western Electric Company, and on the day the plaintiff was injured had sent Murphy with the horse and truck, which he was driving at the time. Murphy had taken a load of goods for the Western Electric Company, and was returning to its factory, when he ran over the plaintiff. Under these circumstances, although the Western Electric Company was the primary employer for whom the service which Murphy was engaged in was being rendered, the defendant was Murphy's immediate superior. It had hired him, and could discharge or retain him, and thus had the selection and control of the means of accomplishing the object of the contract which had been made between the Western Electric Company and itself. The defendant was not the servant or agent of the Western Electric Company, but was an independent contractor; hence those employed by the defendant to do the work contracted for were its servants, and not those of the Western Electric Company. *Reedie v. Railroad Co.*, 4 Exch. 244; *Blake v. Ferris*, 5 N. Y. 48; *Hilliard v. Richardson*, 3 Gray, 349; *Allen v. Willard*, 57 Pa. St. 374; *Scammon v. Chicago*, 25 Ill. 424.

The rule of *respondet superior* rests on the power which the superior has a right to exercise, and which, for the protection of third persons, he is bound to exercise, over the acts of his subordinates. It does not apply to cases where the power of control does not exist, and the power does not exist when the primary employer has no voice in the selection or retention of the subordinate. The following citations illustrate the application of the rule: *Laugher v. Pointer*, 5 Barn. & C. 560, was an action to recover damages done to plaintiff's horse. The defendant owned a carriage, and hired of a stable-keeper a pair of horses and a driver to draw it for a day or a short time. The injury was done through the carelessness of the driver, while the owner of the carriage was riding in it. The plaintiff was nonsuited, on the ground that the driver was the servant of the stable-keeper, and not of the owner of the carriage. In *Quarman v. Burnett*, 6 Mees. & W. 497, the defendant owned the carriage, and hired a pair of horses and the driver for a short time, during which an injury was done to the plaintiff's horses. It was held that the defendant was not liable, the court stating: "That person is undoubtedly liable who stands in the relation of master to the wrong-doer; he who has selected him as his servant, from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey." LITTLEDALE, J., said: "He was the servant of one or the other, and not the servant of one and the other. The law does not recognize a several liability in two principals." In *Jones v. Mayor, etc.*, 14 Q. B. Div. 890, one Dean contracted with the defendant to furnish a horse and driver to draw a watering-cart belonging to defendants, under the supervision of inspectors employed by defendants, whose duty it was to direct the drivers of the wa-

tering-carts when and where to water the streets." As their order was necessary for this purpose, the inspectors had authority and control over the drivers of the carts. The plaintiff's carriage was injured through the negligence of the driver furnished by Dean. The court held that he could not recover of the defendants. In *Michael v. Stanton*, 3 Hun, 462, one Hinkley was employed by Gilbert, who sent him to cart goods for the defendant, and told him where to load. The court said: "The defendant did not employ Hinkley, and had no power to discharge him. This is the only test by which to determine which is the master, and, as such, liable to the person injured." In *Fenton v. Steam-Packet Co.*, 8 Adol. & E. 835, a steam-vessel was under a charter-party for six months, for the conveyance of goods from Newcastle and Goole, or such other coasting stations as the charterer might from time to time employ it in; the owners to keep it in order and appoint the crew, but the crew to be paid by the charterer, as also all disbursements. The charterer did not interfere with the navigation of the vessel, but while he was on board, through the negligence of the crew, it ran against the plaintiff's boat. In a suit for the injuries the court held that the owners were liable. In *Dalyell v. Tvrer*, 28 Law J. Q. B. 52, a ferry-man hired from the defendant, for one day, a steam-tug and crew, to assist him in carrying passengers across. The ferry-man received the fares, but the defendant hired and paid the crew. By the negligence of the crew, the plaintiff, while being carried over the ferry, was hurt, and it was held that he was entitled to recover against the defendant. These authorities justify the instructions given to the jury in the present case.

The motion for a new trial is denied.

FINANCE CO. OF PENNSYLVANIA *et al.* v. CHARLESTON, C. & C. R. Co. *et al.*

Ex parte BRADFORD.

(Circuit Court, D. South Carolina. May 23, 1891.)

RECEIVERS.—ACTIONS AGAINST.

An action for personal injuries sustained before the appointment of a receiver cannot be maintained against him, but must be brought against the corporation.

At Law.

D. E. Finley and *B. A. Hagood*, for petitioner.

SIMONTON, J. This is an application for leave to sue the receiver. The cause of action is for personal injuries sustained long before the appointment of a receiver, while the road was in the hands of the president and directors of the company. There can be no doubt that a receiver is responsible for personal injuries suffered through the negligence of his employees during the receivership. *Ex parte Brown*, 15 S. C. 523.

It is equally clear that neither he nor the funds in his hands arising from the earnings of the road under him can be held responsible for wrongs committed before any receiver was appointed. *Davenport v. Railroad Co.*, 2 Woods, 519; *Ex parte Brown*, *supra*. As the court in this last case says: "The receivership is the transfer of the property to a new owner, who begins his work, cut off from the past, with new duties and new obligations." 15 S. C. 533. The proper course for the petitioner is to bring his action against the company. If the result of a judgment in his favor would be a lien on the property which could interfere with the lien of the mortgagees, (see Gen. St. S. C. § 1528,) then the receiver will be instructed to defend the suit. If any injunction be in existence which may prevent such a suit against the company, his petition should pray that it be suspended as to him. But he cannot have the sanction of the court for a suit against the receiver upon a cause of action for which, as such, the receiver cannot be responsible. The leave asked is refused.

UNITED STATES v. WOLTERS *et al.*

(Circuit Court, S. D. California. June 8, 1891.)

INTERNAL REVENUE—DISTILLED SPIRITS—LIABILITY OF STOCKHOLDERS OF DISTILLERY CORPORATIONS.

The stockholders of a corporation engaged in operating a distillery are "persons interested in the use of the distillery," within the meaning of Rev. St. U. S. § 3251, which declares that every proprietor and possessor, "and every person in any manner interested in the use, of" a distillery, shall be jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom.

At Law. On demurrer to complaint.

W. Cole, U. S. Atty., for United States.

Anderson, Fitzgerald & Anderson, for defendants.

Ross, J. This is a suit to recover of the holders of the stock of a corporation organized under the laws of California to engage in, and which did engage in, the business of distilling, a tax amounting to \$20,124.40 on spirits distilled by it, and of which tax, it is alleged, the distiller defrauded the government. The action is based on that clause of section 3251 of the Revised Statutes which declares that "every proprietor and possessor of, and every person in any manner interested in the use of, any still, distillery, or distilling apparatus, shall be jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom." Demurrers to the complaint have been filed by some of the defendants, and in their support it is urged that the language of the statute in question is not broad enough to include the stockholders of a corporation engaged in the business of distilling; that stock-

holders are neither proprietors nor possessors of the corporate property; and that the words "interested in the use of" were inserted "to designate a class who might be using, or interested in using," such distillery, although not interested in the property itself.

The language of the act does not admit of such limitation. Revenue laws are not, like penal laws, to be strictly construed, nor are they, like remedial statutes, to be construed with extraordinary liberality; but they should be so construed "as most effectually to accomplish the intention of the legislature in passing them." *Taylor v. U. S.*, 3 How. 197. The provisions of the law are rigid, and in some instances perhaps arbitrary, in their operation. But they were designed to prevent frauds upon the government, and whoever engages in business by virtue of their provisions must be governed by them. The holder of stock in a corporation organized for and engaged in the business of distilling spirits, if not the proprietor or possessor of the distillery within the meaning of the statute, is certainly "interested in the use of" the distillery operated by the corporation of which he is a stockholder. He has a direct, pecuniary interest in the business of distilling,—the purpose for which the distillery is used,—as well as in the property itself. The amount of such interest, whether large or small, is of no consequence. The statute declares that every person so interested shall be jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom. It is obvious that the state statute regulating the liability of stockholders of corporations organized under its laws has no application here. The liability of the defendants is to be measured by the provisions of the statute under which, and by virtue of which only, the distilling was done.

Demurrers overruled, with leave to defendants to answer within the usual time.

In re ARNOLD *et al.*

(Circuit Court, S. D. New York. May 6, 1891.)

1. CUSTOMS DUTIES—ACT OCT. 1, 1890.

Construction of paragraphs 392 and 396 of Schedule K.

2. SAME—WOOLEN UNDERWEAR.

Completed articles of woolen underwear *held* to be dutiable as "articles of wearing apparel," and not as "knit fabrics."

3. SAME.

If they are knit fabrics, they are also wearing apparel, and their use is determinative of the proper rate of duty to be assessed thereon under said act; it being shown that there are other "knit fabrics," well known in trade and commerce, bought and sold by the yard and in the piece, and not made up into completed articles for wear.

At Law. Appeal from decision of board of United States general appraisers.

Arnold, Constable & Co., of the city of New York, imported certain merchandise by the steamer Alaska on October 13, 1890, consisting of

woolen or worsted undershirts, drawers, hosiery, etc., upon which the collector of the port of New York assessed duty at the rate of 49½ cents per pound and 60 per cent. *ad valorem*, under the provisions of paragraph 396 of the tariff act of October 1, 1890. Paragraph 396 reads as follows:

"On clothing, ready made, and articles of wearing apparel of every description, made up or manufactured wholly or in part, not specially provided for in this act, felts not woven, and not specially provided for in this act, and plushes and other pile fabrics,—all the foregoing, composed wholly or in part of wool, worsted, the hair of the camel, goat, alpaca, or other animals, the duty per pound shall be four and one-half times the duty imposed by this act on a pound of unwashed wool of the first class, and, in addition thereto, sixty per centum *ad valorem*."

Against this classification of duty the importers protested, claiming that their goods were properly dutiable as "knit fabrics" at the rate of 44 cents per pound and 50 per cent. *ad valorem*, under the provisions of paragraph 392 of the act of October 1, 1890, which reads as follows:

"On woolen or worsted cloths, shawls, knit fabrics, and all fabrics made on knitting machines or frames, and all manufactures of every description made wholly or in part of wool, worsted, the hair of the camel, goat, alpaca, or other animals, not specially provided for in this act," etc.

An appeal was duly taken by the importers to the board of United States general appraisers, under the provisions of the act of June 10, 1890. The board of general appraisers reversed the decision of the collector, and sustained the protest of the importers. The collector thereupon took proceedings for a review of the decision of the board of general appraisers in the United States circuit court. The board of general appraisers duly filed their return, in which they found and returned—*First*, that the merchandise embraced in the invoice, and made the subject of protest, are stockings, socks, undershirts, and drawers, composed wholly or in part of wool or worsted; *second*, that said goods were made upon knitting machines or frames; *third*, that said stockings, socks, undershirts, and drawers are knit fabrics; *fourth*, that the phrase "knit fabrics," as used in paragraph 392, Schedule K, Act Oct. 1, 1890, is one of commercial designation, and was such at the time of the passage of said act, and was then, and is now, understood in trade and commerce to include all articles which were knit either by hand or by knitting machines or frames, whether completed or in the piece; *fifth*, that the phrase "knit fabrics" is also one of common knowledge, and is popularly known to be the kind of goods covered by the invoice and protest in this case. In their findings and opinion they also found that the articles under consideration are "wearing apparel," and would be admitted free of duty as such under paragraph 752 of the free list, if accompanying and in use by a passenger arriving in this country from abroad, as readily as his coat, his vest, or his pantaloons would be.

Edward Mitchell, U. S. Atty., and Henry C. Platt, Asst. U. S. Atty., for collector.

William B. Coughtry and Alexander P. Ketchum, for importers.

LACOMBE, Circuit Judge, (*orally*.) These articles are of course within the broad, general meaning of the phrase "wearing apparel," and, unless they are, by other language in the act, taken out of that category, the original assessment of duty by the collector was correct. It is claimed that they are thus excepted by reason of the circumstance that, in the paragraph containing the enumeration of articles of wearing apparel, there appear the words, "not specially provided for by this act;" and, also, elsewhere, (to-wit, in paragraph 392,) a rate of duty upon "woolen and worsted cloth, shawls, knit fabrics, all fabrics made on knitting machines or frames, * * * not specially provided for in this act." I am very strongly of the opinion, in view of the dropping of the phrase "except knit goods" from the paragraph in the old act referring to articles of wearing apparel, and in view of the change of the phrase "knit goods" to "knit fabrics" in paragraph 392, that the word "fabrics," as used therein, relates to the piece goods or the unassembled pieces out of which garments are made; but I do not put the decision of this case upon that ground. If the articles here are "knit fabrics," it also appears quite clearly that there is another and very large group of "knit fabrics," which are illustrated before us here by Exhibits K, L, Q, etc., which are emphatically piece goods of various sizes and shapes. There are certainly two large groups, then, of knit fabrics. Now the exception in paragraph 396—the one dealing with articles of wearing apparel—is of articles *specially* provided for elsewhere in the act. In view of the fact that the words "knit fabrics," if they cover these articles, cover articles suitable for wearing apparel and articles not suitable at all for wearing apparel, I cannot see that it is one bit more specific than the phrase "articles of wearing apparel." There seems very little difference between two such phrases as to relative specificness. It is difficult to determine, as between them, which is the general and which is the specific; but I am inclined to the conclusion which I have heretofore expressed in the *Fertilizer Case*, [*Heller v. Magone*, 38 Fed. Rep. 908,] that that phrase is the more specific one which determines the rate of duty on an individual article by the specific use to which that particular article is put. Therefore, as between these two paragraphs, 392 and 396, (assuming that these articles are "knit fabrics" for the purpose of deciding this case,) I have reached the conclusion that the more specific paragraph is 396, and that the articles are dutiable as wearing apparel. The result of that will be to reverse the decision of the board of appraisers, and determine the specification of the merchandise to be as stated, to-wit, wearing apparel, under paragraph 396.

SOWLES v. FIRST NAT. BANK OF ST. ALBANS.

(Circuit Court, D. Vermont. May 27, 1891.)

REMOVAL OF CAUSES—AGAINST NATIONAL BANK—RECEIVERSHIP.

A suit against a national bank to reach property held as a part of its assets by its receiver, appointed by the comptroller of the currency, arises under the laws of the United States, and may be removed from the state court into the federal court.

In Equity. On motion to remand.

Edward A. Soules, in pro. per.

Chester W. Witters, for defendant.

WHEELER, J. This suit was brought in a court of chancery of the state against the bank to reach property held as a part of the assets of the bank by the receiver appointed by the comptroller of the currency. The subpoena ran to the bank, and did not name the receiver, but was served upon him, and a temporary injunction was granted which would reach him. He removed the cause into this court. The orator has moved to remand it to the state court, and that motion has now been heard. The orator insists that the suit is against the bank, and not against the receiver; and relies upon *Whittemore v. Bank*, 134 U. S. 527, 10 Sup. Ct. Rep. 592, to show that this court has no jurisdiction. In that case the bank was not in the hands of a receiver, but was *sui juris*. This bank is altogether in the hands of the receiver, and the decree sought, if it would reach anything, would reach assets of the bank in his hands. Although the bank, as an organization, is not extinguished, but is continued in existence for the purposes of being wound up, it has no control, as a bank, of any of its property interests, and cannot, apart from the receiver, be affected by a decree to reach them. The receiver is the real party in this behalf. He is an agent of the United States, and an officer thereof for this purpose. *Kennedy v. Gibson*, 8 Wall. 498. The assets in his hands belong to the United States for distribution among those entitled to them. *Hitz v. Jenks*, 123 U. S. 297, 8 Sup. Ct. Rep. 143. The jurisdiction of this court is not affected by the provisions of section 4 of the act of August 13, 1888, relating to suits for and against national banks, but is saved by them. 25 St. 436. The suit arises from the proceedings of the receiver, and under the laws of the United States, and appears to be removable. Motion denied.

UNITED STATES BANK v. LYON COUNTY *et al.*

(Circuit Court, N. D. Iowa, W. D. June 15, 1891.)

RESCISSION OF CONTRACT—EQUITY JURISDICTION—REMEDY AT LAW.

In a suit against a county and its agent the bill alleged that said agent induced complainant to buy bonds of the county by the false representations that they were issued to refund indebtedness, all of which had been in judgment against the county; that whether any of the bonds represented indebtedness which was enforceable against the county could be determined only by an investigation of the county's financial history for many years past; that when said bonds were issued, the legal limit of indebtedness had already been exceeded; that the county denied the validity of the bonds. The prayer was for a rescission of the contract of sale, the bonds being tendered back, and for a judgment for the amount paid. *Held*, that the bill failed to show a case within equitable jurisdiction, as an action for money had and received would accomplish all that was sought save the rescission, which was unnecessary.

In Equity. Demurrer to amended bill.

Henderson, Hurd, Daniels & Kiesel, for complainant.

Van Wagenen & McMillian, Kauffman & Guernsey, and *E. C. Roach*, for defendants.

SHIRAS, J. The facts averred in the amended bill herein filed are in brief as follows: That during the period from April, 1884, to September, 1885, inclusive, the county of Lyon, in the state of Iowa, under the provisions of the several statutes of Iowa then in force, ordered the issuance of the bonds of the county, and, in pursuance thereof, there was issued a series of bonds, 120 in number, for the sum of \$1,000 each, with interest coupons attached; that in September, 1885, the defendant Richards, then being the agent of the county, duly authorized, requested the complainant to purchase five of said bonds, being those numbered 091 to 095 inclusive; that the value of the taxable property of said county at that time, as shown by the state and county tax-lists for the year 1884, did not exceed the sum of \$1,580,735; that, in order to induce complainant to purchase said bonds, the said Richards, as agent of said county, represented that the said series of 120 bonds had been issued to refund indebtedness of the county evidenced by bonds previously issued, the validity of which indebtedness had been established by judgments against said county; that, relying upon these representations, complainant purchased said five bonds, paying therefor the sum of \$5,100, which money was received and used by the said county; that the representations thus made are false, it not being true that said 120 bonds were issued to refund indebtedness, all of which had been in judgment against said county, but only a portion thereof had been evidenced by judgment; that the said Richards and the said county well knew at the time that said representations so made were untrue; that after the year 1887 the county ceased to pay interest on said bonds, and now refuses to recognize said bonds as being valid obligations of the county, and now avers that the same were not issued to refund a previously existing valid indebtedness, which had been evidenced in whole by judgments against said county; that from the investigation made by complainant it now ap-

pears that said bonds do not represent indebtedness which had been previously put in judgment against said county, and that whether said series of 120 bonds or the 5 bonds owned by complainant, represent, in part, indebtedness which was enforceable against the county can only be finally determined by an accounting, which shall include an investigation of the entire financial history of the county for many years past; that when the bonds sold to complainant were issued the legal limit of indebtedness, to-wit, 5 per cent. upon the assessed value of taxable property, had already been exceeded. Based upon the facts set forth, complainant prays for a decree rescinding the contract of sale of said bonds, the same being tendered back to the defendant county, and for a judgment against the defendants Richards and the county of Lyon for the amount paid for said bonds by complainant; the latter accounting for the sums received by way of interest on said bonds.

To this bill a demurrer is interposed on behalf of the defendants, mainly upon the ground that the bill does not show a case of equitable cognizance, as complainant has an adequate remedy at law. So far as a decree is asked against the defendant Richards, it does not appear that there is need or ground for the exercise of the powers of a court of equity in granting relief as to him. The complainant has no contract with him to be rescinded, and, in effect, the bill as against him amounts only to a suit for damages based upon the alleged false statements made by him to induce the complainant to purchase the bonds of the county. Do the allegations of the bill show a need for a decree rescinding the contract of sale as against the county? It is therein charged that the county repudiates the validity of the bonds, and refuses to recognize them as of any force; and it is averred that the complainant has tendered them back to the county. Of what benefit would a decree rescinding the sale be under such circumstances? If the county was seeking to hold the complainant bound thereby, it might be necessary to have it decreed void for fraud; but, if both the parties now practically repudiate it, how can it stand in the way of any legal proceeding which complainant may wish to bring for the protection of its rights.

The bill filed in this cause does not seek a decree for the return of any specific property, nor to clear the title of complainant to property wrongfully obtained from it; neither does it seek to have a full accounting in regard to the entire series of 120 bonds, issued by the county and sold to different parties, including complainant, in order that it might be ascertained what part, if any, of said series of bonds, either in number or proportionate amount, is valid and collectible from the county, and what proportion thereof is equitably the property of plaintiff. In such case the inquiry and accounting would be of such a nature as to require equitable aid to accomplish it. The bill, however, is not framed for that purpose. It charges the making the fraudulent representations in regard to the character of the bonds, and the present repudiation thereof by the county, as ground for asking a decree of rescission, and then prays for a decree or judgment for the amount of money paid by it, and received by the county, as the purchase price for the bonds in question.

Why cannot an action at law be maintained, either for damages on the ground of false representations, or for money had and received, which, in effect, will cover all that the complainant is seeking in the present proceeding? If it were necessary, in order to maintain such an action, that the plaintiff should prove the nature of all the indebtedness existing against the company, and which had been refunded in the series of 120 bonds issued by the county, it might then be true that the complexity of such investigation and accounting would be such as to justify an appeal to a court of equity, on the ground that the mode of trial before a court and jury in an action at law would be inadequate to meet the exigency of the situation. In an action at law for money had and received, to prove the invalidity of the bonds, and their repudiation by the county, an investigation of the kind indicated would not be necessary. The general fact that false statements touching the bonds had been made, and that the county now repudiated the same, and denied the validity thereof, would be sufficient, so far as that issue would be material, without going into an exhaustive investigation of the details of such pre-existing indebtedness. According to the allegations of the bill, the county repudiates all liability on said bonds, and does not take the ground that it is liable on such part thereof as might be found to represent a previous existing valid indebtedness, but is not liable on the remainder; in other words, the county repudiates the contract of sale by virtue of which it obtained \$5,100 from the complainant. In like manner the complainant does not now seek the aid of the court of equity for the purpose of ascertaining whether any part of the bonds owned by it represent a valid consideration, so as to be enforceable against the county; or, in other words, it does not seek equitable aid in order to sift out and separate the valid from the invalid indebtedness, and to compel the county to recognize and pay such part as may be adjudged to be valid. In effect, the averments of the bill are simply that, by false representation, it was induced to pay to the county \$5,100 for five bonds issued by the county, which bonds the county now repudiates, and therefore complainant wishes a decree rescinding the contract of sale and a judgment for the sum paid by it to the county, less any payments made thereon. An action for money had and received will accomplish all that is thus sought, save the entry of a formal decree rescinding the contract of sale, which, so far as is now made to appear, is wholly unnecessary, as that contract is not relied upon by the county, but, on the contrary, is treated as being invalid and void, in that the county now denies all liability on the bonds, claiming that the issuance and sale thereof was in violation of the constitutional limitation upon the amount of indebtedness that could be legally incurred by the county.

It not appearing, therefore, that equitable aid is necessary for the accomplishment of what is aimed at by complainant, which is a judgment for the money paid to the county, it must be held that the bill fails to show a case within equitable jurisdiction, and the demurrer is therefore sustained.

BRANAGH v. SMITH.

(Circuit Court, S. D. New York. May 15, 1891.)

ALIENS—RIGHT TO TAKE BY DESCENT.

Laws N. Y. 1845, c. 115, as amended by Laws 1874, c. 261, provides that those aliens who, according to the statutes of New York, would answer to the description of heirs may take by descent from any alien resident, or any naturalized or native citizen of the United States, who has "purchased" and taken, or shall hereafter "purchase" and take, a conveyance of real estate. *Held*, that the statute gives the right of transmission by descent only to resident aliens and naturalized or native citizens, that it attaches only to land acquired by purchase, and that it contemplates only one step of transmission to alien heirs.

At Law.

Benj. F. Butler and *W. H. Secor*, for plaintiff.

Joseph H. Choate, *Elihu Root*, and *Horace Russell*, for defendant.

WALLACE, J. The plaintiff is an alien, residing in Ireland, and has brought this action of ejectment to recover lands of which Alexander T. Stewart died seised in the year 1876. She claims title through her mother, Mary Branagh, who, it is conceded for the purposes of the present decision, was a first cousin of Mr. Stewart, and was an alien residing in Ireland at the time of his death. It is a familiar rule of the common law that an alien has no inheritable blood, and can neither acquire land by descent, nor transmit it by descent to another. At the death of the alien the land which he may have acquired by purchase instantly escheats, and, without any inquest of office, vests in the government or state. Consequently, at common law the plaintiff would not have any title to the land in controversy, both because her mother as an alien would be incapable of acquiring title by descent, or of transmitting it, and she herself, as an alien, would be incapable of acquiring it by descent from her mother. It follows that, unless the statutory law of this state has modified these rules of real property, the plaintiff cannot recover, because in ejectment a plaintiff without title cannot succeed; any infirmity in the title of the defendant notwithstanding.

The question, then, is whether a case like that of the present, in which the plaintiff, a non-resident alien, claims a title by descent which had previously vested by descent in a non-resident alien ancestor, is embraced in any of the enabling provisions of the statutes of this state. In 1845 (chapter 115, Laws 1845) the legislature enacted the law entitled "An act to enable resident aliens to hold and convey real estate, and for other purposes." This act was amended by chapter 261 of the Laws of 1874, and again by chapter 38 of the laws of 1875. These are the statutes which were in force at the time of Mr. Stewart's death, and therefore control the decision of the present question. I have not been referred to any other act which is germane. The act of 1845 provides as follows:

"If any alien resident of this state, who has purchased and taken, or hereafter shall purchase and take, a conveyance of real estate within this state, has died, or shall hereafter die, leaving persons who, according to the statutes

of this state, would answer the description of heirs of such deceased alien, such persons, so answering the description of heirs to such deceased alien, whether they are citizens or aliens, are hereby declared and made capable of taking and holding, and may take and hold, as heirs of such deceased aliens, as if they were citizens of the United States, the lands and real estate owned and held by such aliens at his death, in like manner and with the effect as if such alien at his death were a citizen of the United States."

This act, while it removed the incapacity of aliens to inherit as heirs of resident aliens, did not remove their incapacity to inherit as heirs of naturalized or native citizens, and in this respect discriminated unreasonably against native and naturalized citizens who might have alien kindred; and, apparently to obviate this defect, it was amended by the act of 1874, which introduced after the words "alien resident" the words "or any naturalized or native citizen of the United States." The act of 1875 extended the enabling provision of the former acts to alien devisees, placing them in the same category with alien heirs, and has no bearing upon the present question. Succinctly stated, the act of 1845, as amended in 1874, enables those aliens, "who, according to the statutes of this state, would answer to the description of heirs," to take by descent from any alien resident, or any naturalized or native citizen of the United States, who has purchased and taken, or shall hereafter purchase and take, a conveyance of real estate within this state. The act of 1875 permits aliens to take as devisees. This legislation does not, in terms, enlarge the capacity of aliens to take by descent from non-resident aliens, or to take by descent from resident aliens or naturalized or native citizens who have not acquired lands by purchase. It is expressed in unequivocal language, and must be taken to mean what its language implies. There is a clear distinction, which has always been recognized in the law of real property, between titles acquired by purchase and titles acquired by descent. The latter vest by operation of law. It cannot be supposed that the legislature were unaware of this distinction, or that they employed the language of the statute unadvisedly. The meaning of these statutes has been considered in two adjudicated cases by the highest court of the state, but in neither of these cases was the precise question which is now presented under consideration. Speaking of the act of 1845, the court of appeals have said, in *Goodrich v. Russell*, 42 N. Y. 177, that it gives to a resident alien who takes title by grant of real estate the same power of transmitting such title by descent as a citizen, and to this extent gives an inheritable quality to the blood of aliens. And in *Stamm v. Bostwick*, 122 N. Y. 48, 25 N. E. Rep. 233, the court of appeals, referring to the effect of the original and amendatory statutes, declare that the word "purchase," as used therein, should be given its broadest meaning, and includes all land acquired by devise. These adjudications are authority inferentially for the proposition that the legislation does not affect titles which have not been acquired by resident aliens, or native or naturalized citizens, nor titles which have been acquired by any person of these classes otherwise than by purchase; that is, by grant or devise. The only case in the courts of this state which

directly adjudicates the present question, which has been called to my attention, is one decided by the supreme court in June, 1881, the case of *Harrison v. Harrison*, 3 N. Y. Law Bul. 65, decided by BARTLETT, J. In that case the court says:

"The non-resident aliens took under the act of 1845. They so took as if they were citizens; consequently, with full power of disposition and transmission. Dying intestate, the estate passed to their heirs at law, capable of taking by descent or devise; that is, to such of their heirs as were citizens, but not to such as were non-resident aliens."

The act makes no provision for the latter, nor indeed specially for the former; they taking as an incident to the power of disposition and transmission conferred upon the original non-residents. I conclude, therefore, *first*, that the statutory law of this state gives the right of transmission by descent only to resident aliens and naturalized or native citizens. Mary Branagh, the mother of the plaintiff, was not one of these. *Secondly*. The right attaches only to land acquired by purchase,—that is, by grant or devise; and Mary Branagh, the mother of the plaintiff, acquired this land by descent. If Mr. Stewart died intestate, it being conceded that he was a naturalized citizen, Mary Branagh acquired title as one of his collateral kindred. *Thirdly*. These statutes, in my judgment, contemplate only one step of transmission to alien heirs, and, when that step was taken by transmission from Mr. Stewart to the mother of the plaintiff, the operation of the statute ceased.

For these reasons, I must hold that any title to the real estate in controversy which may have been acquired by Mary Branagh has not been transmitted upon her death to the plaintiff by descent. A verdict must consequently be directed for the defendant.

HAHN v. ERHARDT.

(Circuit Court, S. D. New York. April 29, 1891.)

CUSTOMS DUTIES—ARTICLES COMPOSED OF AGATE AND OF TIGER EYE OR CROCIDOLITE.

Agate pen-holder handles, tiger eye or crocidolite pen-holder handles, and other agate articles and other tiger eye or crocidolite articles, that were manufactured by a process called "cutting" from crude stones at and prior to the passage of the tariff act of March 3, 1883, (22 U. S. St. 488,) known to trade and commerce of this country as agate and tiger eye or crocidolite, and as varieties of precious stones, and that were at such times, in such trade and commerce, bought and sold, respectively, under the names of agate pen-holder handles, tiger eye or crocidolite pen-holder handles, and other similar descriptive names, were not dutiable at the rate of 20 per centum *ad valorem* as "non-enumerated manufactured articles," under the provision for "all articles manufactured in whole or in part, not herein enumerated or provided for," contained in section 2513 of the aforesaid tariff act of March 3, 1883, but were dutiable at the rate of 10 per centum *ad valorem* as "precious stones," under the provision therefor contained in Schedule N of that act.

At Law.

During the year 1889 the plaintiff made nine importations from Germany into the United States at the port of New York of merchandise in-

voiced as "onyx" and "unmounted onyx." This merchandise was classified for duty as "non-enumerated manufactured articles," under the provision for "all articles manufactured in whole or in part, not herein enumerated or provided for," contained in section 2513 of the tariff act of March 3, 1883, and duty at the rate of 20 per centum *ad valorem* (the rate specified in that provision for such articles) was exacted thereon by the defendant as collector of customs at that port. Against this classification and this exaction the plaintiff duly protested, claiming that this merchandise was free of duty under the provision for "agate, unmanufactured," contained in the free list of the aforesaid tariff act of 1883, (Tariff Ind. New, par. 596;) or, if not free of duty, was dutiable at the rate of 10 per centum *ad valorem*, under the provision for "all non-dutiable crude minerals, but which have been advanced in value or condition by refining or grinding, or by other process of manufacture, not specially enumerated or provided for in this act," contained in Schedule A of that act, (Id. par. 95;) or, if neither free of duty nor dutiable under the last-mentioned provision, was dutiable at the rate of 10 per centum *ad valorem* under the provision for "precious stones of all kinds," contained in Schedule N of that act, (Id. par. 480.) The plaintiff also seasonably appealed to the secretary of the treasury, who sustained the aforesaid classification and exaction of the defendant as said collector, and thereafter duly brought this suit to recover so much of the duties exacted as should be held to be excessive under his protests. Upon the trial it appeared that the merchandise in suit consisted of various articles composed, with few exceptions, of agate, and, in case of these exceptions, of tiger eye or crocidolite. That those of agate were manufactured from crude agate, and those of tiger eye or crocidolite from crude tiger eye or crocidolite, by a process called "cutting," or, in other words, by first sawing these crude stones into pieces of the required sizes, and then grinding such pieces on sand-stones, or otherwise, and afterwards polishing the same, so ground, into the shapes of and for the uses, respectively, as pen-holder handles, glove-hook handles, shoe-hook handles, knife handles, paper weights, paper cutters, rollers for book-binders, slabs for match-boxes, and slabs for blotting-paper. That on and prior to March 3, 1883, these different articles were bought and sold in trade and commerce of this country, respectively, when made of agate, under the names of and as agate pen-holder handles, agate glove-hook handles, agate shoe-hook handles, agate knife handles, agate paper weights, agate paper cutters, agate rollers, agate match-box slabs, and agate blotter slabs; and, when made of tiger eye or crocidolite, under the names of and as tiger eye or crocidolite pen-holder handles, tiger eye or crocidolite glove-hook handles, etc. That the highest market value of these different articles was as follows: For the pen-holder handles about 15 cents each; for the glove-hook handles and the shoe-hook handles about 10 cents each; for the knife handles about 25 cents each; for the paper weights about 70 cents each; for the paper cutters about 50 cents each; for the rollers about \$2 each; for the match-box slabs 15 cents each; and for the blotter slabs about \$1 each. That on and prior to March 3, 1883, agate of

the description of that of which these articles were composed was also made into cameos, ring-stones, sleeve-buttons, pieces for ear-rings, and other articles used for jewelry purposes. That at such times such agate and such tiger eye or crocidolite as those of which the articles in suit were composed were known to trade and commerce of this country as precious stones. That at those times all other stones then known to such trade and commerce as precious stones were subjected to some process of "cutting," in order to adapt them to the respective uses for which they were intended. Schedule G of the act of July 30, 1846, (9 St. U. S. 42,) imposed a duty of 10 per centum *ad valorem* on "diamonds, gems, pearls, rubies, and other precious stones, and imitations thereof, when not set." Section 21 of the act of March 2, 1861, (12 St. U. S. 178,) imposed on "diamonds, cameos, mosaics, gems, pearls, rubies, and other precious stones, when not set, a duty of five per centum *ad valorem*; on the same when set in gold, silver, or other metal, or on imitations thereof, and all other jewelry, twenty-five per centum *ad valorem*." Heyl, par. 104. Section 3 of the act of June 30, 1864, (13 St. U. S. 202,) imposed a duty of 10 per centum *ad valorem* on "diamonds, cameos, mosaics, gems, pearls, rubies, and other precious stones, when not set." Heyl, par. 367. Section 5 of the act of June 6, 1872, (17 St. U. S. 230,) exempted from duty "agates, unmanufactured." Heyl, par. 741. Schedule M of section 2504 of the United States Revised Statutes reads as follows:

"*Precious stones and jewelry.* Diamonds, cameos, mosaics, gems, pearls, rubies, and other precious stones, when not set, ten per centum *ad valorem*; when set in gold, silver, or other metal, or on imitations thereof, and all other jewelry, twenty-five per centum *ad valorem*." Heyl, par. 1396.

Section 2505 of the United States Revised Statutes exempted from duty "agates, unmanufactured." Heyl, par. 1457. Schedule N of the act of March 3, 1883, (22 St. U. S. 488,) imposed a duty of 10 per centum *ad valorem* on "precious stones of all kinds." Tariff Ind. (New,) par. 480. Section 2503 of the act of March 3, 1883, exempted from duty "agates, unmanufactured." Tariff Ind. (New,) par. 596. Schedule N of the act of October 1, 1890, (paragraphs 452-454,) reads as follows:

"*Jewelry.* All articles not elsewhere specially provided for in this act, composed of precious stones or imitations thereof, whether set with coral, jet, or pearls, or with diamonds, rubies, cameos, or other precious stones, or imitations thereof, or otherwise, and which shall be known commercially as 'jewelry,' and cameos in frames, fifty per centum *ad valorem*. * * * Pearls ten per centum. * * * Precious stones of all kinds, cut but not set, ten per centum *ad valorem*. If set, and not specially provided for in this act, twenty-five per centum *ad valorem*."

Section 2 of the act of 1890 exempts from duty "diamonds and other precious stones, rough or uncut, including glaziers' and engravers' diamonds not set," (paragraph 557;) and also "agates, unmanufactured," (paragraph 476.)

Both sides having rested, the defendant's counsel moved the court to direct the jury to find a verdict for the defendant, on the ground that

the plaintiff had not proven facts sufficient to entitle him to recover, and the plaintiff's counsel moved the court to direct the jury to find a verdict in favor of the plaintiff for the amount, with interest, of so much of the aforesaid duties as was exacted in excess of 10 per centum *ad valorem*, on the ground that the articles in suit were "precious stones."

Comstock & Brown, for plaintiff.

Edward Mitchell, U. S. Atty., and *Thomas Greenwood*, Asst. U. S. Atty., for defendant.

LACOMBE, Circuit Judge, (*orally*.) These articles would, in ordinary speech, it seems to me, be clearly included within the broad meaning of the term "precious stones." What testimony there is here as to how the trade regards them also shows that in trade and commerce in this country they are considered "precious stones." As to any particular meaning which congress in the past may have given to the phrase "precious stones," and as to the distinction suggested in the argument for the defendant of a variety known as semi-precious stones, it is sufficient to say that, for the elaborate and somewhat involved phraseology which congress has from time to time used in the past when laying duty on articles of this class, there has been substituted the comprehensive phrase "precious stones of all kinds," just as in the same tariff act, for the somewhat elaborate and more or less involved description of different varieties of jewelry, there was substituted the phrase "jewelry of all kinds." Heretofore this court has held (in *Robbins v. Robertson*, 33 Fed. Rep. 709) that the words "jewelry of all kinds" in the act of 1883 were sufficiently broad to cover imitation jewelry, as well as real jewelry. I am led to make the same disposition of this case, and to hold that the phrase "precious stones of all kinds," when used in this act of 1883, is broad enough to cover stones which may sometimes be called "semi-precious stones," and which are of the class which, in the broad use of the term "precious stones," is by the community at large regarded as comprised in that family. I shall therefore direct a verdict in favor of the plaintiff.

In re STRAUS et al.

(*Circuit Court, S. D. New York. April 21, 1891.*)

CUSTOMS DUTIES—BOHEMIAN GLASSWARE—ACT OF OCTOBER 1, 1890.

The tariff act of October 1, 1890, held to be a substitute for all prior tariff legislation, so far, at least, as such legislation lays a duty upon imported articles of any kind; and Bohemian glass, imported after October 6, 1890, although specifically enumerated *eo nomine* in the tariff act of March 3, 1883, and only generally enumerated as an "article of glass, colored," etc., in the act of October 1, 1890, is dutiable under the latter act, and not under the former act, which is no longer in force, as to the imposition of duties.

At Law. Appeal from board of United States general appraisers.

The firm of L. Straus & Son on October 11 and 29, 1890, imported by the Polynesia and Arabia certain Bohemian glassware, which was duly entered at the port of New York and classified and assessed by the collector of customs at that port at 60 per cent. *ad valorem*, as an "article of glass, colored," under paragraph 106 of the tariff act of October 1, 1890. The importers protested, claiming that the said goods were dutiable under Schedule B, par. 143, of the tariff act of March 3, 1883, at 45 per cent. *ad valorem* as "Bohemian glass," and claiming that said merchandise, being specifically mentioned or enumerated in said act of October 1, 1890, the former act was still in force, and applicable to the particular merchandise in suit. An appeal was taken by the importers from the decision of the collector to the board of United States general appraisers, under the provisions of the act of June 10, 1890. The board of general appraisers affirmed the decision of the collector. The importers then applied for a review of the decision of the said board by the United States circuit court. The board of general appraisers in their return to the court found that "the merchandise under consideration is commonly known as Bohemian glassware, well recognized under this description in the trade and in popular parlance," and that "the present tariff law does not provide for duty on it by enumeration *o nomine*, as prior tariff acts had done for many years." They also found "that Bohemian glassware imported since October 6, 1890, although omitted to be named by specific mention, is provided for and made dutiable under paragraphs 106 or 108 of the new tariff act, according to the nature of the article, and not under the act of 1883."

Samuel H. Ordway and Benjamin Barker, Jr., for importers.

Edward Mitchell, U. S. Atty., and *Henry C. Platt*, Asst. U. S. Atty., for collector.

LACOMBE, Circuit Judge. Taking the language of the new tariff act as a whole and in its entirety, from beginning to end, I cannot escape the conviction that it manifests a plain intention to substitute that tariff act in the place and stead of all prior tariff legislation, so far, at least, as such legislation lays a duty upon imported articles of any kind. The decision of the appraisers is therefore affirmed.

GRIER v. BAYNES *et al.*

(Circuit Court, N. D. New York. June 5, 1891.)

1. PATENTS FOR INVENTIONS—LICENSE—ASSIGNMENT.

Where a patentee for a stipulated royalty granted an exclusive license to manufacture and sell under his patent, and subsequently, with the knowledge of his licensee, assigned for a valuable consideration a portion of the royalty, he cannot, by a secret assignment to the licensee, cut off the rights of such third party.

2. SAME—NOTICE.

A subsequent assignment by the licensee to a third party having knowledge of the facts will not free the patentee or said third party from the obligation to pay the portion of the royalties so conveyed. The latter took subject to the obligation to pay such royalty.

In Equity.

James A. Allen, for complainant.

Edwin S. Jenney, for defendants.

COXE, J. This action is to recover royalties at the rate of 35 cents for each set of springs sold by the defendants under letters patent No. 292,147, granted to Charles L. Thomas, January 15, 1884, for an improved spring for vehicles. On the 18th of February, 1885, the patentee and the defendant Baynes entered into an agreement by which the patentee granted to Baynes—subject to a prior license—an exclusive license under the patent, in consideration, among other things, of an agreement upon Baynes's part to push the sale of the patented springs and pay the patentee one dollar for every set of springs so manufactured and sold. On the 26th of May, 1885, the patentee assigned to his wife, Jeanette G. Thomas, all his right, title and interest to royalties under the preceding agreements. On the 24th of June, 1885, therefore, the defendant Baynes was obligated to pay Jeanette G. Thomas one dollar royalty upon every set of springs sold by him. On that day she and her husband, for a valuable consideration, assigned to the complainant a certain portion of the royalties under the Baynes license, namely, 35 cents for each set of springs sold, which sum was, by the terms of the agreement, to be deducted from the amount due her and paid by Baynes directly to the complainant. Baynes was present at the execution of this agreement and was aware of its contents. On the 15th of January, 1886, without the knowledge or consent of the complainant, Thomas and wife assigned the patent to Baynes and released him from all obligations to pay royalties under the former agreement.

The question, then, so far as the defendant Baynes is concerned, is this: Where a patentee has for a stipulated royalty granted a license to manufacture and sell under his patent and subsequently, with the knowledge of the licensee, assigns, for a valuable consideration, a portion of the royalty to a third party, can he, by a secret settlement with the licensee, cut off the rights of such third party? It is thought that he cannot upon the authority of the following decisions: *Lett v. Morris*, 4 Sim. 607; *Field v. Mayor, etc.*, 6 N. Y. 179; *Trist v. Child*, 21 Wall. 441; *Bank v. McLoon*, 73 Me. 499; *Risley v. Bank*, 83 N. Y. 318.

As to the liability of Baynes there can be no doubt. He had agreed to pay Thomas one dollar for each set of springs made and sold by him. When the complainant parted with valuable rights in exchange for 35 per centum of this royalty, which was thereupon solemnly set apart and assigned to him, Baynes was present. He had full knowledge of the agreement in all its particulars, including the stipulation that he should pay the royalty not to Mrs. Thomas but to complainant himself. In these circumstances he cannot rid himself of his obligation to the complainant by pleading a settlement with Thomas. Thomas could receipt for Baynes's debt to him, but not for Baynes's debt to the complainant.

The remaining question relates to the liability of the defendant the Buffalo Spring & Gear Company, a corporation organized by Baynes, and others, February 20, 1886. On the 12th of March, 1886, Baynes

transferred the patent in question to the Buffalo Company, which became his successor in business and has since carried on the manufacture and sale of the patented springs. At the time of the transfer the Buffalo Company had actual knowledge of the agreement of June 24, 1885, and of the provision that—

"The party of the first part, [Thomas,] his licensees, heirs, or assigns, shall pay to the party of the second part, [complainant,] his heirs or assigns, the sum of thirty-five cents royalty on each and every set of Thomas springs sold by the said party of the first part or by his licensees under and during the term of the Thomas patents."

It also had full notice of the rights of the complainant and of the obligation of its assignor, Baynes, to pay the royalty of 35 cents to the complainant. The company stands in no better position than Baynes stood in relation to the complainant. Baynes was equitably liable to pay royalty, and neither he nor the owner of the patent could destroy this obligation without the complainant's consent. The company having full knowledge of the relations of the parties acquired the rights possessed by its assignor, and these only. Thomas could not give the company a right to manufacture under the patent, for he had previously granted the exclusive right to Baynes. Baynes could not give an unconditional right, for he was under an agreement to pay royalty to the complainant. In other words, every set of springs made under the patent was charged with a royalty of 35 cents payable to the complainant. He had relinquished valuable rights in exchange for this royalty, and Thomas and Baynes had received the benefit. When, therefore, Baynes assigned to the Buffalo Company, the latter, having full knowledge of the facts, took subject to this obligation. To hold otherwise would be to say that the defendants can destroy the complainant's rights by a mere shuffle of agreements and a specious exchange of positions.

There should be a decree for an accounting substantially as demanded in the complaint. Whether the decree should extend beyond December 6, 1887, is a question which can be determined upon the settlement of the decree. I do not decide it now for the reason that considerations, which seem to me important, were not alluded to upon the argument and are but casually mentioned in the briefs. On the 16th of August, 1884, Thomas, the patentee, assigned to Victor and Hamilton Richardson a one-third interest in the patent in question. The assignment was restricted by many conditions, but it provided that upon the assignor's default in certain particulars, it should become absolute. There is a plausibility in the suggestions that it did become absolute and that the Richardsons, in December, 1887, held an unincumbered third interest in the patent. On the 6th of December, 1887, they assigned their interest to the Buffalo Company. If the Richardsons had the right to make and sell the patented spring, free from all obligation to pay royalty to the complainant, it is clear that when the defendant company purchased their title it acquired the same right.

The complainant is entitled to a decree for an accounting, with costs.

WHITE v. WALBRIDGE.

(Circuit Court, D. Vermont. May 13, 1891.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—LENS-HOLDERS.

The manufacture of lens-holders by defendant, which operate in substantially the same manner as those covered by complainant's patent, is an infringement, though defendant's holders are composed of a smaller number of parts than complainant's.

2. SAME—INJUNCTION.

An injunction will issue against one who has already infringed a patent, though he denies that he intends to make any further infringement during its term.

3. SAME.

The part manufacture of lens-holders, not constituting an infringement, with intent to complete into the patented article immediately on the expiration of the patent, will not be enjoined, as complainant's monopoly exists only during the life of his patent.

In Equity.

Franklin Scott, for orator.

James L. Martin, for defendant.

WHEELER, J. This suit is brought upon patent No. 151,576, dated June 2, 1874, for an improvement in lens frames of stereoscopes. The patent was under consideration in *White v. Surdam*, 41 Fed. Rep. 790, and sustained. The defendant has made and sold lens-holders of less numbers of parts than those described in the specification of the patent, but having the rabbeted groove of the first claim. This difference in the number of pieces, which operate in substantially the same way as those of the patent, is not deemed to be material. He denies that he intends to make any more during the term of the patent. If he had not already infringed, that denial would be sufficient to prevent an injunction; but, as he has infringed in this manner, an injunction to prevent further infringement in the same manner is proper.

The defendant has on hand and is making more lens-holder blanks, which can be completed into those that would infringe or those that would not; and has advertised that he would furnish those of the patent at reduced prices after the expiration of the patent. The counsel for the orator argues that this part manufacture during the term of the patent, with intent to complete into the patented article immediately on the expiration of the patent, should be restrained, because a partaker in an infringement may be holden for it. This argument, however, fails, as to this, for the reason that what is being done and so intended will never be an infringement. Till completed, these things would not infringe, and when completed the patent will not be in force to be infringed. The orator has a monopoly of making, using, and vending to others to be used, during the term only of the patent. Every one else has the right to do anything as to that during that term which stops short of the patented article itself, and to come to that as soon as may be after the expiration of the term by any preparation which does not amount to that before. This leaves to him all that his patent covers, and to others what it does not cover. Motion granted as to an injunction against completing the patented articles, and denied as to the residue.

THE JOHN DILLON.

STARIN *v.* THE JOHN DILLON.

(District Court, D. New Jersey. June 11, 1891.)

MARITIME LIENS—ENFORCEMENT—LACHES.

A maritime lien for repairs, based on a running account extending over nearly four years, during the whole of which time the account was largely reduced by payments made with considerable regularity, the last within a week before the libel to enforce the lien was filed, is not barred by laches, though the last repairs were made nearly a year before the filing of the libel; and the claim of the libellant should not be postponed to those of other lienors, who made repairs and furnished supplies to the vessel while the payments to libellant were being made.

In Admiralty.

Otto Crouse, for libellant.

Alexander & Ash, for lienors.

GREEN, J. The only question presented upon this argument for consideration was whether any part of the claim of the libellant should be allowed. The *Dillon* has been sold under a decree of this court, producing the sum of \$1,125. After deducting the costs and expenses as taxed, and a preferred claim for seamen's wages, there remain in the registry of the court for distribution about \$500. The claims which have been duly presented aggregate \$2,062.01; the claim of the libellant being \$600.50. If this claim is allowed, the lienors will receive about 25 per cent. of their claims; if disallowed, the percentage of dividend will be much larger. It is insisted by the other lienors that the claim of the libellant should be postponed to their claims, for the reason that it is stale, and that their claims should be preferred because of the laches of the libellant in not more promptly enforcing his lien. The *Dillon* is a steam propeller, engaged in towing in and about the harbor of New York. It is admitted that she is a domestic vessel. The claims of the lienors other than the libellant were all incurred between the 10th of January, 1890, and the 20th of September, 1890, and are for repairs or supplies. The libellant's claim is of very much longer standing. The first item is for repairs made on the 3d of September, 1887, and the last charge was on October 31, 1889. The whole account during that period, as rendered, amounted to \$1,807.29, upon which indebtedness, however, payments have been made with considerable regularity at various times, amounting to \$1,206.79; reducing the claim to \$600.50. The last payment was made on September 12, 1890. The libel was filed September 18, 1890, within a week after the last payment on account, but more than 11 months after the last repairs were made upon the propeller by the libellant. These circumstances, the lienors insist, justify their claim for preference in payment, as they show clearly such delay by the libellant in enforcing his lien as to charge him with gross negligence, and of necessity deprive him of his right to participate in the di-

vision of the proceeds of the sale of the Dillon, to their pecuniary hurt. As from their very nature, as well as by operation of law, liens of the character of the libellant's are secret incumbrances, and are unknown to those who subsequently become creditors of the ship, and who look primarily to the ship for the payment of their claims, it is clear that honesty and fair dealing require prompt action in their enforcement; otherwise, innocent creditors might suffer from the laches of the others. It has therefore been uniformly held by courts of admiralty that, if reasonable opportunity exists for the enforcement of such liens, and such opportunity be suffered to pass without action on the part of the lienor, such failure to act will be regarded as an abandonment of the right to enforce the lien *in rem*. Such laches taints the claim of the negligent lienor with staleness, and will cause its postponement to the claims of more diligent creditors. But it is equally well settled that no inflexible rule can be used to measure the time by lapse of which without action a claim may fairly be adjudged to be stale. Indeed, whether a particular claim shall be considered stale depends not so much upon the lapse of time, as upon the circumstances which have caused the non-enforcement of the lien. The laches capable of destroying the priority of a lien must be born of unreasonable and inexcusable neglect. It is apparent, therefore, that every case must be determined by its own circumstances, and not by the criterion of a fixed principle.

Considering the case at bar in this view, the claim of the libellant cannot fairly be declared to be so stale as to lose its position among the other liens. This claim was based upon a running account, extending over nearly four years. During the whole of this time, the account was largely reduced by payments made with considerable regularity. In fact, payments upon account were continued for months after the date of the last charge, and up to a date less than a week previous to the filing of the libel. It was while these payments were being made that the indebtedness to the other lienors was incurred. The effect of these payments was to increase the value of the propeller as a security to them. They gained rather than lost by such delay as may be chargeable against the libellant. When payments ceased, the libel was promptly filed. If these payments be applied to the earlier items of the libellant's account, those remaining unpaid will have been incurred within a period less than one year previous to the filing of the libel. These items are for repairs done at very short intervals, and separately amount to small sums. The first libel filed against the propeller was that of the libellant. He was the earliest to move against her. The claims of many of the other lienors are nearly as long standing as this.

Under these circumstances, it would be unjust to postpone the claim of the libellant because of alleged staleness. While liens should be promptly enforced, the spirit of this rule does not require resort to courts for the collection of every item in a running account immediately upon the incurring of the indebtedness.

Let the usual order for distribution be entered.

WALCOTT v. WATSON *et al.*

(Circuit Court, D. Nevada. June 1, 1891.)

1. REMOVAL OF CAUSES—"LOCAL PREJUDICE"—COUNTER-CLAIM.

A non-resident plaintiff, suing in the state court, against whom a counter-claim is brought, becomes thereby a "defendant," within the provision of the removal act of congress (25 U. S. St. 435) that in a controversy between citizens of the state where the suit is brought and citizens of another state any defendant, being such citizen of another state, may remove the suit into the United States circuit court on the ground of prejudice and local influence, and the case is removable on his petition.

2. SAME—EVIDENCE OF PREJUDICE.

Though the existence of prejudice and local influence must be made to appear in such a way that the court will be legally satisfied of the truth of the allegation, yet, where the affidavits in support of the petition state the facts upon which affiants' belief is founded, and, when considered in connection with opposing affidavits, show that there did exist such "prejudice and local influence" as would prevent petitioner from obtaining justice in the state court, the order of removal should be granted.

At Law. On demurrer to the jurisdiction.

A. C. Ellis, for plaintiff.

Thomas Wren, for defendants.

HAWLEY, J. This suit was originally brought in the state district court in December, 1889, by the plaintiff, a citizen of the state of California, against the defendants, citizens of the state of Nevada, to recover an undivided one-half interest in certain property situate in White Pine county, and for an accounting, etc. The defendant A. R. Watson, on the 9th of February, 1890, filed an answer denying the material allegations of the complaint, and alleging that the claims of plaintiff were "without right, and fraudulent, except her claim to one-half interest in the claims known as 'copper claims.'" For further answer, by way of cross-complaint, and as a counter-claim to plaintiff's cause of action, the defendant alleges the existence of an agreement between the parties plaintiff and defendant relative to the "copper claims," and a breach thereof on the part of the plaintiff, and claims damages therefor in the sum of \$40,000. On the 2d of March, 1890, the plaintiff filed a petition, with the requisite bond, in the district court of the state where the suit was commenced, for the removal of the cause to the United States circuit court. The district judge held that the petition was not filed in time, and set the case for trial. Subsequently, proceedings were instituted in the supreme court of Nevada for a writ of prohibition to prohibit the trial of the cause in the state court. This writ was denied. *Walcott v. Wells*, 24 Pac. Rep. 367. Thereafter the cause was again set for trial in the state court for the 4th of August, 1890. On the 15th of July, 1890, the plaintiff filed her petition and affidavits in this court to remove the cause from the state court upon the ground of "prejudice and local influence," under the provisions of the act of congress to regulate the removal of causes, 25 U. S. St. 435. Judge KNOWLES of Montana, then presiding as judge of this court, thereupon made an order removing the cause.

This order was regularly served upon the district judge and clerk of the state court, and, notwithstanding this order, in utter disregard of said proceedings, and without the presence of Mrs. Walcott or her attorneys, the district judge proceeded to try said cause, and render judgment for defendants. After the removal of the cause to this court a reformed bill of complaint was filed, to which A. R. Watson in due time interposed a demurrer, contesting the jurisdiction of this court. Several preliminary motions have been made by the respective parties touching the sufficiency of the record. The various motions, the demurrer to the complaint, and a motion to remand were argued and submitted by consent of the court at the same time.

The important question concerning the validity of the removal of this case is whether or not the plaintiff can, by reason of the counter-claim set up in the answer, be treated as a "defendant," within the spirit, intent, and meaning of the act of congress before referred to, which reads as follows:

"And where a suit is now pending, or may be hereafter brought, in any state court in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant, being such citizen of another state, may remove such suit into the circuit court of the United States for the proper district at any time before the trial thereof, when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in such state court, or in any other state court to which the said defendant may, under the laws of the state, have the right, on account of such prejudice or local influence to remove said cause."

In *Carson v. Holtzclaw*, 39 Fed. Rep. 578, it was held that a non-resident plaintiff, suing in the state court, against whom a counter-claim is brought, is a "defendant," within the provisions of said act. It was upon the authority of that case that Judge KNOWLES made the order of removal in this case. *Clarkson v. Manson*, 4 Fed. Rep. 260, is also an authority in favor of the removal. The presiding judge having acted, and his action being supported by respectable authority, it is questionable, to say the least, whether his ruling should be interfered with at this time, even if the present judge doubted its correctness. But my opinion is, notwithstanding the decision of the supreme court of the United States in *West v. City of Aurora*, 6 Wall. 141, upon which defendant's counsel rely to support their motion to remand the case, that his ruling was correct. The counter-claim set up in the answer is a cause of action in favor of the defendant, upon which he might have sued the plaintiff, and obtained affirmative relief. By filing the counter-claim to the plaintiff's action the defendant becomes an affirmative actor. The counter-claim creates a controversy in which the attitude of the respective parties is changed. When the plaintiff brought this suit, she chose the forum of the state court to litigate the matters presented by her complaint. When the defendant filed his answer it presented a new and independent issue, and was not wholly in the nature of a defensive plea, as in *West v. City of Aurora*. Moreover, the facts in that case were dissimilar from the facts of this case, and the statute of this state in rela-

tion to counter-claims is, in some respects, essentially different from the provisions of the Code of Indiana upon which that decision was based. See Gen. St. Nev. § 3068.

2. With regard to the question as to how the prejudice or local influence warranting the removal of a cause of action from the state to the United States court may be "made to appear," the authorities are by no means uniform. The present state of the authorities leaves it optional for each judge to pursue any course which to his mind may be deemed proper. It has been decided in several cases that a defendant can remove a cause by filing an affidavit that he has reason to believe that from prejudice and local influence he will not be able to obtain justice in the state courts, and that his affidavit, if deemed sufficient to authorize the court to act, cannot be traversed or contradicted by the opposite party. *Neale v. Foster*, 31 Fed. Rep. 53; *Fisk v. Henarie*, 32 Fed. Rep. 417, 35 Fed. Rep. 230; *Hills v. Railroad Co.*, 33 Fed. Rep. 81; *Whelan v. Railroad Co.*, 35 Fed. Rep. 849; *Huskins v. Railway Co.*, 37 Fed. Rep. 504; *Cooper v. Railroad Co.*, 42 Fed. Rep. 697; *Brodhead v. Shoemaker*, 44 Fed. Rep. 518. In others it is held that the defendant must state in his affidavits the facts which show the existence of the prejudice and local influence, and that the opposite party is entitled to a hearing. *Short v. Railroad Co.*, 33 Fed. Rep. 114, and 34 Fed. Rep. 225; *Malone v. Railroad Co.*, 35 Fed. Rep. 625; *Southworth v. Reid*, 36 Fed. Rep. 451; *Dennison v. Brown*, 38 Fed. Rep. 535; *Amy v. Manning*, Id. 536, 868; *Goldworthy v. Railroad Co.*, Id. 769. The supreme court of the United States, in *Re Pennsylvania Co.*, 137 U. S. 457, 11 Sup. Ct. Rep. 143, in referring to this question said:

"Our opinion is that the circuit court must be legally (not merely morally) satisfied of the truth of the allegation that, from prejudice or local influence, the defendant will not be able to obtain justice in the state court. Legal satisfaction requires some proof suitable to the nature of the case; at least, an affidavit of a credible person, and a statement of facts in such affidavit which sufficiently evince the truth of the allegation. The amount and manner of proof required in each case must be left to the discretion of the court itself. A perfunctory showing by a formal affidavit of mere belief will not be sufficient. If the petition for removal states the facts upon which the allegation is founded, and that petition be verified by affidavit of a person or persons in whom the court has confidence, this may be regarded as *prima facie* proof sufficient to satisfy the conscience of the court. If more should be required by the court, more should be offered."

It will also be noticed, by an examination of the authorities which declare that it is the duty of the court to allow the opposite party to be heard, that there is no uniformity in the decisions as to the proper procedure in such cases; some holding that the objection to the removal of the cause can only be made, like other dilatory pleas, by a plea in abatement, some that notice of removal ought to be given to the opposite party before the order of removal is made, and others that it may be made by a motion to remand after the cause has been removed. Owing to the conflicting opinions in the circuit courts, and, inasmuch as the statute does not, in direct terms, prescribe how the fact of prejudice or local in-

fluence shall be made to appear, it suggests the propriety of the supreme court of the United States, or the circuit court of appeals, formulating some definite rule of court upon the subject, in order to secure a uniform course of procedure in such cases. Under the peculiar facts of this case, I do not feel called upon to determine what particular rule ought to be prescribed or followed. It is enough to say that, under any of the methods adopted by the various judges who have discussed the question, the removal of this cause must be sustained. The affidavits filed on behalf of petitioner state the facts upon which affiants' belief is founded. If these affidavits could not be questioned or contradicted, then the action of Judge KNOWLES was final. If the opposing party is entitled to be heard only by a plea in abatement, then the answer is that no such plea was filed within the proper time, (Fost. Fed. Pr. §§ 135, 136, 139,) and the question ought not to be considered. But if the question can properly be brought up on motion, then, upon the merits, my opinion is that the facts presented by the record and affidavits filed by the respective parties clearly show that at the time the order of removal was made it is "made to appear" that there did exist in White Pine county, where the cause was then set for trial, such prejudice and local influence as would have prevented Mrs. Walcott from obtaining "justice in such state court."

The only question upon this branch of the case which I deem necessary to notice is whether or not it is sufficiently "made to appear" that from prejudice or local influence the petitioner, at the time the order of removal to this court was made, might not have been able to obtain justice in "any other state court" to which she had, under the laws of the state of Nevada, the right to remove said cause. The affidavits show the existence of the same state of facts, as to the prejudice and local influence of the community in the counties adjoining White Pine county, as is alleged to exist in that county. With reference to the state court in the other counties of the state, it must be borne in mind that all the counties in the state of Nevada are in the same judicial district; that the district judges possess "equal, co-extensive, and concurrent jurisdiction;" and that each judge has the power to hold court in any county of this state. St. Nev. 1885, p. 60; *State v. Atherton*, 19 Nev. 332, 10 Pac. Rep. 901; *Walcott v. Wells*, *supra*. The existence of prejudice and local influence on the part of the district judge is relied upon, as well as the prejudice and local influence of the community. The fact that the same judge who tried this case after the order of removal was made to this court was authorized to hold court in any county of the state, and might have presided at the trial if this cause had been removed to any other county in the state, is, under the facts presented in this case, of itself, sufficient upon this point to justify the order of removal to this court. When the order of removal was served upon the clerk and district judge, it was the duty of the state court to have refrained from further action in the case. If the opposing party considered that the order was improvidently or erroneously made by this court, they should have taken the proper steps in this court to have the cause re-

manded. Then, if it was remanded, a fair and impartial trial might have been had in the state court. By pursuing this course, the comity of the respective courts, national and state, would be maintained, the rights of both parties preserved, and the ends of justice secured. Counsel for petitioner had the right to rely upon this course being taken by the state court. If this cause was now remanded, the right of Mrs. Watson to a fair and impartial trial would be placed in jeopardy by the prejudicial and anomalous action of the state court in proceeding to try the case after it had been removed to this court.

The views expressed and conclusions reached render it unnecessary to further consider the various motions submitted by the respective counsel. The demurrer is overruled, and the motion to remand denied.

CHANDLER v. POMEROY *et al.*

(Circuit Court, D. New Jersey. June 1, 1891.)

SPECIFIC PERFORMANCE—INEQUITABLE CONTRACT.

A testator directed that \$50,000 should be placed at interest for the benefit of his wife during her life, and at her death the principal to be divided equally among his three younger children, E., J., and K.; that \$30,000 should be placed at interest, and the income paid to his eldest son G. during his life; that his executors should sell real estate, and place the first \$100,000 received therefrom at interest, \$50,000 each for J. and K.; that all the rest of his property should be divided equally among the three younger children; that his homestead should be kept up for the younger children and widow; and that subject to this right, it was to be included in the residue of the estate. The testator's personalty amounted to \$480,000, and the real estate to \$355,000. E., who was one of the executors, took charge of the personalty, put \$50,000 at interest for his mother, and \$30,000 for his brother G., and paid each of his sisters \$2,000 per annum. The widow died, and he took possession of the \$50,000 held in trust for her. The sisters finally received \$50,000 each from him, and, being unable to obtain any further settlement, they sued him, pending which he died, leaving a will by which he gave the rest of his estate to his brother G. to the exclusion of his sisters, from whom he had become alienated, but who at that time were each entitled to at least \$100,000 from him. The complainant then, as the representative of G., whose executor he afterwards became, negotiated the contract in suit with defendants J. and K., by which they, in terms, gave up their claim against E.'s estate, the \$50,000 already received by each of them, and their right under their father's will to have \$50,000 apiece raised for them out of the real estate, and agreed that G. should stand on an equality with them, not only as against E.'s estate, but also as against their father's estate from the time of his death. The defendants testified that they did not understand the effect of the agreement when they signed it; that they were dissuaded by complainant, in whom they had absolute confidence, from consulting counsel; that their sole intent was to divide up with their brother G. "what was left" of their father's estate, and not to surrender anything they had already received. In pursuance of the agreement, the assets in E.'s hands at his death, \$380,688, was divided into three parts, and distributed between J., K., and G. Held, that the contract, according to the evidence, was obtained by misrepresentation and deception, and was manifestly inequitable, and the court would not decree a specific performance of it further than it already had been performed by the parties.

In Equity. On bill for specific performance.

Cause argued by consent before Hon. JOSEPH P. BRADLEY, Circuit Justice, at his chambers in the city of Washington, December 30, 1889, and held for advisement.

C. C. Bonney and Guild & Lum, for complainant.
Geo. W. Smith and John Manard Harlan, for defendants.

BRADLEY, Justice. The bill in this case is filed by Frank R. Chandler, as trustee and executor of the last will and testament of George P. Pomeroy, deceased, against Josephine Pomeroy, Julia Pomeroy Morrison, and her husband, William F. Morrison, and Alfred Mills, surviving executor of the last will and testament of George Pomeroy, deceased. Its primary object is to enforce and carry out an agreement alleged to have been made by and between the said George P. Pomeroy, on the one part, and the said Josephine and Julia, (with her husband,) on the other part, in relation to the division and settlement of the estate of the said George Pomeroy, father of the said George P. Pomeroy, Josephine, and Julia, and the estate of Edward Pomeroy, deceased, their brother. The agreement sought to be enforced is alleged to have been made by certain telegraphic communications and correspondence between the parties in March and April, 1887, culminating in a written agreement dated April 13, 1887, which is set out in the bill. The agreement relied on is that which is supposed to have been arrived at in this correspondence, and not that which is contained in the written document afterwards signed and executed by the parties. But the rule is so imperative that previous negotiations and correspondence are merged in a written agreement finally executed, that I have no hesitation in deciding that the prayer of the bill cannot be granted in the aspect in which the complainant has presented his case. But as all the facts are set forth, including the written agreement, and as the bill prays for general and alternative relief, it is perhaps allowable to look at the case as if it were based upon the written agreement itself, which the complainant contends is not repugnant to, but consistent with, the agreement first made and relied on.

The facts of the case, as exhibited by the pleadings and evidence, may be briefly stated as follows: George Pomeroy, of Madison, Morris county, N. J., died June 24, 1880, leaving a large estate, real and personal, and leaving his wife, Abba S., and four children, George P., Edward, Julia, and Josephine, him surviving. He also left a will, bearing date July 22, 1875. Aside from unimportant legacies and directions, the main provisions of the will are as follows: (1) Securities to the amount of \$50,000 were directed to be placed with the New York Life Insurance & Trust Company, in trust for the testator's wife during her natural life, the interest to be paid to her, and upon her death the principal to be divided equally between the three younger children, Edward, Julia, and Josephine. (2) Securities to the amount of \$30,000 were directed to be placed with the same company in trust for the testator's son George during his natural life, the interest to be paid to him, and at his death the principal to be equally divided between the said three younger children and the survivors of them. If, at the time of the division, either of the three children should have died leaving issue then surviving, such issue to take by representation. (3) The testator empowered his executors, or the survivor of them, to sell his real estate,

and to place the first \$100,000 received from the said sales with the said trust company in trust, \$50,000 thereof for Julia, and \$50,000 for Josephine, during their natural lives, respectively; and, at the death of either, to pay the principal of her share to her issue surviving her, (if any,) and if no such issue, to pay the same to the surviving daughter and to Edward, and the survivors of them, or their issue. (4) All the rest and residue of his property, real and personal, the testator gave to the said three younger children, Edward, Julia, and Josephine, their heirs and assigns, to be equally divided between them; but, if either should die before the testator without issue, the said residue was given to the survivors. These provisions of the will were subject to a specific direction with regard to the testator's homestead at Madison, which he desired to be kept up by the said three younger children so long as they could live harmoniously together, his wife living with them; and a certain part of the homestead described in the will was not to be sold, leased, or partitioned without the consent of his wife and of said three children; and, if either of them should marry, he or she should not remain in the homestead without the consent of the others. Subject to this specific direction, the homestead was included in the residue, with the rest of the property not otherwise disposed of. The testator appointed his son Edward Pomeroy and Alfred Mills the executors of his will, and after his death they regularly proved the same. The testator's wife and all his children survived him. George, the eldest, soon after the testator's death, married a Miss Cowles, of Cleveland, daughter of Edwin Cowles, and had a son by her, born May 27, 1881. The wife of George shortly after died.

The bill states that the testator's property, at the time of his death, amounted, as estimated by himself, to about \$538,000 of personal estate, and \$355,000 of real estate. The inventory of the personal property made by the executors, however, amounted to only about \$480,000. Edward took charge of the personal assets, and placed with the New York Life Insurance & Trust Company, as directed by the will, securities to the amount of \$50,000 in trust for the widow, and also to the amount of \$30,000 in trust for his brother George, and paid to his sisters annually about \$2,000 apiece for their support. He engaged in the business of a broker in New York, and his sisters became apprehensive that he used the funds of the estate for his own purposes. The widow having died in February, 1883, he took possession of the \$50,000 held by the New York Company in trust for her. The sisters, Julia and Josephine, on the 2d of February, 1885, received from Edward \$50,000 apiece in securities. They must have been entitled at that time to at least \$150,000 apiece from the personal estate. Being unable to procure any further settlement from Edward, in September, 1885, they instituted a suit against him in the supreme court of New York. This suit was pending at the time of Edward's death, which took place 6th of March, 1887. He died without issue and unmarried, leaving a will, dated October 23, 1886, by which, after some pecuniary legacies, amounting in the aggregate to \$6,500, he gave all the residue of his estate to

his brother George, (who was then in Paris,) and made him his sole executor. He had become alienated from his sisters, probably on account of their efforts to enforce their claims against him. Julia had in the mean time married Rev. William F. Morrison. It is apparent that when Edward died his sisters were justly entitled to demand from him or his estate at least \$100,000 apiece, without including interest; and their brother George, as Edward's chief legatee, was only entitled to what remained of his estate after they were satisfied and paid.

But now happened a most extraordinary thing. Laying out of view the preliminary correspondence before referred to, a written agreement was brought about between George P. Pomeroy and his sisters, dated April 13, 1887, (but not executed until May 2, 1887,) by which they, Julia and Josephine, (as the complainant, Chandler, contends,) gave up their claim against Edward's estate; gave up the \$50,000 apiece already received by them; gave up their right to have \$50,000 apiece raised for them out of the real estate; and agreed that George should stand on an equality with them, not only as against Edward's estate, but as against their father's estate from the time of his death in 1880, and that they should be charged with all that they had in any way received, together with interest thereon, while George should only be charged with what he had received, and interest thereon, and not with what Edward (whom he represented) had received; George having received only the interest on the trust fund of \$30,000 left for his use by his father. And this suit is brought to compel a specific performance of that agreement, or, rather, of the agreement, substantially the same, supposed to have been arrived at in previous correspondence. Looking at the case at large, this seems to be one of the most inequitable agreements ever extracted from confiding and helpless females. The following are the most material parts of it: It contains, first, a number of recitals relating to the family history, among which is one to the effect that Edward Pomeroy, at the time of his death, was indebted to Julia P. Morrison, Josephine Pomeroy, and George P. Pomeroy, or some or one of them, in a sum or sums, the amount of which was unknown to the parties. So far as this recital affirms that Edward Pomeroy was indebted to George, it is unsupported by any evidence whatever. It was evidently inserted for the purpose of giving some color to the agreement that follows. After these recitals the agreement proceeded in the following terms:

"Now, therefore, in consideration of the premises and other covenants and agreements herein set forth, it is covenanted and agreed by each of the parties hereto that the remainder of the estate of George Pomeroy, deceased, shall be equally divided between his said three living children and heirs at law as of the date of his death; and, in order to arrive at the interest each should be entitled to at the date of these articles of agreement, it is agreed that each of the said children shall be charged with the amount in value that he or she may have received from the estate last aforesaid, together with interest on such sum at the rate of six per cent. per annum, payable annually, from the date of the receipt thereof to the date of these articles, and that the said will of George Pomeroy, deceased, shall be disregarded, so far as the same may be done by the parties hereto, to correspond with the provisions of this agree-

ment. It is further covenanted and agreed by the parties hereto that the estate of Edward Pomeroy, deceased, shall be divided and distributed equally between his said heirs at law, share and share alike, after the payment of his just debts and sundry legacies of six thousand five hundred dollars (\$6,500) aforesaid, and that his said will shall be disregarded in so far as it conflicts with the terms of this agreement. It is further covenanted and agreed by the parties hereto that in case it is found that the personal property of said George Pomeroy, or of said Edward Pomeroy, cannot be equally distributed in kind, then so much of the same as may be necessary shall be sold, and the proceeds thereof divided equally between the parties as herein provided. It is further covenanted and agreed that the real estate of the said George Pomeroy, deceased, and of Edward Pomeroy, deceased, wherever situated, and by whomsoever of the parties hereto held, shall be conveyed by good and sufficient deeds of conveyance by each of the parties hereto, an undivided third part to Julia P. Morrison, an undivided third part to Josephine Pomeroy, and an undivided third part to George P. Pomeroy, so that said last-named parties shall hold the entire title to said real estate as tenants in common, and that if the title to said real estate, or any portion thereof, is held by any other party, that the same shall be considered as belonging to the parties hereto in the proportion stated, and that it shall be so conveyed. It is further covenanted and agreed that in the division of the said estate the proceeds or revenue to be derived from the trust fund for the benefit of George P. Pomeroy, Julia Pomeroy Morrison, and Josephine Pomeroy, created by the will of George Pomeroy, deceased, shall be treated as a joint fund, and divided equally between the said last three parties; and, so far as it lies in our power, we, the parties hereto, covenant and agree that the said trust fund shall be considered and be the joint fund of the said last three parties."

This agreement has some curious aspects. It will be observed that it sets out by specifying only "the remainder" of George Pomeroy's estate to be equally divided between his three living children; but it goes on to declare that each of the children shall be charged with the amount that he or she may have received, together with interest; which, to say the least, is a very singular qualification of "the remainder." Now, as we shall see, the defendants understood that the division was to have respect only to "what was left" at that time,—to the "remainder," properly so called,—exclusive of what had been actually received, and exclusive of the trust fund of \$100,000 which was to be raised by sales of real estate for the benefit of the two daughters. It will also be observed that the last clause deals separately with "the proceeds or revenue" of that fund and the *corpus*, or principal, thereof; stipulating for a division of the former, but only a division of the latter "so far as it lies in our power." It will be seen that the defendants understood that the *corpus*, or principal, of that fund was not to be included in the division at all, but was to be set apart for them, in trust, according to their father's will. They insist that in regard to both of these matters they had no idea, when they signed the agreement, that it was different from their understanding of what it was to contain. Then as to the real estate, the sweeping terms of the agreement would seem to cover the homestead, as well as the residue; whereas they never understood that they were to be deprived of the privilege of living in the homestead according to the terms of their father's will.

George P. Pomeroy was living when the agreement was executed, and signed the same; but it was not of his getting up. He had a disease of the brain which unfitted him for business. The complainant, Chandler, (whose wife was a cousin of the Pomeroy's,) acted for him in the whole matter, and now appears in this suit as his executor, and as one of his residuary legatees. He prepared the paper, and produced it for signature, and, according to the weight of the evidence, induced the defendants Julia and Josephine (who will hereafter be called the defendants generally) to sign it without consulting counsel, actually dissuading them from consulting counsel. It is true that his own testimony is otherwise; but I conceive the weight of the testimony to be as stated. It is also in evidence, and according to what I conceive to be the weight of the testimony, that the said defendants were under a misapprehension as to the terms of the agreement. They understood that the division to be made between them and George related to what was left of the two estates. They had never, as they allege, seen the agreement before it was produced for them to sign. They had placed the utmost confidence in the complainant. When it was read over to them in the evening, after they had signed it, they were greatly surprised ("amazed" is the expression) at its terms, and threatened to repudiate it, and to seek legal relief for that purpose; but Chandler reassured them, represented that the effect of it was different from what they apprehended, and quieted their alarm. Their confidence in him induced them to trust to what he said. These matters will be more fully shown hereafter.

One of the means employed to induce the defendants to come to a settlement was the magnification of the costs and expenses which they were in danger of incurring by carrying on the suits against Edward's estate. It is admitted in the bill as follows:

"And your orator further shows that in and about said suits large expenses and counsel fees had been incurred, and your orator, on looking into said controversy, and the character and condition of said suits, was convinced that unless said controversy could be settled, and said suits brought to an amicable termination, a large portion of the estate in dispute would be wasted in costs, expenses, and the losses incident thereto."

This corroborates the following statement of the answer:

"These defendants admit and charge that said complainant, and others acting in complainant's interest and that of said George P. Pomeroy, did shortly after said Edward's death represent to these defendants that the expense of said litigation would be very large, and that if no settlement thereof was made the estate would be entirely eaten up by lawyers; and that such representations were made as an inducement to these defendants to settle said suits."

In connection with the representations as to the frightful expenses of the litigation was the insinuation by the complainant of the desire of the defendants' lawyers to continue the litigation in their own interest, and the raising of a suspicion of their integrity, and the dissuading of the defendants, as mentioned above, from taking their advice or consulting them in regard to the proposed agreement. Mrs. Morrison says:

"He [Chandler] distinctly and frequently advised us to consult with nobody in regard to this settlement. The reason he gave was that there would be an

expense attending it; that, if we had decided to divide up what was left, there was no need of having counsel. He also said our lawyers would advise not to settle in that way. * * * All the reason Mr. Chandler gave why our lawyers would advise against the settlement was that it would be stopping the litigation they had in hand, and therefore he thought they might not approve it. * * * The attitude of Mr. Chandler, as I understood it, in these negotiations, was that he was a peace-maker. He was George's agent, and had come on to try and settle the question without any further law, and bring us together again. His attitude was that of a friend to us all."

And having thus the entire confidence of the defendants, it was comparatively easy to bring about the result he desired, and make them believe that they desired it more than he did. Mr. Morrison confirms his wife's testimony as to Chandler's prevailing with them not to consult their lawyers. Josephine Pomeroy, in her testimony, distinctly says:

"Mr. Chandler advised us not to consult any counsel prior to signing the agreement, and we promised him not to do so, and followed his advice."

This testimony is further corroborated by the lawyers themselves. Mr. Shoudy says:

"My advice was not sought as to the propriety and advisability of that agreement."

Chandler accompanied the defendants to the lawyers' office. Shoudy says:

"There was no discussion by me, or in my presence, of the agreement or its special provisions. I did not make a careful examination. I was not asked to do so. I do not exactly remember what brought out the remark, but I think the general plan of settlement was spoken of by Mr. Chandler; and Mrs. Morrison, I think, asked me what I thought of it; and I told her I thought it was a tremendous leap in the dark. I did not assume to advise; I had not sufficient facts before me to enable me to do so. * * * The ladies spoke of Mr. Chandler as a very warm friend, and they thought he was looking out for their interest. * * * I was instructed either at that time, or soon after, to dismiss the suit against Edward."

The defendants were in a condition to be easily wrought upon. In the first gush of feeling which ensued upon Edward's death, after his refusal to see them on his death-bed, they were open to excited impressions. The overanxiety of officious friends for their mental peace and welfare excited them still more. They were advised to give up their claims against Edward and his estate, and they no doubt, at first, under the sway of these influences, were ready to surrender all their rights, and make an equal division of everything with their brother George. But that was not the final view or purpose under which they acted at the time of executing the agreement. At this time they had no intention of being brought into account for what they had received in the past, nor of giving up their interest in the trust fund to be raised out of the real estate. It was "what was left"—that is, the personal securities which remained in Edward's hands at his death, and which they had in their own hands—which they had principally in view when they assented to an equal division, and which division was in fact made immediately thereafter, as will be shown hereafter.

Another of the inducements held out to the defendants Julia and Josephine to bring them to an agreement to divide equally with George was the suggestion that Edward died very rich; whereas, if he had paid his sisters their just dues, the probability is that he would have had very little, if anything, left. It is contended, however, that neither party knew what the condition of his estate was, and therefore the chance was equal on both sides. It is certain that the defendants were entirely in the dark on the subject, and the risk to them was very great, even in their point of view, that the agreement was to extend only to the personal estate. Chandler also protests, in his evidence, that he knew nothing about Edward's circumstances. As to details, this may be true; but it is hardly to be believed that he had not some general knowledge on the subject. He was intimate with the family. He and Edward had been partners together in the grain commission business in Chicago, and the firm had failed. In the settlement of its affairs, Chandler must have been interested to know about Edward's ability to respond to their mutual liabilities. It would be very strange if he did not know something about Edward's doings, and whether he had amassed a large fortune or not. Besides, it is hardly probable that a shrewd business man like him would have advised George to sign the agreement in question if there had been any probability of Edward's suggested wealth, or even a possibility of it. It is difficult to believe that he did not well understand that he was making a very advantageous bargain for George. He took care not to become the representative of Edward's estate until the agreement was signed; but, as soon as it was signed, he at once took out letters of administration *cum testamento annexo* upon said estate, George P. Pomeroy having renounced the executorship. Looking at the history of the whole transaction, it is not to be believed that Chandler blindly urged forward the consummation of the agreement; while it is undoubtedly true that the defendants had their imaginations excited by the flattering suggestions as to Edward's wealth which were held out to them, and, being induced to avoid any advice from their lawyers, they fell into the trap, and executed the agreement without due consideration. The evidence of the defendants as to what took place after the agreement was signed bears marks of truth on its face, and is interesting in this connection. Josephine Pomeroy says:

"I first read the agreement of April 13, 1887, the evening of the day on which we signed it. I was in my sister's bedroom, and she read it aloud. Mr. Morrison, Mr. Chandler, my sister, and myself were present. My sister read it aloud at Mr. Chandler's request. * * * Mr. Chandler said his object was to explain it to us. She read it through. A great deal was said. The first clause that surprised us very much was the one in regard to being charged with moneys from the time of father's death. We were perfectly amazed at finding such a thing. We said we would never submit to anything of that kind. We repudiated it on the spot. We said we would see a lawyer the next day and have it annulled; we would not endure any such thing. Mr. Chandler asked us how much we had had from the estate since father's death. * * * Mr. Chandler said * * * there would be a large balance coming to us. We were much pleased to hear that. * * * I know we were exceed-

ingly indignant, but when he smoothed over matters in that way we believed him. There was another clause, relating to the trust funds, that he explained by saying it referred to the interest on the trust funds. We asked him what it meant, to explain it to us, and he said it did not refer to the principal at all; it was only the interest on those two funds; that it was to equalize the income so as to make George feel more pleasantly towards us; to think that the incomes were more equalized. * * * After that the securities were pooled and divided. The income from our trust funds and from George's trust fund were also divided, and each of the three received one-third up to the last payment, just before my brother died, [meaning George.]"

Mr. Morrison testifies as to the same interview as follows:

"George retired very early after dinner. Then Mr. Chandler went into my wife's bedroom, and asked her for a copy of the agreement, and said there were some points in it that he thought she did not understand. Josephine and I were also present. My wife got the agreement for him, and my recollection is that he turned to the points about charging each one with the amounts she or he had had since her father's death, and about the trust funds. Those seemed to be the matters which he thought they did not understand. As soon as this matter of back charges was suggested, the two ladies became very indignant and mad; told Mr. Chandler they would never submit to that,—that is, being charged back to the time of their father's death; that it had never been so explained to them; that they had never so understood it, but that they were 'dividing up what was left,' emphasizing that word repeatedly; that, if he ever attempted to force this, he could only do it by law through the courts; that they repudiated that feature,—they never meant it; never intended it; didn't know it was in the agreement; didn't know anything about it; it was news to them. It came out that night. Then about the trust funds, they said they could not understand that,—why they had got to give up part of the income of the larger trust funds, and why George had to give up part of the income of the smaller trust fund, which they knew he only had a life-interest in. Mr. Chandler told them that that was to equalize their income; that George would give up more at that time, as his \$30,000 trust fund yielded about \$2,100, and only about \$25,000 had been placed in trust towards \$100,000 which was to be raised for the two ladies; and he talked very smoothly, and quieted them about this matter of the trust funds. The other matter about the back charges they fiercely resented all through. There were some pretty hot words. Mr. Chandler sat there rubbing his hands, and seemed very well satisfied. 'Well, you have signed it, you have signed it,' he would say. They vehemently protested about this part of the agreement, and said it was not their understanding, and he would chuckle and say, 'You have signed it.'"

From this it is evident that the defendants were made to believe that the principal of the trust funds was not affected, and that the provision about back charges all operated to their benefit. The whole scene is a striking commentary on the pertinency, if not excellency, of the advice given to them not to consult their lawyers. As for Mr. Morrison himself, though present, he explains that he took no part whatever in the negotiations, or in the management of his wife's business affairs, except to execute and carry out what had been determined on by her. Of course, Chandler in his testimony (for he is called to rebut all this) puts a different gloss on these transactions. It seems to me, however, that there is good ground for believing that the general tenor of the defendants' evidence is to be relied on. And the conviction is strongly forced upon

my mind that the defendants were greatly deceived and taken in when they were induced to execute the agreement in question. Letters of the defendants were produced, it is true, which, taken by themselves, might lead to a different conclusion; but how they came to be written, for what purpose, and what was the tenor of the rest of the correspondence, does not satisfactorily appear. One of them, to which some importance is attached, written by Mrs. Morrison to her aunt Martha, (Chandler's mother-in-law,) is testified to have been dictated by the complainant himself. Josephine says: "I heard Mr. Chandler beg my sister to write that. * * * She did it all to please Mr. Chandler." Notwithstanding these letters, and notwithstanding the testimony of the plaintiff, the impressions which the whole evidence, taken together, has left on my mind are as before stated. Two of the witnesses, Chapman and Shoudy, were entirely disinterested, and they corroborate the testimony of the defendants. They distinctly say that the division to be made between George P. Pomeroy and his sisters was only to relate to what was left of the estate. I am satisfied, as contended by the defendants, that they understood, when they signed the agreement, that the division contemplated by it related only to what was left without going into past transactions, or interfering with their trust fund; that they misapprehended its purport, if construed as contended by the complainant; and that they were induced to sign it without consulting their counsel; and that when they signed it they did so with the greatest confidence in Chandler as a friend to them and their interests, as well as to George and his interests. I cannot rid myself of the conviction that that agreement was brought about by contrivance and deception. Many other circumstances not adverted to go to corroborate this conclusion.

Under this view of the case, I cannot hesitate to refuse a decree for specific performance of what I regard as an iniquitous agreement. As far as it has been actually carried out by the parties, they must be held concluded. The defendants are concluded by the division of assets made in May, 1887. That was understood to be an equal division of the remaining personal assets of both estates;—the father's estate and Edward's estate. The defendants produced, and put into the common fund, bonds and stocks estimated at \$109,153.33, being the \$100,000 and its accretions which they had received from Edward in February, 1885; and the complainant produced what was found of the estate in Edward's hands at his death, making together \$380,688 or thereabouts. This was divided into three equal parts of \$126,896 each, and each party received his or her share; the defendants Julia and Josephine each receiving securities to the amount of \$72,896, and cash to the amount of \$54,000, and the complainant the like amount in behalf of George P. Pomeroy. There is very little doubt in my mind that all this property came from the father's estate. It was not nearly equal to the amount which Edward ought to have had in his hands, and was accountable for. The portion received by the complainant for George was no doubt so much clear gain to him. The defendants regarded and understood this division of assets to be a complete execution of the agreement and settlement of the

estate, so far, at least, as the personal property was concerned; and that by accepting this division they relinquished all further claim upon Edward's estate. In making this settlement, they supposed and believed that no disturbance of their father's will would ensue; and they expressly declare, in their answer, that it was never the intent to disturb that will, notwithstanding some expressions in the agreement that had a contrary appearance. This conviction seems to have been impressed upon the defendants in some manner or form which gave them a just reason for entertaining it. The complainant cannot deny that, notwithstanding the agreement, it was the intention of the parties to carry out the will. The bill of complaint has the following striking passage:

"And your orator further shows that, in drawing up said document, certain expressions were used therein as though it was the purpose thereof to disregard and attempt to vacate and set aside some of the provisions of the will of said George Pomeroy, and certain provisions of the will of said Edward Pomeroy; but that in fact and in truth the agreement actually made between the parties did not contemplate or require any such disregard, vacation, or setting aside, but was in complete and perfect harmony therewith, and all such expressions in said document are mere surplusage, and may be rejected as of no force or effect, without in any manner impairing the proper sufficiency and force of said agreement or of said document."

Then follows a somewhat specious, but unsatisfactory, argument to show that the agreement can be carried out in all its parts without interfering with the dispositions of the will. But the declaration means something. It indicates a consciousness that the idea of not disturbing the will by anything in the agreement had been prominently held up before the minds of the defendants; a consciousness that that impression had been made upon them, and could not be ignored.

If, then, as has been stated, it would be inequitable to carry out and enforce the agreement further than it has already been executed by the parties themselves, and executed largely to the detriment of the defendants, the question arises whether any other relief can properly be granted upon the frame of the bill. If the agreement is an inequitable one, and cannot justly be enforced, and if, as both parties admit in their pleadings, it was not intended to disturb the provisions of George Pomeroy's will, there is nothing to be done but to fall back upon that will, and to ascertain whether upon the bill of complaint as framed any decree for relief ought to be made. In addition to an express prayer for the specific performance of the agreement, the bill prays that the defendants may be required to account for all money, securities, and property of every kind received by them either from the estate of their father under his will, or from that of Edward under the agreement referred to; and that each of them may be charged with the \$50,000 invested or to be invested in trust for her out of the sales of real estate. It prays for a decree giving to George P. Pomeroy's estate, represented by complainant, one-third part of the whole estate, including said trust fund, and to include in such third part the securities which constituted the trust fund of \$30,000 invested for George P. Pomeroy during his life, which by their father's will went to the defendants after George's death, as survivors of

their brother Edward. It is evident that these prayers are founded on the hypothesis that the agreement on which the bill is primarily founded will be carried out by a decree for specific performance, and they require no further consideration. The bill also prays that Alfred Mills, the executor, after completing, by sales of real estate, the trust fund of \$100,000 in favor of the defendants, may be directed to realize from further sales the sum of \$20,000, to be paid over to the complainant, to make, with the trust fund of \$30,000 before referred to, the proper equivalent, under said agreement, of the trust fund raised for the defendants, and that when this has been done the executor report to the court what estate shall then remain undisposed of, and that then the parties, said complainant, Julia, and Josephine, have opportunity to agree upon a partition of the residue, and, if they fail to agree, that the executor be directed to sell such residue, and divide the proceeds according to said agreement. This prayer is also based on the same hypothesis of a decree for specific performance of the agreement referred to, and may be passed over. The bill then prays for the appointment of a receiver, to receive and manage all the property; but all upon the same hypothesis. The only other prayer is one for general relief. It is not too much to say that the whole frame, scope, and object of the bill is to obtain a decree for a specific performance of the agreement set forth therein, either the agreement to be deduced from the preliminary negotiations and correspondence, or that contained in the document afterwards prepared and executed. As I have already expressed my views as to that agreement, and my conviction that no relief based upon it can be given, it follows that the bill ought to be dismissed. Even if the scope of the bill was broad enough to require it, it is difficult to see what the court could do to aid in carrying the will into execution. Nearly all of its provisions have already been executed. The complainant himself in his bill makes the following statement:

"And your orator further shows that, except the completion of said trust fund of one hundred thousand dollars from the sales of real estate, the special bequests and provisions of said will were executed long prior to the filing of this bill of complaint; and that the residue of the personal estate of said George Pomeroy was, soon after his decease, delivered to, and for the most part equally divided among, the said children, Edward, Julia, and Josephine."

As to the trust fund of \$100,000, it is shown that it has been completed by the executor by sales of real estate since the commencement of this suit, and that the money has been invested as required by the will, and the executor has given notice to the other parties in the case of a motion that the bill be dismissed as to him. No objection is made to this motion, except that the solicitors of the complainant think that he ought to file a schedule or inventory of the real estate which still remains undisposed of, and to continue in readiness to make any other sales that may be required of him. As to the other part of the allegation made in the above extract from the bill,—that the residue of the personal estate of George Pomeroy was, soon after his decease, delivered to, and for the most part equally divided among, the said children, Edward, Julia, and

Josephine,—it is only true as to the division which took place in May, 1887. Up to the death of Edward he had never settled with his sisters, and, as already seen, they had commenced suits against him for a settlement. But the division referred to, made in May, 1887, was undoubtedly intended to be a final division of the personal property belonging to the estate, excepting such as was appropriated to particular trusts by the will. That division, in my view, was a mutual and final settlement of the personal estate, and of all claims against each other for moneys received; and as to the trust funds, the will of George Pomeroy gives them to the defendants, and they are not under any obligation to render any account thereof. As to the real estate now left undisposed of, the title stands as the will directed it should, the fee being vested in three equal undivided parts in the two defendants and the infant son of George P. Pomeroy, as the representative of Edward, as tenants in common in fee, except that, by the will of George P. Pomeroy, the infant's estate is defeasible, and passes over to other parties, by way of executory devise, in case he should die before 21.

Since the commencement of this suit, Josephine Pomeroy, one of the defendants, has filed a bill in the court of chancery of New Jersey against the complainant, and the other parties interested in the real estate whereof said George Pomeroy died seised, praying for a partition, or sale and division of proceeds, of the same. And the said Josephine, together with said Julia Pomeroy Morrison and her husband, William F. Morrison, have also commenced a similar suit in the circuit court of the city of St. Louis, in the state of Missouri, to obtain a partition of certain lands and real estate whereof said George Pomeroy died seised situated in St. Louis. And a similar suit has been commenced by said Julia Pomeroy Morrison in the supreme court of New York for Queens county to procure a like partition of lands whereof said George Pomeroy died seised in the state of New York. The complainant has presented a supplemental bill in the present suit to enjoin the said parties from proceeding with the said suits, and praying that the said executor, Alfred Mills, may be required to file an inventory of all the lands and real estate whereof the said George Pomeroy died seised, wheresoever situated, and to state specifically what lands he has sold; also praying that this court will proceed to cause a just and equitable partition of all said residue of said estate among the parties thereto, or a sale and division of the proceeds. This supplemental bill was entertained for the purpose of the injunction prayed for, (for which a mere petition would have been sufficient,) and a temporary injunction was granted, in order to prevent any embarrassment that might arise, during the pendency of the present suit, from a conflict of jurisdiction. But it was not intended to sanction a supplementary proceeding which would have the effect of changing the whole object of the suit, and turn it into a suit for partition. If any such order was made, it was inadvertently done; though I have no recollection that any was made. No decree for partition was asked for in the original bill, but, as already stated, the entire relief sought was based on the hypothesis of a specific performance of the

v.46f.no.9—35

agreement relied on. Under that aspect the bill prayed for a decree of sale and a division of proceeds in case the parties themselves could not make an amicable partition. I do not think that the supplemental bill ought to be allowed for the purpose of decreeing a partition. Proceedings for partition were commenced in the court of chancery for New Jersey before any application or prayer for that purpose was made in this suit; and probably they can be conducted with greater facility in that court, under the provisions of the state statutes, than they can in this; and as to the lands and real estate in New York and Missouri, this court has no jurisdiction over them. Nor do I think that the court is called upon to hold the supplemental bill for the purpose of requiring the executor to file an inventory of the lands, or of directing him about selling and conveying them. He is primarily amenable in his character of executor and trustee to the orphans' court of the county of Morris, N. J.; and he has represented, and it is not disputed, that he has rendered his account to that court, and all the parties interested, including the complainant, were cited to appear and show cause why said account should not be confirmed, and did appear accordingly, and the account was duly confirmed without exception. If the executor should hereafter refuse to perform any duty imposed upon him by the will in regard to selling the remaining lands of the estate in New Jersey, the matter can be more properly considered in a proceeding to be instituted for that purpose. The bill and supplemental bill are dismissed, with costs.

PAYNE *et al.* v. KANSAS & A. VAL. R. Co.

(Circuit Court, W. D. Arkansas. June 22, 1891.)

1. INJUNCTION—PRACTICE.

The court, in determining the question of granting a temporary restraining order or a perpetual injunction, is governed solely by the laws of congress, the rules of the supreme court regulating equity practice, and the general rules of procedure in equity cases applicable to the equity practice in the courts of the United States.

2. SAME—JURISDICTION—FEDERAL QUESTION.

The court has jurisdiction of this case because it involves a federal question. The rights of the parties arise under a law of the United States, and involve the construction thereof.

3. SAME—TEMPORARY RESTRAINING ORDER.

After the passage of the act of congress of 1793, and prior to the act of June 1, 1872, a temporary injunction or restraining order could not be granted without notice to the adverse party. But by the seventh section of the act of congress of June 1, 1872, which is now section 718 of the Revised Statutes of the United States, if a bill is filed for an injunction, and a subpoena issued notifying a defendant to appear on a rule-day, and if in the mean time there is danger that irreparable injury may be committed, the court, in the exercise of a sound discretion, will issue a temporary restraining order without notice.

4. JURISDICTION IN EQUITY—ADEQUATE REMEDY AT LAW.

By section 723 of the Revised Statutes of the United States, suits in equity will not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law. This section of the statute is merely declaratory, and made no change in the pre-existing law. It serves merely to emphasize the rule already existing.

5. SAME—CONTINUED TRESPASS.

If the remedy at law is not as plain, adequate, and complete as one obtainable in equity in case of a continued trespass, the party may prevent the injury by injunction, rather than wait until it is done, and then look for his damages in a court of law.

6. SAME.

To bar equitable relief the legal remedy must be equally effectual with the equitable remedy as to all the rights of a complainant. Where the remedy at law is not as practicable and as efficient to the ends of justice, and its prompt administration, the aid of equity may be invoked.

7. INJUNCTION—RESTRAINING IRREPARABLE DAMAGE.

The courts will interfere by injunction to prevent wrongs of a repeated and continued character, but which occasion damages which are estimable only by conjecture, and not by an accurate standard; that this is what is meant by irreparable damages or mischief, when we use the expression in connection with an application for an injunction. If the damage is irreparable, it presents a state of case where the party, in the sense of section 723 of the Revised Statutes of the United States, does not have a plain, adequate, and complete remedy at law; for, if he has such remedy, the damage is not irreparable.

8. SAME—TAKING PRIVATE PROPERTY WITHOUT COMPENSATION.

An attempt by a railroad company to build its road upon private property without payment of compensation may be prevented by injunction.

9. SAME—EASEMENTS.

The lands taken by defendant in this case were taken *in invitum*, and defendant only acquired an easement to the land, and only such a one as the act of congress authorized. If the use of the lands of plaintiffs for an approach for a wagon-road and foot bridge is a use not authorized by congress, and it injuriously affects the lands of plaintiffs, then it is a new and unauthorized use, which, because it injuriously affects their lands, becomes a supervening servitude, which amounts to a taking of their property, and for which taking they are entitled to compensation.

10. EMINENT DOMAIN—COMPENSATION.

Private property, under the constitution of the United States, can be taken for public use only with just compensation.

11. SAME—PURPOSE OF TAKING—EXTENSION.

A use beyond the purpose of a first condemnation of land by right of eminent domain cannot be included in the first use if not authorized by law to be so included, and such use creates a new servitude if it casts on the land already condemned an additional burden. If such second use affects the value of said land to an extent to which it was not affected by the original taking, then it subjects the land to a new servitude, and there is a taking of private property which has not been paid for.

12. SAME.

When private property is taken for public use the owner is entitled to full compensation, which means the fair market value of the property at the time of the taking.

13. SAME—ESTIMATE OF DAMAGE.

In estimating the value of the lands of plaintiffs, situated as they are shown to be, the fact that they possess peculiar advantages as a site for a ferry-landing may be allowed in the estimation of the market value of the land. Plaintiffs have a right to insist on this fact as an element that goes to make up the value.

14. SAME—ADDITIONAL USE.

If the additional use sought to be fastened on the land of plaintiffs by the construction of a wagon and footway bridge by defendant necessarily injures its value as a ferry-landing, then there is, for this reason, an additional servitude cast on the land, for which plaintiffs are entitled to additional pay.

15. SAME—EXERCISE OF POWER.

In this case the land condemned under the act of congress of June 1, 1886, could be condemned but for one purpose, and that was for use as a right of way for a railway and a railway bridge. The condemnation of private property for public use must be to subserve the use authorized, and the power of condemnation can only be exercised when expressly granted, or when it exists by necessary implication, and it must be exercised in the manner granted.

16. CHEROKEE NATION—TITLE TO LAND.

The Cherokee nation holds the fee to all the lands to which it has title. Individual citizens of the nation have a right of perpetual occupancy in lands improved and occupied by them under the laws of the Cherokee Nation. By this right of occupancy the individual Indian citizen can hold and occupy the lands forever, and fully enjoy all profits arising from them, and their right of occupancy may be trans-

ferred by a grant to another citizen of the nation, or it may descend by inheritance. Practically they get all of the productions of the land, and are entitled to its increased or peculiar value as though they held it in fee.

17. SAME—RIGHT TO COMPENSATION.

The Cherokee citizen and occupant of land has such a durable and permanent interest in his land as to entitle him to pay for an additional servitude cast on the same.

18. EMINENT DOMAIN—ADDITIONAL SERVITUDE—COMPENSATION.

The use of lands already condemned for use as a right of way for a railway and railway bridge, for approaches for a wagon and foot-passenger bridge, is not a use for railway purposes, and is not one authorized by such first condemnation; and, before the same can be used for approaches for a wagon and footway bridge, if such use in any way casts an additional burden on said land, it must be condemned again by right of eminent domain, and this can only be done when authorized by the legislative power. In this case no such authority exists, either expressly or by necessary implication.

(Syllabus by the Court.)

In Equity.

Rogers & Read, for plaintiffs.

Dodge & Johnson, *D. W. Jones*, and *C. B. Moore*, (*Clayton*, *Brizolara & Forrester*, of counsel,) for defendant.

PARKER, J. The plaintiffs filed their bill in equity to obtain an injunction against the defendant. They allege that the defendant corporation, by virtue of an act of congress entitled "An act to authorize the Kansas & Arkansas Valley Ry. Co. to construct and operate a railway through the Indian Territory, and for other purposes," approved June 1, 1886, were invested and empowered with the right of locating, constructing, owning, equipping, operating, using, and maintaining a railway and telegraph and telephone line through the Indian Territory, beginning at a point on the eastern line of said territory, at or near the city of Ft. Smith, in the state of Arkansas; thence running, by the most feasible and practicable route, in a north-westerly direction, through the Indian Territory, between the Arkansas river and Cowley county, and the Caney river, in Chautauqua county, Kan., as said corporation may select; and also another branch line, which is not relevant to the issues involved in this case, "with the right to construct, use, and maintain such tracks, turn-outs, and sidings as said company may deem it their interest to construct along and upon the right of way and depot grounds herein provided for." That by the second section of said act said corporation was "authorized to take and use for all purposes of a railway, and for no other purpose," a right of way 100 feet in width through said Indian Territory, for said main line and branch of said corporation, and—

"To take and use a strip of land 200 feet in width, with the length of three thousand feet, in addition to the right of way, for stations, for every 10 miles of road, with the right to use such additional grounds, where there are heavy cuts or fills, as may be necessary for the construction and maintenance of the road-bed, not exceeding 100 feet in width on each side of said right of way, or as much thereof as may be included in such cut or fill: provided, that no more than said addition of land shall be taken for any one station: provided, further, that no part of the lands herein authorized to be taken shall be leased or sold by the company, and they shall not be used except in such manner and for such purpose only as shall be necessary for the construction and convenient

operation of said railroad, telegraph, and telephone lines; and, when any portion thereof shall cease to be so used, such portion shall revert to the nation or tribe of Indians from which the same shall have been taken."

—That the third section of said act provided a method for the condemnation of said right of way, and provided that full compensation should be paid the occupants of the right of way by the railway company before its road should be constructed for "all property to be taken or damage done by reason of the construction of such railway." That by virtue of the said act of congress the said defendant proceeded to locate and construct its roads. That defendant now has a large portion of said road in operation. That the road is constructed down to a point on the Arkansas river opposite to Ft. Smith, in the state of Arkansas, where said defendant now has in progress of construction, and almost completed, a railway, passenger, and wagon bridge across the Arkansas river. The bill further alleges that for several years last past the plaintiffs have been the owners and individual occupants, and as such have held, and now hold and occupy, the land in the Cherokee Nation opposite the city of Ft. Smith for several hundred yards both above and below the point where said bridge is located, and extending back several hundred yards from the bank of said river in said Cherokee Nation, and on both sides of said railway. That heretofore the said defendant, under the provisions of the said act of congress, condemned a right of way 100 feet wide through said lands of plaintiffs, as described in said bill of plaintiffs; for a railway bridge, and for railway, telegraph, and telephone purposes, and for no other purpose. That defendant has been in the quiet, undisturbed, and peaceful possession of said right of way ever since. That, long after said lands were condemned for the purposes aforesaid, the defendant conceived the idea in constructing the bridge hereinbefore described of converting it to or making it a passenger and wagon bridge. That the defendant secured the passage of another act of congress entitled "An act to authorize the construction of a bridge over the Arkansas river, in the Indian Territory," approved March 15, 1890. That said act of congress provided, among other things—

"That the Kansas & Arkansas Railway Co., a corporation organized and existing under the laws of the state of Arkansas, and being empowered by act of congress approved June 1, 1886, to construct its railway from a point on the eastern boundary line of the Indian Territory at or near Ft. Smith, Arkansas, through said territory, in a north-west direction, to a point on the northern boundary line of said territory, with the power to build a branch as therein provided, the construction and operation of which said line of railway involves the construction of a bridge across the Arkansas river, in the Indian Territory, from a point at or near Ft. Smith, be, and the said Kansas & Arkansas Valley Railway, its successors and assigns, are hereby, authorized and empowered to construct said bridge across said river, and to maintain and operate the same as a railway, passenger, and wagon bridge."

The act further provides that the rates of toll which shall be charged for vehicles and foot passengers over said bridge shall be the same as those now established for like service by the laws of Arkansas. The bill further alleges that under and by virtue of the last-named act said bridge

has been constructed as a railway, passenger, and wagon bridge. That said act, authorizing the construction of a passenger and wagon bridge, gave no authority to defendant to take, use, and condemn property for approaches to said bridge, nor under it can the defendant use the right of way obtained under the act of June 1, 1886, for approaches of the road-way for wagons and passengers to its said bridge. The plaintiffs further state that they not only hold the land hereinbefore described as individual occupants, according to the laws, customs, and usages of the Cherokee Nation, but that the ferry privilege across the Arkansas river at Ft. Smith, Ark., attaches to said land, and that they have the license and exclusive right from the Cherokee Nation to run a ferry across that river from the Cherokee side at that point, and are now, and have been for years, interested in running a ferry at that point for the crossing of passengers, wagons, stock, and general travel for hire. That they have a large amount of money invested in said ferry. That defendant is now grading and constructing on its said right of way, condemned, as aforesaid, approaches for a wagon-way and footway to its said bridge for the accommodation of wagons, passengers, and general travel, and has begun to construct approaches on plaintiffs' land on both sides of said road, not on its right of way. That said approaches on said right of way are now rapidly approaching completion, and will be completed and used for the purposes aforesaid unless defendant is restrained by this court. The plaintiffs further state that the construction of said road-way on said bridge for passengers and footmen, and other general travel on the right of way of defendant, constitutes an additional burden on the lands of plaintiffs. That the same is unauthorized by the charter of defendant, and the same is in violation of law. That the opening of said bridge and the construction of the passenger and wagon way over the right of way of defendant, or over plaintiffs' lands, adjacent thereto, will utterly destroy the value of the ferry privilege attached to said land. The plaintiffs pray that defendant be perpetually restrained and enjoined from further constructing or grading of approaches or road-ways to its passenger or wagon bridge for the use or convenience of wagons, passengers, cattle, or other stock either upon or along their said right of way, or upon or over the lands held and owned by plaintiffs adjacent to said right of way. That defendant be restrained from using, and that it do not suffer or permit said grading along its right of way, where the same runs through the lands of plaintiffs, except for the purposes for which the same was condemned. The plaintiffs pray a temporary restraining order.

The court, upon the showing made in the bill, issued such temporary restraining order, and also a subpoena giving notice to defendant to appear on the next rule-day of this court, and plead to or answer the bill of plaintiffs. The defendant, by its counsel, filed a demurrer to the bill, and for cause thereof said:

"(1) That said bill fails to set up facts sufficient to constitute a good cause of action against this defendant. (2) That said bill fails to set up facts sufficient to constitute a cause of action for equitable relief against this defend-

ant. (3) There is no equity in said bill. (4) That plaintiffs have full, complete, and adequate remedy at law by reason of any damages or injury suffered as alleged in said bill."

At the same time defendant filed its motion to dissolve the temporary injunction heretofore granted in the case, for the reason—

"(1) That said writ of injunction was issued without any notice of any kind whatever made or had upon this defendant. (2) The granting of the same without notice was in violation of section 3738 of Mansfield's Digest, which, by act of congress approved May 2, 1890, was extended over and made the law of the courts having jurisdiction in the Indian Territory. (3) The granting of said injunction without notice was in violation of equity rule 55, governing United States courts in all equity proceedings. (4) Because the acts of the defendant in the premises in no manner worked an irreparable injury or wrong against plaintiffs. (5) Because defendant did not begin nor attempt to build approaches to its bridge for foot passengers and wagon-way either on the land of plaintiffs or off of its right of way upon lands belonging to any one else. (6) Because the plaintiffs have a full, complete, and adequate remedy at law, if the defendant, as alleged, is guilty of any trespass upon their rights, land, or other property. (7) Because said bill fails to set up facts sufficient, or any facts at all, which entitle the complainant to the interposition of a court of equity. (8) Because there is no equity in said bill entitling complainants to a writ of injunction or other equitable relief, as prayed for in said bill."

By agreement the demurrer and motion to dissolve were heard by the court at the same time.

The first question to be considered is whether the temporary injunction should be dissolved because there was no notice given to the defendant of an application for the same before the same was granted. It is manifest that the court, in determining the question of granting a temporary injunction in this case, is not governed by the statute law of the state of Arkansas that may have been, by an act of congress, extended over the Indian country; but it is governed solely by the laws of congress, or the rules of the supreme court regulating equity practice, and the general rules of procedure in equity cases applicable to the equity practice in the courts of the United States. It may be remarked that this court does not have jurisdiction of this case because of the extension of the laws of Arkansas over the Indian Territory by the act of congress of May 2, 1890, but it has jurisdiction because there is involved in it a federal question. The rights of the parties litigant necessitate the construction of an act of congress. The rights of the parties arise under a law of the United States, and involve the construction thereof. Under the clause of the act of congress of 1793, which provided: "Nor shall a writ of injunction be granted in any case without reasonable previous notice to the adverse party or his attorney of the time and place of moving the same,"—a temporary injunction or restraining order could not be granted without notice to the adverse party. But the part of the act of 1793 as above set out has been repealed by section 7 of the act of June 1, 1872. This section is now section 718 of the Revised Statutes of the United States, which is as follows:

"Whenever notice is given for a motion for an injunction out of a circuit or district court, the court or judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion; and such order may be granted with or without security, in the discretion of the court or judge."

As the rule of equity practice is now established by the above section of the law, if a bill is filed for an injunction, and a subpoena is issued notifying the defendant to appear on a rule-day, and if, in the mean time, there is a danger that an irreparable injury may be committed, the court, in the exercise of a sound discretion, will issue a temporary restraining order without notice. *Chicago, B. & Q. Ry. Co. v. Burlington, C. R. & N. Ry. Co.*, 34 Fed. Rep. 481; *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 25 Fed. Rep. 1. By the allegations in this bill the injury complained of would have been fully sustained before a hearing could be had in the case, and therefore, if the party is entitled to an injunction to prevent the injury, without power in the court to temporarily restrain, it would be useless to him when he obtained the same. The point that no notice was given of the temporary restraining order is not, in my judgment, well taken in this case.

The defendant, in its motion to dissolve the injunction, for further cause thereof, states that its act in no manner worked an irreparable injury or wrong against plaintiffs, and that they have a full, complete, and adequate remedy at law, if defendant is guilty of any trespasses upon the rights of plaintiffs, their lands or other property. These allegations go to affect the equity jurisdiction of the court, to which the right to issue an injunction belongs. By section 723 of the Revised Statutes of the United States, "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law." This section of the statute "is merely declaratory, and made no change in the pre-existing law." *Lewis v. Cocks*, 23 Wall. 466. It served merely to emphasize the rule already existing. *New York, etc., Co. v. Memphis Water Co.*, 107 U. S. 214, 2 Sup. Ct. Rep. 279. If merely declaratory of the rule then existing, if we can find, from interpretations of the rules fixing equity and law jurisdiction by the courts of the country, when equity will take jurisdiction, we will have a rule for our guidance which we can safely follow. In *Lewis v. Cocks*, 23 Wall. 470, the supreme court of the United States said:

"To bar equitable relief the legal remedy must be equally effectual with the equitable remedy as to all the rights of the complainant. Where the remedy at law is not as practicable and efficient to the ends of justice and its prompt administration, the aid of equity may be invoked."

The same court, in *Kilbourn v. Sunderland*, 130 U. S. 514, 9 Sup. Ct. Rep. 594, says:

"The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances."

It seems to need but a moment's reflection to satisfy the mind that equity, in a case of this kind, is more efficient to secure the ends of justice, and its prompt administration, than law; that greater justice can be more promptly secured by an appeal to equity, that the wrong may be stopped in its inception, rather than compel the injured party, or the party about to be injured, to wait until all the wrong is done, and then drive him to his action at law to get damages in reparation of wrong of a repeated and continuing character, when the amount of damages is estimable only by conjecture, and not by any accurate standard. Mr. Pomeroy, in his *Equity Jurisprudence*, (section 1357, vol. 3,) says:

"Judges have been brought to see, and to acknowledge, contrary to the opinion of Chancellor KENT, that the common-law theory of not interfering with persons until they shall have actually committed a wrong is fundamentally erroneous; and that a remedy which prevents a threatened wrong is, in its essential nature, better than a remedy which permits a wrong to be done, and then attempts to pay for it by the pecuniary damages which a jury may assess."

In *Com. v. Railroad Co.*, 24 Pa. St. 159, the supreme court of that state, in a most able opinion, declares that the courts will interfere by injunction to prevent wrongs of a repeated and continued character, but which occasion damages which are estimable only by conjecture, and not by any accurate standard, and that this is what is meant by irreparable damages, or mischief, in injunction cases. If this be so, then, when a state of case of that description exists, the damage is regarded as irreparable; and, if irreparable, it must be of a kind for which a party does not have a plain, adequate, and complete remedy at law, for, if he has such remedy at law, the damage is not irreparable. If the remedy at law is not as plain, adequate, and complete as one obtainable in equity in case of a continued trespass, the party may prevent the injury by injunction, rather than wait until it is done, and then look for his damages in a court of law. High, *Inj.* § 702, says:

"It is frequently a matter of difficulty to determine what constitutes such a degree of irreparable injury as to warrant a court of equity in enjoining what might otherwise seem to be an ordinary act of trespass, for which an adequate remedy at law might be found. * * * When the trespass complained of is repeated or continued, in the nature of a nuisance, or when the wrongful acts continued, or threatened to be continued, may become the foundation of adverse rights, and occasion a multiplicity of suits to recover damages, the case presents such equitable features as to entitle complainant to the aid of an injunction. So, too, a trespass which is continued, and will ripen into an easement, may properly be enjoined."

Mr. Foster, in his *Federal Practice*, (section 215,) says that—

"Injunctions to restrain trespasses are only granted when the trespass is destructive or continued. * * * An attempt by a railroad company to build its road upon private property without payment of compensation may be thus prevented."

Again, at section 210, he says it may be granted "to suppress the continuance of a public or a private nuisance; to prevent a threatened destructive trespass." A private nuisance is anything done to the hurt of

the lands or tenements or hereditaments of another; anything that unlawfully worketh hurt or inconvenience or damage. 3 Bl. Comm. 215, 216; 2 Bouv. Dict. 245. Whatever annoys or does damage to another is a private nuisance. And. Law Dict. 717. Thus we see a private nuisance, as thus defined, may be prevented or suppressed by an injunction. "In a case where private property has been taken by a railroad company without condemnation by such company, the remedy in equity in the shape of an injunction protects both the owner and those acting under the authority, and is more speedy and efficacious in its operation than the ordinary legal remedy." Section 632, Lewis, Em. Dom. In *Browning v. Railroad Co.*, 4 N. J. Eq. 47, the chancellor held: "If a R. R. Co. claim a right to enter upon land under color of law without having complied with the requirements of that law, a court of equity will restrain their entry by injunction." In the case of *Bonaparte v. Railroad Co.*, 1 Baldw. 229, the court, in treating of the remedy says:

"If his rights of property are about to be destroyed without the authority of law, or if lawless danger impends over them by persons acting under color of law, when the law gives them no power, or when it is abused, misapplied, exceeded, or not strictly pursued, and the act impending would subject the party committing it to damages in a court of law for a trespass, a court of equity will enjoin its commission."

In *Railroad Co. v. Owings*, 15 Md. 199, the court held "that a R. R. Company may be enjoined from constructing its road without authority over private property, for the use of which it has not paid or tendered compensation, whether or not the injury is irreparable." In *Bird v. Railroad Co.*, 8 Rich. Eq. 46, the court held that—

"An injunction will be granted where the act complained of is attended with permanent results, destroying or materially altering the estate, or where defendants are attempting to make permanent appropriation of land admitted or proved to belong to plaintiff, and the license or warrant of the defendant to encroach upon it is deemed doubtful by the court. That a R. R. Company will be enjoined from appropriating land admitted or proved to belong to a plaintiff, when not authorized to do so by its charter."

These principles affecting equity jurisdiction are generally sustained by the English equity courts. This is the source of our chancery jurisdiction. The American chancery courts are generally as clear and explicit as are the English chancery courts in sustaining chancery jurisdiction in cases such as I have referred to. This is the rule as to jurisdiction that is simply declared by section 723 of the Revised Statutes of the United States. The doctrine of the above cases is fully sustained by the case of *Griffing v. Gibb*, 2 Black, 519. This was a case where an injunction was prayed to prevent injury to a city lot in San Francisco. The case of *Widemiller v. Wyandotte City*, 2 Dill. 376, is a case where an injunction was prayed to prevent the making of an embankment on a road that had been laid off through the land of plaintiff; but the same had not been condemned and paid for. It was objected by the defendant that the complainants are not entitled to an injunction, because the injury complained of was not irreparable; and because they have a full and adequate remedy at law. In reply to this Judge DILLON said:

"I deem it unnecessary to follow the counsel in their discussion. The making of a high embankment of great width and length, to be used as a public road-way, falls, I think, within the legal notion of an irreparable injury, and gives a clear and recognized right to an injunction."

The same principle is recognized in *Northern Pac. R. Co. v. St. Paul, M. & M. R. Co.*, 1 McCrary, 302, 3 Fed. Rep. 702. There can, I think, be no doubt of the right of plaintiffs to an injunction, provided they have any equity growing out of any injury to a right they may possess. The defendant asserts that "there is no equity in said bill entitling complainants to a writ of injunction, or other equitable relief prayed for in the bill." This depends on the right or interest plaintiffs may have remaining in the property, which has, by right of eminent domain, been taken in accordance with law, and paid for, to be used for a specific purpose, and no other; for using for any other purpose was expressly prohibited by act of congress of June 1, 1886. Section 2 declares "that said corporation is authorized to take and use for all purposes of a railway, and for no other purpose, a right of way," etc. The same section further provides that the lands herein authorized to be taken "shall not be used except in such manner and for such purpose only as shall be necessary for the construction and convenient operation of said railroad, telegraph, and telephone lines." If any other use than for railroad purposes would cast an additional burden on the land of plaintiffs, the same could not be used for any other purpose than that for which it was condemned, unless express authority, or authority by necessary implication, was given, authorizing condemnation for such additional use. We do not find in this case any such authority given as would authorize the use of the right of way for any other than railroad purposes, but, on the contrary, we find such use expressly prohibited by the act of congress of June 1, 1886. It was under this act of congress that the right of way was condemned, upon the application of defendant, and the same was paid for as condemned by it. This power, granted by this act of congress, must be exercised for the purpose for which the power was granted, and for no other purpose; for lands acquired by corporations for a specified purpose cannot be used for others. *Green's Brice, Ultra Vires*, pp. 104, 109-112; *Imlay v. Railroad Co.*, 26 Conn. 255; *Telegraph Co. v. Smith*, 18 Atl. Rep. 910. The land taken by defendant in this case, under the act of congress of June 1, 1886, was taken *in invitum*, and defendant only acquired an easement to it, and such easement as the act of congress authorized. But does the use of the railroad right of way by defendant for the purpose of building a wagon and passenger bridge subject the land of plaintiffs to a new use which injuriously affects the same? If it is a new use which does not injuriously affect the value of their land, then their estate in such land is not injuriously affected by the supervening servitude, and there is not a taking of their property. In every case where there is a taking of private property for public use it must be with just compensation. Article 5, Amendment to the Constitution of the United States. What is meant by the taking of private property, or, rather, what is meant by an additional taking? There has been one tak-

ing by the defendant. Was the use of its railroad right of way for the approaches of a wagon and passenger bridge an additional taking? Mr. Elliott, in his work on Roads and Streets, 155, says if there is a—

“Subjection of the land to an easement, or any other burden incompatible with the dominion of the owner, or the serious interference with the use or the enjoyment of the property, it will be deemed a taking, within the meaning of the organic law. An incident annexed to land may be of value, and to wrest such a thing from the owner for a public use is to take from him his property. The term ‘property’ is by no means limited to land itself, but embraces all the incidents which give value to the owner, and includes the right which pertains to the ownership of things real and personal; and, whenever there is a direct and substantial invasion of these rights, there is a taking, in the constitutional sense, conferring upon the owner a right to compensation.”

The supreme court of the United States in *Pumpelly v. Green Bay Co.*, 13 Wall. 166, says—

“That it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the constitution.”

—And, as a matter of course, one that gives the owner a right to additional compensation, because his land, if the additional burden is cast upon it, is again taken for public use, and he is entitled to additional compensation, although the land may have been taken and paid for, if paid for a use other than the one for which it is taken the second time, as whatever use was contemplated in the original condemnation, and the damages resulting therefrom are the damages and use included in the assessment therefor. But a use beyond the purpose of that condemnation, and which could not, for the want of legal power, be included in it, would be a new use, and would create a new servitude, if it cast any additional burden on the lands of plaintiffs, or on the right of way already condemned for a specific purpose. The question then presents itself, does this use of the right of way of defendant, already condemned for railroad purposes, for the approaches to the wagon and footway part of its bridge, under the above rule laid down, cast any additional burden on the adjacent land of plaintiffs? If such use affects the value of such property to an extent to which it was not affected by the original taking, then it is subjected to a new use, which creates an additional burden upon its owner, and which subjects the land to a new servitude, and consequently there is a taking of private property for public use, which has not been paid for. The proof submitted in this case shows that plaintiffs are the owners by right of perpetual occupancy of the lands on either side of the approaches to the wagon and footway part of the bridge for several hundred yards back of the river on the Cherokee side of it; that the same is the river front at the above-named point; that there is now, and has been for many years, a ferry owned in part by plaintiffs, used by them in crossing wagons, foot passengers, and live-stock of all kinds for hire over the Arkansas river; that said ferry now lands, and has for many years landed, on the Cherokee side of the river on the lands owned by plaintiffs; that

the same have a peculiar value because of their being particularly adapted to use as the site of a ferry-landing. The plaintiffs show the existence of the ferry, and its landing on their lands, to prove the eligibility of the same as a ferry-landing. Can this fact be taken into consideration in assessing the value of these lands? And are they rendered less valuable for use as a ferry-landing by the building of the bridge as a wagon and footway bridge? When private property is taken for public use, the owner is entitled to full compensation, which means the fair market value of the property at the time of the taking. In *Boom Co. v. Patterson*, 98 U. S. 408, the supreme court of the United States says:

"The inquiry in such cases must be, what is the property worth in the market, viewed, not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted? That is to say, what is it worth from its availability for valuable uses? Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated. So many and various are the circumstances to be taken into account in determining the value of property condemned for public purposes that it is perhaps impossible to formulate a rule to govern its appraisal in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the future."

In the case of *Railway Co. v. Woodruff*, 49 Ark. 381, 5 S. W. Rep. 792, the supreme court of Arkansas fully recognized the above rule, and held that, in estimating the value of the land of Woodruff, the fact that such land had on it a site well suited for the landing of the end of a bridge might be taken into consideration in fixing the value of the same. The court further said: "In a proceeding to condemn a site for a railroad bridge, evidence to show that the land required for that purpose possessed peculiar advantages as a bridge site is admissible as affecting the question of its value." In the case of *Railway Co. v. McGehee*, 41 Ark. 202, the land appropriated by the railroad company was worthless for habitation or cultivation, but its prospective value for a ferry-landing, to be established in the future, was allowed in the estimate of damages. Under the above rule the adaptability of the lands of plaintiff for ferry-landing purposes is a circumstance that they have a right to insist upon as an element that goes to make up the market value of their lands. If the defendant, by the construction of its wagon and footway bridge, necessarily injures the value of plaintiffs' lands, such value growing out of its adaptability as a ferry-landing, does it not take away this element of value? If so, there is a burden cast upon the land by the defendant,—a servitude of such a character as to injure, if not largely destroy, its value. If the act of defendant in building its railroad bridge did not affect this peculiar value of the lands of plaintiffs, and its building its footway and wagon bridge does affect such value, or if its building its

railroad did not as largely affect the value of such lands as does the building of its wagon and foot bridge, then, by such last-named act, there is most certainly a new servitude cast on the land, which affects its value. The peculiar value of this land grows out of the fact that it is eligible as the site of a ferry-landing. One of the elements that largely makes it so eligible for such purpose is that at that point on the river there is a ferry, with a large patronage from the people. Take away that patronage, and it is scarcely any more eligible or valuable as the site of a ferry-landing than any other point on the river. The building of the wagon and footway bridge will very largely destroy the patronage of the ferry, and in this way affect the value of the ferry-landing. The building of the bridge as a railroad bridge only could not to this extent affect the value of the land, because the amount of patronage the railroad would take from the ferry would amount to scarcely nothing, and, in condemning the land for railway purposes alone, there would be no injury of this kind to take into consideration. I think we can therefore see that it is clearly a new use,—a new servitude cast upon the land by the building of the wagon and foot bridge. A property which has been condemned for public use under the right of eminent domain cannot be subjected, under such condemnation, to an additional charge, without another condemnation; for, when the public use has ceased, the property will then revert to the former owner. *Mills, Em. Dom.* § 57. Some evidence has been offered to show that the value of this land as a ferry-landing site was taken into consideration when the right of way for railroad purposes was condemned. It could not be, as the building of the railroad or the railroad bridge could not materially affect the value of this land by the taking of patronage from the ferry, which has its landing on these lands, and thereby they are made more valuable. Then the injury to them by the building of a wagon and footway bridge could not have been considered in the first condemnation, because defendant at that time had no authority to build such a bridge. Under the act of congress of June 1, 1886, the land could be condemned but for one purpose, and that was the purpose of a railway; for this was taking private property for public use by the right of eminent domain, the exercise of a reserved sovereign power, and such power can only be exercised when the power is granted, and in the manner granted. *Lewis, Em. Dom.* § 237. The condemnation of private property for public use must be to subserve the use authorized.

We are not to consider any direct injury to the ferry franchise, but we may consider the existence of this franchise, and the fact that it is being used, and that a ferry is being run, which does a large business, and which on one side of the river has its landing on the land of plaintiffs, adjacent to the approach to the bridge, and for these reasons the land is made more valuable. This is an evidentiary fact, to show the eligibility of this land for a particular purpose. It is claimed that this additional burden can only be considered as affecting the interest of the holder of the fee of this land, the Cherokee Nation. As between the holder of the fee and an ordinary tenant this is true, but these plaintiffs,

under the laws of the Cherokee Nation, hold this land in such a way as to give them the right of perpetual occupancy. The reason why additional damages, growing out of a new burden cast upon the property, goes to the owner of the fee is because the ordinary tenant is not likely to have an interest so durable as that it can be affected by this new charge cast upon the property. But if the party has such a perpetual interest in the property that it is manifest that the additional burden cast on it does injury to it, the reason of the rule ceases, and in justice a new principle should operate. While citizens of the Cherokee Nation do not have a fee to the lands they occupy, they can hold them forever, and fully enjoy the profits arising from them, and this right may be granted to their heirs, or may descend by inheritance. Practically they get all the productions of the land, the same as though they held it in fee. If there is any peculiar value to the land, it attaches to the right of possession, and the occupant gets the benefit of it. The plaintiffs have such a right to their lands as that they could resume possession of them whenever the original use for the purpose for which they were condemned shall be finally abandoned; and, while they do not hold the fee to the land, I think their interest is so great as to entitle them, as perpetual occupants, to compensation for the additional servitude cast upon their lands, for this additional servitude affects them more intimately and more effectively than it does the Cherokee Nation. The circuit court of the United States, in *Northern Pac. R. Co. v. St. Paul, M. & M. R. Co.*, 1 McCrary, 302, 3 Fed. Rep. 702, declares: "The open and acknowledged possession of a party is sufficient to maintain injunction to prevent such possession being disturbed by being taken for a R. R. right of way." I think this principle is justly applicable to the existing condition in this case.

The remaining question which was presented in argument is, has congress conferred upon defendant the power to condemn the property of plaintiffs for approaches for a wagon and footway bridge? As already declared, there is an additional taking of the property of plaintiffs, because there is, in addition to the easement already enjoyed by defendant, the subjection of the property to an additional servitude, which amounts to another taking; and, before there can be that taking by the defendant, there must be authority for it. The right of eminent domain in government is the right to take private property by an extraordinary method; extraordinary, because it does not involve the consent of the owner. Because it may thus be asserted against the individual citizen, the party asserting it must assert it by the authority of the law-making power, when given in express terms or by necessary implication. Lewis, Em. Dom. § 240, says: "The exercise of the power being against common right, it cannot be implied or inferred, but must be given in express terms or by necessary implication." When the act of congress authorizing the building of the wagon and footway bridge fails to make any provision for compensation, it is to be presumed that congress did not intend that the power of eminent domain should be exercised, but it contemplated that the right might be obtained by negotiation, by contract with the

owners. This principle is fully sustained in *Pennsylvania R. Co.'s Appeal*, 93 Pa. St. 150. Judge Dillon, in his able work on Municipal Corporations, (section 469,) says:

"Not only must the authority to municipal corporations or other delegated legislative agents to take private property be expressly conferred, and the use for which it is taken specified, but the power, with all constitutional and statutory limitations and directions for its exercise, must be strictly construed. Since the power to condemn private property against the will of the owner is a stringent and extraordinary one, based upon public necessity, or an urgent public policy, the rule requiring the power to be strictly construed, and the prescribed mode for its exercise strictly followed, is a just one, and should, within all reasonable limits, be inflexibly adhered to and applied."

The right of eminent domain is one which lies dormant in the state until legislative action is had pointing out the occasion, mode, conditions, and agencies for its exercise. *Dyckman v. City of New York*, 5 N. Y. 434; *Cooley*, Const. Lim. 527; *Allen v. Jones*, 47 Ind. 438.

The court in *Water-Works Co. v. Burkhart*, 41 Ind. 364, said: "No property can be taken for public use by condemnation or otherwise than by legislative authority, and in the manner and for the purposes authorized." These declarations of a legal principle are fully sustained by all the authorities on the subject.

It is claimed for the defendant that the act of congress of June 1, 1886, granting a right of way to the defendant for railroad, telegraph, and telephone purposes, and the act of congress of March 15, 1890, authorizing the construction of defendant's bridge across the Arkansas river, at Ft. Smith, as a wagon and footway bridge, are to be construed as laws *pari materia*. I think this is correct. But by such construction we cannot evolve from these acts of congress the power to condemn the property of plaintiffs, unless such power, expressly or by necessary implication, exists in one or the other of these acts, and unless the purpose of the exercise of such power is to be found, expressly or by necessary implication, in one or the other of them. Does it so exist? As we have already seen, by the act of June 1, 1886, the defendant was authorized to take property and use the same for all purposes of a railway, and for no other purpose,—a right of way, etc.; and the section further provides that the lands taken "shall not be used except in such manner and for such purposes only as shall be necessary for the construction and convenient operation of said railroad, telegraph, and telephone lines." Use of the lands for approaches of a wagon and footway bridge is not use for railroad, telegraph, or telephone purposes. The use for railway purposes alone is the use to which the land authorized to be condemned was limited by the act of congress. Then there is no express authority to condemn for the use of a footway and wagon bridge in this act of congress, nor does it appear by necessary implication. But, on the contrary, a use of that kind, as well as all other uses, except for railway, telegraph, and telephone purposes, is expressly prohibited. In the act of March 15, 1890, authorizing the building of a footway and wagon part of the bridge, there is not a word on the subject of the condemnation of pri-

vate property to be used in the construction of the bridge. There is therefore in this act no express authority to condemn, nor can it arise by necessary implication. If there is no authority in either act to do this thing, we cannot create an authority by construing the two acts as laws *pari materia*. If the authority does not exist in either of the acts, we cannot find its existence by putting them together. After a careful examination of these laws of congress, and all the authorities upon the condemnation of private property for public use, I have arrived at the conclusion that defendant has now no power to condemn the land of plaintiffs for use as an approach for a wagon and footway bridge; and to get the right, and use the same for such purpose, defendant must either go to congress for authority to exercise the right of eminent domain, or negotiate with plaintiffs for the use of the right of way as an approach to its wagon and footway bridge. It is in my judgment a matter of great regret that authority to condemn has not been given, as it works delay in the completion of a great thoroughfare, which will be an important agency in securing the development, progress, and prosperity of the country, and consequently of great and lasting benefit to the people. Yet when plaintiffs have a legal right, although it may be but a small one, when weighed in the balance against the general good to be subserved by the early completion of the bridge, still it is a right, no matter how small it may be, that must receive the full measure of protection afforded by the law, and it is a right of which plaintiffs can be divested alone in the manner provided by the law. I am sure no one, after a full investigation of this whole question, will ask that plaintiffs' rights be taken from them without authority of law. The motion to dissolve the injunction, and the demurrer to the bill, will be overruled.

AMATO v. NORTHERN PAC. R. Co.

(Circuit Court, S. D. New York. June 24, 1891.)

1. INJURY TO EMPLOYEES—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Plaintiff's testimony was that he was working with other laborers for defendant railroad on the west bank of a river, and that it was the custom of the defendant at the end of the day to carry them on cars across the bridge; that on the day he was injured the boss told them they would have to walk, and that it would be safe, as no engine would cross for two hours; that on account of a lame side he was unable to keep up with the others; that when part way over he saw an engine coming, and tried to step aside, but caught his foot under the wheel. The bridge had a single track, and there was no room to walk at the sides, though one could step out of the way of a train. The track was frozen and slippery, and it was after night-fall. *Held*, that the court properly left the question of the defendant's contributory negligence to the jury.

2. SAME—EVIDENCE.

There was no error in directing the jury that they could take into consideration the statement made by the boss that it would be safe to cross, and that no engine would cross for two hours.

At Law.

The plaintiff, an Italian, 24 years of age, was, in 1888, in the employ of the defendant as a common laborer. On the evening of November
v.46f.no.9—36

6th, of that year, he was run over by a locomotive of the defendant, receiving injuries which resulted in the amputation of his right foot. He sues to recover damages for this injury which, he alleges, was caused by the defendant's negligence. The action was tried at the April circuit, and resulted in a verdict of \$4,000 for the plaintiff. The defendant thereupon moved to set aside the verdict as contrary to law, against the weight of evidence and for excessive damages. The plaintiff testified that on the day in question he was engaged with 56 other laborers in working on the west side of the Missouri river, near Bismarck, N. D. The lodging place of these workmen was on the east side of the river, and it was the custom of the defendant at about half past 5 in the afternoon to carry them on cars across the bridge to their homes. On the day in question the foreman who had charge of this party of laborers informed them that they could not be carried home in the usual manner, but would have to walk across the bridge; and that it would be safe to do so as no engine would cross until half past 7. The entire party started to cross the bridge on foot. The plaintiff had received an injury to his side a short time previous, and was unable to keep up with the others. When near the center he saw an engine coming towards him. He tried to step aside, but caught his foot under the wheels and received the injury described. The Bismarck bridge is straight, it has a single track, and is 1,450 feet in length. On the day in question the track was slightly frozen. The plaintiff could have stepped off the track out of the way of the engine if he had seen it coming, but there was not room at the side of the track to walk. He could have crossed at the side only by crawling from one trestle to another. The foregoing is, in substance, the account of the accident given by the plaintiff. On the part of the defendant several witnesses testified that the plaintiff was injured at a point several hundred feet from the east end of the bridge while attempting to jump on the front board of a moving engine. It is unnecessary to consider this testimony further than to say that it entirely exculpated the defendant; if true, the defendant was proved to be free from negligence, and the plaintiff was shown to be guilty of gross contributory negligence. The jury, however, believed the statement of the plaintiff and rejected that of the defendant. At the close of the plaintiff's case and again after the evidence was all in the defendant moved to direct a verdict on the ground of the contributory negligence of the plaintiff. Upon this question the court charged the jury, after calling their attention to the evidence which tended to show that the plaintiff should have seen and avoided the engine, as follows:

"Of course, on the other hand, you have the right to take into consideration the statement which the plaintiff says was made to him by the defendant's boss, that it was safe for him to cross at that time, and that no engine would cross the bridge until about 7:30 o'clock."

The defendant excepted to that portion of the charge just quoted. This exception and the exception to the refusal of the court to direct a verdict on the ground of contributory negligence were the only ones taken by the defendant. The point that the defendant was free from fault, and

that the negligence which caused the accident was that of the engineer, who was a fellow-servant with the plaintiff, and the point that this court has no jurisdiction of the action, were not raised at the trial.

Roger Foster, for plaintiff.

Henry Stanton, for defendant.

COXE, J. The verdict was not against the weight of evidence. It is true that the plaintiff testified to one version of the accident and several witnesses called for the defendant testified to a different, and wholly irreconcilable, version; but this did not authorize the court to take the question from the jury. Such disputes are peculiarly within their province. A verdict, so rendered, should not be disturbed if there is any evidence to sustain it. *Davey v. Insurance Co.*, 20 Fed. Rep. 494; *Bust v. Steam-Boat Co.*, 24 Fed. Rep. 188; *Greany v. Railroad Co.*, 101 N. Y. 419, 423, 5 N. E. Rep. 425; *Sherry v. Railroad Co.*, 104 N. Y. 652, 10 N. E. Rep. 128. It was not error to submit the question of the plaintiff's negligence to the jury. Contributory negligence is a defense in the federal courts; the burden is upon the defendant to prove it. *Hough v. Railway Co.*, 100 U. S. 213; *Coasting Co. v. Tolson*, 11 Sup. Ct. Rep. 653, 139 U. S. 551. As a general rule this question is for the jury. It is only where the evidence is practically undisputed and the inferences deducible therefrom point to the conclusion that the plaintiff was at fault, and to that conclusion alone, that the court is justified in determining the question as matter of law. *Dunlap v. Railroad Co.*, 130 U. S. 649, 9 Sup. Ct. Rep. 647; *Kane v. Railroad Co.*, 128 U. S. 91, 9 Sup. Ct. Rep. 16; *Railroad Co. v. Stout*, 17 Wall. 657; *Railroad Co. v. Woodson*, 134 U. S. 614, 10 Sup. Ct. Rep. 628.

The question of plaintiff's negligence was one of fact and it was submitted under instructions as favorable to the defendant as it could expect. If the jury found that the defendant, having theretofore conveyed the workmen across the bridge to their homes at the end of the day's work, neglected on the occasion in question to provide the usual transportation, and ordered them to return after night-fall, on foot, across a long and slippery bridge, high above the water and unprovided with a footway; if the jury found that the plaintiff was induced to take this perilous journey upon the assurance of the defendant through its agent—the plaintiff's foreman—that it was entirely safe to do so as no engine would cross the bridge for two hours; if the jury found that the plaintiff relied upon this assurance of safety, and, being disabled, was devoting his attention and using his best energies to avoid the dangers beneath his feet; if they found that while in such a position he was run over by a locomotive, without signal or warning so that he did not see it until too late to escape; they were at liberty to find that the defendant had not succeeded in proving, by a preponderance of evidence, that the plaintiff was guilty of contributory negligence. The contradicted testimony that he was told by the defendant's agent at half past 5 that for two hours no engine would cross the bridge certainly distinguishes the case from that of a mere trespasser or the case of a person rightfully on the

track but to whom no such assurance of safety has been given. *Bradley v. Railroad Co.*, 62 N. Y. 99; *Erickson v. Railroad Co.*, 41 Minn. 500, 43 N. W. Rep. 332; *Oldenburg v. Railroad Co.*, 124 N. Y. 414, 26 N. E. Rep. 1021; *Palmer v. Railroad Co.*, 112 N. Y. 234, 19 N. E. Rep. 678; *Ormsbee v. Railroad Corp.*, 14 R. I. 102; *Warren v. Railroad Co.*, 8 Allen, 227; *Hooker v. Railroad Co.*, 76 Wis. 542, 44 N. W. Rep. 1085; *Goodfellow v. Railroad Co.*, 106 Mass. 461.

The exception to the charge was not well taken. It is never error for the court to instruct the jury to consider evidence properly presented. In the present instance the testimony was highly important and bore directly upon the question under consideration.

It is thought that the court has jurisdiction of the action. *Uhle v. Burnham*, 42 Fed. Rep. 1. At least the contrary has not been made to appear.

The other questions argued need not be considered for the reason that they are presented now for the first time. No error can be imputed to a trial court for failing to deal with propositions not brought to its attention. As before stated but two exceptions were taken by the defendant, and these have been sufficiently considered.

The motion is denied.

SHAIN v. GOODWIN.

(Circuit Court, N. D. California. May 4, 1891.)

1. GAMBLING CONTRACT—PROMISSORY NOTES.

Pen. Code Cal. § 330, declares "any banking game played with cards, dice, or device for money" an offense punishable by fine, and Civil Code, § 1667, declares any contract contrary to the policy of express law, or "contrary to good morals," to be unlawful. *Held*, that notes given for a debt created by throwing dice are invalid between the original parties or purchasers with notice.

2. SAME—INNOCENT HOLDER—BURDEN OF PROOF.

In an action brought by the indorsee of such notes, the invalidity of their origin having been shown, the burden is cast upon the plaintiff of showing that he took them for value, and without notice of the illegality of the consideration, and, where the evidence on this subject is evasive, uncertain, improbable, and unsatisfactory, a judgment will be rendered for defendant.

At Law.

Vincent Neale, for plaintiff.

Joseph D. Redding, for defendant.

HAWLEY, J. This action was brought by plaintiff to recover the amount due upon two certain promissory notes, each for the sum of \$1,500, one dated July 5, 1884, the other October 5, 1884, and each made payable within 90 days after date. The notes were signed by the defendant, and made payable to Edmond Morris, or order. Each note is indorsed as follows: "*Edmond Morris*: Without recourse, pay to Joe. E. Shain, or order. T. H. CUNNINGHAM." The cause was tried before the

court without a jury. Plaintiff offered the notes in evidence, and then rested. Defendant offered in evidence the deposition of Edmond Morris, taken on behalf of the plaintiff. This was all the testimony taken in the case.

It is contended by the defendant that the notes were given for a gambling debt, and that the burden of proof is upon the holder of these notes to show that he received them before maturity for a valuable consideration, and without notice of any illegality. With reference to the consideration of these notes, Morris testified upon his direct examination as follows:

"Question. What was the consideration for these notes, Mr. Morris? *Answer.* Well, it was a debt that he owed me. *Q.* How was that debt evidenced, if evidenced at all, before these notes were given? *A.* Well, it was some money that I wonned from him. I had a gambling transaction with him, as you usually call it."

And upon cross-examination as follows:

"Question. What was the consideration for these notes? Was it that gambling? *Answer.* It was money that he had wonned from me, and I had wonned a portion of it back, and he gave me these notes in satisfaction of the debt."

The facts in relation to the gambling between these parties is given by Morris as follows:

"Question. Now, you have stated that the notes sued upon in this action were for money you won from Goodwin in a gambling transaction. State what that gambling transaction was? *Answer.* Well, about the 3d of July, in the morning or night, him and me were gambling, that night and the night before, and he had beaten me out of eighteen hundred dollars dealing faro, and two hundred dollars playing casino, and I paid him his money, and he went away,—paid him two thousand dollars,—and after he went away I happened to go over to the Palace Hotel, an hour after this transaction took place, as near as I can recollect, and he was in the bar-room of the Palace Hotel, and we naturally began to gamble again, and we shook dice,—shook one dice,—for two hundred dollars a shake, and it resulted, eventually, of my beating him out of five thousand dollars."

It appears that before defendant signed the notes in question he had given due-bills for the amount, and these due-bills were surrendered, and the notes executed in proper and due form. The testimony of Morris relating to the settlement is as follows:

"Question. After winning this five thousand dollars, state how it was settled. *Answer.* It was settled by his paying me one thousand dollars in cash. That morning he paid me one thousand dollars in cash, and he said he would see me the next day, and settle the balance. The next day I didn't see him, which was the 3d of July, and on the 4th of July he hunted me up himself, and gave me these notes, and asked me to take these notes the way that he wanted it done."

Section 330, Pen. Code Cal., provides that "any banking game played with cards, dice, or any device, for money, * * * is punishable by fine." Section 1667 of the Civil Code provides that a contract which is contrary to the policy of express law, or "contrary to good morals," is not lawful.

Conceding, as claimed by plaintiff, that the supreme court of California in *Corbin v. Wachhorst*, 73 Cal. 411, 15 Pac. Rep. 22, decided that throwing dice for money is not unlawful, and was not such a game as was forbidden by any statute of this state, still the question remains whether, upon the facts of this case, which are dissimilar in several essential features from *Corbin v. Wachhorst*, the contract between the parties to throw dice for money, upon which the consideration of the notes is based, was not unlawful under the provisions of the Civil Code. In *Corbin v. Wachhorst* the parties plaintiff and defendant, with two other persons, played at the game of throwing dice, and during the game defendant borrowed small amounts of money, which in the aggregate amounted to \$350, and when the game closed the defendant signed a note, and delivered it to plaintiff, for the amount thus borrowed. The decision sustaining the validity of the note thus given is based upon the facts that the money was loaned in good faith, and that it did not appear that the plaintiff won any of the money, or that defendant lost any of it, in the dice throwing. The court said:

"No part of the consideration of the note was money won by plaintiff from defendant. It was all for money loaned by plaintiff to defendant, which plaintiff took out of his money drawer and his safe. Plaintiff himself was not winner at the game, and of the players it does not appear who was winner or loser when the game ended, about ten o'clock. * * * Admitting that the plaintiff knew the money which the defendant borrowed from him was to be used afterwards in the game of dice throwing, he did not loan it with a view to have it used in a game declared by law to be unlawful, and was entitled to recover on a contract, the consideration of which was money loaned. It is claimed that the Civil Code provides that a contract is not lawful when it is 'contrary to good morals.' Conceding, without deciding, that a note given for money lost at dice throwing is a contract based upon 'an immoral consideration,' and still the defendant was liable on the note for he borrowed money from the plaintiff, and gave the note therefor, and, if the defendant used it in playing at dice throwing, as he did, and the plaintiff knew it would be so used when he loaned it, and the plaintiff, as he did, loaned the money in good faith to the defendant, who knew what he was doing, and the plaintiff is not shown to have won the money for which the note was given, nor the defendant to have lost it, in the game, the latter is liable on the note. *Poorman v. Mills*, 89 Cal. 345. For *non constat* from the findings but what the money loaned in good faith to a man competent to contract may still be in his possession, or have been used for some other purpose to his advantage."

In this case it clearly appears that the contract between the defendant and Morris, to whom the notes were given, was to play at the game for \$200 per shake, and the defendant lost and Morris won the full amount of money for which the notes were given. This was the only consideration for the notes. The contract was "contrary to good morals," and therefore illegal, under the express provisions of the Code.

In *Scott v. Courtney*, (7 Nev. 421,) which was an action to recover money won by plaintiff and lost by defendant at the game of faro, a game licensed by the statute of that state, the court held that the action could not be maintained. In the opinion the court said:

"In the United States wagering and gaming contracts seem to have met with no countenance from the courts, and consequently in nearly every state they are held illegal, as being inconsistent with the interests of the community, and at variance with the laws of morality. 2 Smith, Lead. Cas. 343."

In *Irwin v. Williar*, 110 U. S. 499, 4 Sup. Ct. Rep. 160, the supreme court, in discussing the question whether dealing in futures by means of contract of sale or purchase, for purposes of speculating upon the course of the market, was valid, said: "Generally, in this country all wagering contracts are held to be illegal and void as against public policy;" citing *Lewis v. U. S.*, 92 U. S. 513; *Mason v. Bogg*, 2 Mylne & C. 443; *Putnam v. Russell*, 17 Vt. 54; *West v. Bank*, 19 Vt. 403; *Moses v. Ranlet*, 2 N. H. 488; *Findlay v. Hosmer*, 2 Conn. 350; *Logan v. Anderson*, 18 B. Mon. 114; *Patten's Appeal*, 45 Pa. St. 151; *Graeff's Appeal*, 79 Pa. St. 146; *Bates v. Paddock*, (Ill.) 9 N. E. Rep. 257; *In re Bates*, 118 Ill. 524, 9 N. E. Rep. 257; *Jervis v. Smith*, 7 Abb. Pr. (N. S.) 217.

The consideration for the notes being illegal, the next question to determine is upon whom rests the burden of proof to show that the holder of the notes received them for value, before maturity, without notice of the illegality. In *Bailey v. Bidwell*, 13 Mees. & W. 73, Baron PARKE said:

"It certainly has been, since the later cases, the universal understanding that if the notes were proved to have been obtained by fraud or affected by illegality, that afforded a presumption that the person who had been guilty of the illegality would dispose of it, and would place it in the hands of another person to sue upon it, and that such proof casts upon the plaintiff the burden of showing that he was a *bona fide* indorsee for value."

In *Graham v. Larimer*, 83 Cal. 177, 23 Pac. Rep. 286, the same doctrine is announced, as follows: "Section 1615 of the Civil Code provides that 'the burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it.' Conceding that this section applies to cases of illegal consideration, which is not quite clear, since the same Code distinguishes between a mere want of consideration and an illegal consideration, (sections 1607, 1608, and 1667,) yet, when the defendant has proved or the plaintiff has conceded that the consideration for a promissory note upon which the former is sued by an indorsee thereof is illegal, a *prima facie* case of notice to the indorsee of the illegality of the consideration is thereby made, which discharges the burden of proof on the part of the defendant, and casts it upon the plaintiff to prove that he took the note for value, and without notice of the illegality of the consideration. Story, Prom. Notes, § 196; 1 Pars. Notes & B. 188, 189; *Fuller v. Hutchings*, 10 Cal. 526; *Sperry v. Spaulding*, 45 Cal. 548." The principles announced in these authorities are applicable to the facts of this case.

The consideration of the notes being illegal, it was necessary for the defendant to show, by a preponderance of evidence, that the notes were assigned to an innocent purchaser for value, before maturity, without notice of the illegality of the consideration. This the defendant has failed

to do. The evidence offered upon this point is found in the deposition of the witness Morris, and is as follows:

"Question. To whom did you indorse those notes? Answer. Thomas H. Cunningham. Q. Do you know where Cunningham is now? A. No, sir. Q. When did you last see him? A. I think about a year ago."

On cross-examination he said:

"Question. You say you indorsed those to Mr. T. H. Cunningham. Answer. I sold them to Cunningham. Q. When were they indorsed? A. They were indorsed before they become due. Q. What did you receive for them from him?"

At this point defendant's counsel objected to the question, and the witness refused to answer, on the ground that he was not obliged to give his private business away. The court ordered the witness to answer the question, and he then said:

*"I got one thousand dollars from Mr. Cunningham for these notes. Q. Where did he pay you this amount? A. I have forgotten whether it was in the Lick House. He was then keeping a saloon,—the Lick House saloon,—him and Mr. Doyle. Cunningham and Doyle kept a saloon at the Lick House, and I am not positive where he paid me the money for these notes. Q. When did he pay you this? A. Well, he paid me some time after, and before these notes became due. Q. Where is Mr. Cunningham now? A. I do not know, sir. Q. How soon after these notes were signed by Mr. Goodwin did Mr. Cunningham pay you this one thousand dollars? A. Well I could not exactly tell the exact time; he paid me the day that I sold them to him. Q. Was it one week after that? A. I cannot exactly tell; it may be more, Q. How many notes did you sell to Mr. Cunningham? A. I sold two. Q. How many notes did Mr. Goodwin give you? A. Three. Q. He gave one note for fifteen hundred dollars,—one for fifteen hundred dollars,—and how much was the other one for? A. One thousand dollars. Q. Can you not state whether or not these notes were bought by Mr. Cunningham one week, two weeks, or a month, or two months after they were drawn? A. It must be more than a week or more than two weeks. * * * Q. Did he pay you in greenbacks, or in coin or check, or how. A. I could not be positive whether in greenbacks or gold coin; maybe some in greenbacks. It is so long ago that I have forgotten the exact kind of money that he gave me,—in gold notes, greenbacks, or what. * * * Q. Do you know whose handwriting it is upon these notes between the names of Edmond Morris and T. H. Cunningham? A. No, sir. Q. Look at the other one,—at both notes? A. I don't know. Q. Did you see that writing put upon those notes? A. I did not, sir."*

This testimony speaks for itself. It is evasive, uncertain, improbable, and unsatisfactory. It is not sufficient to convince the mind of the court that the notes were transferred before maturity to an innocent purchaser for value. This opinion may be treated as a finding of the facts. The conclusion of the law necessarily follows therefrom that judgment should be entered in favor of the defendant for his costs.

It is so ordered.

UNITED STATES v. WALLACE *et al.*

(District Court, D. South Carolina. June 20, 1891.)

1. JUDGMENT—REVIEW AFTER TERM—JURISDICTION.

A federal court has jurisdiction to determine whether a judgment rendered by it at a previous term is void.

2. SAME—STATE STATUTE.

Code Civil Proc. S. C. § 195, which permits a court at any time within a year to relieve a party from a judgment taken against him through mistake, has no application to a judgment of forfeiture on a recognizance in the federal court, where the defendant was represented by an attorney, and the only mistake alleged is that his attorney failed to make defense.

3. CRIMINAL PRACTICE—RECOGNIZANCE—WAIVER.

Where a person who has been arrested and given bail for his appearance voluntarily appears before the commissioner at the preliminary hearing, and enters into recognizance for his appearance at court, the validity of such recognizance is not affected by any irregularities in the proceedings leading to his arrest, since he waived such irregularities by appearing.

4. SAME—FORFEITURE OF RECOGNIZANCE.

Where the surety on a recognizance not only appears upon proceedings to forfeit the recognizance, but also obtains a continuance of the cause, so as to suspend the entry of confirmation, he waives notice of the rule to plead.

At Law.

Abial Lathrop, Dist. Atty.

J. P. K. Bryan, for defendants.

SIMONTON, J. One L. W. Wallace, charged with violating sections 5392, 5438, Rev. St., entered into a recognizance with J. C. Jaudon, as his surety, for appearance at October term, 1889, of this court. He fled the jurisdiction. His case was called at the October term, and at the succeeding January term. As he failed to appear, a *scire facias* on the recognizance was issued against him and Jaudon. The latter made return under oath. In this return, after admitting that he was the surety on the recognizance of the absconding defendant, and after stating that he has good ground for believing that Wallace was within reach, and could be arrested, he prayed the proceeding against him be continued, "with no other desire than that the deponent may have ample time to apprehend the said Wallace, and deliver him into the custody of the marshal." This return, signed by W. J. Gayer, Esq., his attorney, was filed on 5th May, 1890. The continuance was allowed him. The hearing was also postponed at the July term and at the succeeding October term. At the January term, 1891, the rule was made absolute, and the recognizance estreated, and adjudged forfeited. Leave was given to enter judgment and issue execution. The marshal levied under the execution 2d March, 1891. Mr. Gayer again obtained for Jaudon still further delay, on similar hope of arresting Wallace, by suspension of levy until May, 1891: Soon thereafter Jaudon filed his petition, stating that, by the inadvertence of counsel employed by him, no return was made and filed to the rule to show cause why the recognizance should not be forfeited; and the same was adjudged by default; that he has a good defense in law; prays that he be allowed to make his return *nunc pro tunc*,

and that, pending the hearing thereof, "the default be set aside, and proceedings stayed." On this petition a rule to show cause why the prayer thereof be not granted, was served on the district attorney, who, for answer to said rule, says "that the court hath not jurisdiction to set aside the said judgment." The petition is not accurate in its statements that Jaudon made no return, and that judgment by default was taken. He did make return, in effect, admitting his liability, and craving indulgence, so that he could arrest Wallace; and after reasonable delay for this purpose, judgment was taken on the return.

No court of the United States can revise or amend its own final decree or judgment for errors of fact or of law after the end of the term in which such decree or judgment was rendered. *Sibbald v. U. S.*, 12 Pet. 488; *Bronson v. Schulten*, 104 U. S. 417; *Phillips v. Negley*, 117 U. S. 674, 6 Sup. Ct. Rep. 901. The present motion, however, is not directed to the correction of any error of law or of fact on the part of the court on rendering the judgment. But counsel has intimated that he can show that the judgment is void. The court has jurisdiction over this question. *Black*, Judgm. § 307. The district attorney will answer the rule; his exception to the jurisdiction being overruled.

UPON FILING RETURN BY DISTRICT ATTORNEY.

The district attorney has filed his return. The case seems to have assumed a double aspect. In the petition Jaudon seeks to open the judgment taken against him, so that he may make a defense thereto. He asks the court to do this, because he was deprived of this defense by the inadvertence of his counsel. He argues that, as section 914 of the Revised Statutes declares that the courts of the United States should conform to the practice, pleadings, form, and mode of procedure of the courts of the state in which they are severally established; we should follow the course prescribed in section 195, Code Civil Proc. S. C., which permits the court at any time within a year to relieve a party from a judgment, order, or other proceedings taken against him through mistake, inadvertence, or excusable neglect. This is a provision of a Code of Civil Procedure, and therefore cannot apply to this case, which is in a criminal court. *State v. Wilder*, 13 S. C. 344. Besides this, the courts of the United States have no authority to set aside, vacate, or modify their final judgments after the term in which they are rendered; and this authority cannot be conferred on them by the statutes of a state, or the practice of its courts. *Bronson v. Schulten*, 104 U. S. 410; *In re Chateaugay Iron Co.*, 128 U. S. 554, 9 Sup. Ct. Rep. 150; *Association v. Barry*, 131 U. S. 120, 9 Sup. Ct. Rep. 755. Even were this practice adopted in this court, the case, as presented by the petition, would not come within it. In *Clark v. Wimberly*, 24 S. C. 138, the court confine the relief afforded by this section 195 to parties who, by some mistake, inadvertence, etc., have lost the opportunity of being present or of being represented at the trial. Jaudon was represented throughout the case by an attorney; and in this respect the petition simply asks that he may now be permitted to make a defense which his attorney failed

to make for him. Jaudon was regularly before the court, which had jurisdiction of him and of the *scire facias*. "The defense could have been made; indeed the proceeding—'a rule to show cause'—invited him to make it. Failing to do so, the result must be the same, as if he had formally made it, and failed." *McNair v. Ingraham*, 21 S. C. 74; *McDowall v. McDowall*, Bailey, Eq. 330; *Dimock v. Copper Co.*, 117 U. S. 559, 6 Sup. Ct. Rep. 855. So much for the case made by the petition.

The district attorney made an objection to the petition, that it did not state the grounds of objection to the judgment fully; especially that objection next to be noticed. He waived this, however, at the hearing. If he had insisted upon it, the objection would have been sustained.

The defendant at the hearing insists that the whole judgment is void *ab initio*. The position is, this: that we must look over the whole record, from the inception of the case against Wallace; that, doing this, we would find that the recognizance is void; that the recognizance is the judgment, and that the proceedings by way of *scire facias* were used solely to confirm judgment. There is no doubt that a recognizance is in the nature of a judgment confessed of record. *State v. Ahrens*, 12 Rich. Law, 493, and that the *scire facias*, by its own language, is to confirm it. I have some doubt whether it is not too late for Jaudon to raise this question. But he has the benefit of the doubt. Inspecting the records, it appears that Wallace was arrested on 4th September, 1889, on a warrant bearing the same date, to which is attached an affidavit of H. W. Hendricks "that he has reason to believe, and does verily believe." Whether or not the commissioner had any other affidavit in his possession does not appear. That Wallace when arrested gave bail for his appearance before the commissioner on 10th September, 1889. That subsequently he did appear before the commissioner on 10th September, 1889, and was present at the preliminary hearing. That the commissioner examined 23 witnesses, and that, as the result of the examination, he sent the case up, and that Wallace then and there entered into the recognizance, with Jaudon as surety. That Wallace made default, having departed the state. This record shows that Wallace never was in jail, and that he was released from custody as soon as arrested. Assuming, for this case, that the warrant was void and the original arrest illegal, when Wallace was discharged he was free. Yet he voluntarily went before the commissioner six days afterwards, heard the witness examined, and afterwards signed the recognizance, with Jaudon as his surety. Had he resisted or disputed the arrest in the first instance, or, being in custody, had then entered into recognizance, or had he disregarded his bail to appear for preliminary examination, or, had he been in custody, and had moved to quash the warrant, or applied for a *habeas corpus*, the result may have been different. *U. S. v. Shepard*, 1 Abb. (U. S.) 434. He, in my opinion, waived all objection. Indeed, if there had been no affidavit or complaint whatever, and the accused going voluntarily before the officer, had given bail for his appearance to answer the indictment, it would have been good. The giving of the undertaking thus voluntarily would have been a complete waiver of complaint,

deposition, proof of probable cause, and of all irregularities in the case prior to giving of the bail. *U. S. v. Eldredge*, (Utah,) 13 Pac. Rep. 677. See, also, *City of Junction City v. Keeffe*, (Kan.) 19 Pac. Rep. 735; *Ard v. State*, (Ind.) 16 N. E. Rep. 504; *State v. Tennison*, (Kan.) 18 Pac. Rep. 948.

The next objection is to the *scire facias*; that notice of the rule to plead to the *scire facias* had not been served upon Jaudon after he appeared. Examining Jaudon's return to the *scire facias*, it is something more than an appearance,—it is an admission of responsibility, and an application to the grace of the court for time within which to surrender his absconding principal. He does, in this connection, ask for a continuance, and such continuance was granted on his motion; but this was not a continuance of the trial, but a continuance of the cause, so as to suspend the entry of confirmation of judgment. There is an error in the order upon the *scire facias*. It provides that judgment be entered. As we have seen, the recognizance itself is a judgment. The word should be confirmed. Let this be substituted.

The motion is dismissed.

WELLS v. TATUM.

(Circuit Court, S. D. Ohio, W. D. June 22, 1891.)

1. PATENTS FOR INVENTIONS—PATENTABLE NOVELTY—PAPER FILES.

In letters patent No. 386,674, issued July 24, 1888, to Arthur J. Wells, claim 1 is for "a paper file consisting of a base adapted to lie upon a desk or table, and formed with a series of perforations and adjustable partitions, provided with steps removably fitting into the perforated base." Claim 2 is for "the combination of the base, A, and perforated plate, D, secured to its top, and the adjustable partitions, B, having the steps, *a*, *c*, adapted to enter the perforations." *Held*, that the patent is invalid for want of novelty.

2. SAME.

In letters patent 386,675, issued July 24, 1888, to Arthur J. Wells, the claim is for "the combination of the base, A, having rabbets, *a*, extending lengthwise in the outer edges thereof, rods, *b*, detachably secured to the base within the rabbets, and slides, C, having depending feet, *c*, and eyes, *d*, through which the rods pass." *Held*, that this patent is likewise void for want of novelty.

In Equity.

Suit for infringement of patents Nos. 386,674 and 386,675, for paper or bill file, issued July 24, 1888, to Arthur J. Wells, and by him assigned to complainant August 10, 1888.

The article described and claimed in 386,674 is a knock-down portable paper or bill file, consisting of a base having a metal plate on its upper surface, provided with perforations, extending in series at intervals throughout its length, and partitions, preferably of wire, having steps or feet removably fitting into these perforations, which serve as seats or sockets, and support the partitions in their operative position.

The construction specified permits the file to be taken apart and shipped in a "knock-down" condition, and then the parts may be read-

ily put together again for use. The partitions may be arranged on the base at any required distance apart for producing any desired width of compartment between the partitions for use, and the insertion of the steps or feet of the partitions in the perforations firmly holds them in position, and prevents disarrangement of the compartments.

Patent No. 386,675 differs from No. 386,674 merely in features of construction. It comprises a base having longitudinal grooves or rabbets at its outer edges. Two rods of wire, one located in each rabbet, and detachably secured to the base within the rabbets, form a way upon which adjustable partitions, provided with depending feet, having eyes which are guided on the rods, may be placed as desired.

Claims 1 and 2 of patent No. 386,674, which it is claimed are infringed, are as follows:

"(1) The herein described paper file, consisting of a base adapted to lie upon a desk or table, and formed with a series of perforations, and adjustable partitions, provided with steps removably fitting into the perforated base, substantially as and for the purpose set forth.

"(2) The combination of the base, A, and perforated plate, D, secured to its top, and the adjustable partitions, B, having the steps, *a*, *c*, adapted to enter the perforations, substantially as and for the purpose set forth."

Patent No. 384,675 has but a single claim, which is as follows:

"The combination of the base, A, having rabbets, *a*, extending lengthwise in the outer edges thereof, rods, *b*, detachably secured to the base within the rabbets and slides, C, having depending feet, *c*, and eyes, *d*, through which the rods, *b*, pass, substantially as and for the purpose set forth."

Hey & Wilkinson, for complainant.

Wood & Boyd, for respondent.

SAGE, J., (*after stating the facts as above.*) Under the defense that the patents are substantially anticipated, the defendant relies, as to patent No. 386,674, first, upon a patent granted in 1868 to Smith and Cheever (reissue No. 4,864, original No. 76,834) for improvement in paper files. The drawings show, and the specification describes, a paper file-holder, having a lever clamping device so constructed and combined with a base provided with a stationary upright that, by pressing upon the lower part of the device, files of papers can be securely clamped and automatically held, and, by pressing upon the upper part of the papers, can be readily unclamped. The upright is adjustable. The base is provided with flanged grooves, to which the upright is attached by angular braces or plates. These braces are attached to the adjustable upright with their angular arms projecting towards the stationary upright, and their lugs arranged to work in the flanged grooves, so as to bind or catch upon the flanges of the grooves, and automatically hold the adjustable upright when it is pressed against the papers. In operation, the papers, being placed in the holder against the stationary upright, are securely clamped by pressing forward upon the lower part of the adjustable upright or lever, and the holder is automatically locked by the lugs catching against the under part of the flanges, which is caused by the out-

ward pressure of the papers, forcing backward the upper part of the adjustable upright. The papers are readily unclamped by pressing forward upon the upper part of the adjustable upright, which releases the lugs, and allows the adjustable upright to be moved backward. To say the least of this device, it so narrows the range within which the complainant could operate in constructing his device as to leave him little room for invention, and to preclude any claim that he was a pioneer.

Following the Smith and Cheever patent came Kuhnle's patent for improvement in book-racks, which shows a base having in its sides longitudinally extending channels or ways, in which are fitted transversely projecting slides, secured to the lower ends of adjustable walls, between which the books are clamped. This also shows sliding partitions, not, however, constructed so as to be fixed in position when not in use. When books are fitted closely between two walls or partitions, the pressure of the books, forcing out the upper ends of the partitions, causes the upper and lower faces of the slides to bind against the walls of the channels, and thus hold the partitions in their closed position, and tightly confine the books. This patent was granted April 29, 1876.

On the 4th of January, 1887, patent No. 355,511 was granted to John Danner, upon an application filed June 6, 1882, for a book support. To retain books vertically upon their edges on top of the upper shelf of a book support, or a similarly constructed shelf, the patentee provided metallic holders, with open designs, to render them lighter and more easily manipulated by the person using them. These holders were provided with hooks to engage with the edge of the upper thickness of the shelf, which was composed of two layers of wood, glued or otherwise permanently secured together, the upper projecting over the ends and sides of the lower. The holders were placed in position by sliding them forward from the end of the shelf towards its center, and against books placed thereon. Screw-buttons were inserted vertically in the ends of the shelf, that the holders could be placed as near the ends as possible without escaping. In this patent the edge of the base served as a way on which to move the partitions.

The next patent is No. 301,304, dated July 1, 1884, and issued to William B. Berry for a paper and letter file. This shows brackets or frames made of spring wire, bent to form three sides of a quadrilateral figure, with rounded corners, and having their ends properly secured to a board, which is ornamented, and intended to be suspended from a nail or hook in a wall or other upright surface. The brackets are inclined at an acute angle with the board, so as to properly hold a paper or letter, and they are placed at about equal distances from each other, leaving space for the insertion of papers or letters. The sides of the boards are preferably made to taper towards the top. The length of the brackets gradually increases from that of the top one to that of the bottom one, whereby each succeeding bracket or frame, from the top down, projects a greater distance than its predecessor from the board, so as to furnish places for different sizes of letters, papers, cards, etc. The springy character of the brackets increases their capacity, and causes them to

bind on the papers inserted between them. The mode of attaching the brackets to the board or frame is not stated, but the drawings clearly indicate that it was by inserting the ends in perforations, closely fitting them.

The Smith and Cheever reissue, and the patents to Kuhnle and Danner, clearly embody the general principles contained in the complainant's patent, and the Berry patent leaves nothing for invention in the device patented to the complainant by letters No. 386,674. There is nothing more in this patent than would result from laying the Berry block or base on a table or other horizontal surface, making it rectangular in shape, instead of tapering, and changing the direction of the perforations, so as to cause the brackets or partitions to stand upright, instead of at an angle. The change involved nothing but skill, and not a very high order of that. It was purely mechanical, and there was no invention whatever in or about it.

As for patent No. 386,675, it is entirely without merit, and should not have been granted. The claim is substantially limited to the base having rabbets and rods, the partitions having depending feet and eyes, and using the spiral form, so that the device must be duplicated upon either side. This patent is also anticipated by the Smith and Cheever, the Kuhnle, and the Danner patents, respectively. It is true that in the Kuhnle patent the partitions apparently slide in grooves formed on the edge of the base, instead of on the rods; but the rib or upper edge only is of use, and, inasmuch as in the arts, grooves, and ribs, and rods have been for many years used for ways on which to move carriages or other articles to be adjusted, it is wholly immaterial which is used in this instance. In the Danner patent the edge of the base serves as a way on which to move the partitions, and this is an equivalent of the rods. In the Smith and Cheever patent they made a rabbet for their ways on the upper side of the base for feet engaging with the grooves.

Without entering upon consideration of other defenses, the decree will be that the complainant's patent is invalid for the want of novelty, and the bill will be dismissed, with costs.

THE PAPA.

WILLIAMS *et al.* v. THE PAPA.

(District Court, E. D. Pennsylvania. May 8, 1891.)

1. ADMIRALTY—SALE OF VESSEL—DISTRIBUTION OF PROCEEDS—DEBT NOT DUE.

Where a vessel has been attached and sold as perishable, and the resulting fund paid into court for distribution, a libel for a debt acknowledged to exist, the lien of which was discharged by the sale, will not be dismissed even if the debt was not due at the time of suit brought.

2. SAME—RIGHT TO COSTS.

Costs will be given against a libellant who sues for a debt before it is due even though, on account of the circumstances of the case, the libel is retained.

In Admiralty.

Libel by Williams & Co. to recover the principal sum of £250 and interest, advanced on the credit of the vessel when the latter was at Montevideo, and agreed to be paid to said Williams & Co. 10 days after her return to Montevideo, or in event of the abandonment of the voyage back to Montevideo before the vessel left the United States. This suit was begun by attaching the vessel in Philadelphia on the allegation that the voyage back was abandoned. Subsequently under another attachment she was sold as perishable, and the proceeds paid into court for distribution.

John Q. Lane, for claimants.

Curtis Tilton, for libellants.

BUTLER, J. The only question raised is: was the suit of Williams & Co. premature? The indebtedness and lien on the vessel are not open to controversy. The time appointed for payment is "ten days after the vessel's return to Montevideo;" or in case she should abandon her voyage back, then before leaving the United States. The libellants, Williams & Co., proceeded on the assumption that the voyage back was abandoned, and the money consequently due. Whether this assumption is sustained by the proofs (which is open to serious doubt) need not be decided at this time. The question involves nothing more than the costs of Williams & Co.'s suit. If the money was not due, Williams & Co. should pay them. We should not however, in view of the circumstances about to be stated, turn the libellants out of court. The vessel was sold as perishable, while held under attachment of Wesenburg & Co., and the money is now in court to answer all just claims upon it. Williams & Co.'s lien is discharged, and they must be admitted to participate in the distribution. The case will therefore be sent to a commissioner to ascertain all necessary facts and report a distribution, as well as a proper disposition of costs, referred to, and to return all additional testimony that may be taken to the court. John A. Toomey, Esq., is appointed commissioner for the purposes stated.

OVERMAN WHEEL Co. *et al.* v. POPE MANUF'G Co

(Circuit Court, D. Connecticut. June 22, 1891.)

1. REMOVAL OF CAUSES—DIVERSE CITIZENSHIP—RESIDENCE OF CORPORATIONS—AMENDMENT OF RECORD.

Where one of the plaintiffs is simply an agent of the other, without any personal interest in the controversy, his presence has no effect on the defendant's right of removal.

2. SAME—SUFFICIENCY OF RECORD.

Under Act Cong. Aug. 13, 1888, providing that causes removable on the ground of diverse citizenship may be removed into the circuit court for the proper district by the defendant or defendants "being non-residents of that state," it is not enough that the record shows that defendant is a corporation organized under, and a citizen of, another state, and located in such state, since it may also be a resident of the state in which the action is brought by reason of a second incorporation under its laws.

3. SAME.

The fact that the corporation has a factory and place of business in the state where the action is brought does not give it a residence therein.

4. SAME—AMENDMENT OF RECORD.

The amendment of the record to show jurisdiction in the circuit court must be made in the state court.

5. SAME—BOND.

The omission from the removal bond of the seal to the surety's signature is but a formal defect, which may be cured by amendment.

At Law.

E. S. White, for plaintiff.

William A. Redding, *Chas. E. Gross*, and *Henry D. Hyde*, for defendant.

SHIPMAN, J. The questions herein arise under the statute of August 13, 1888, upon the plaintiffs' motion to remand the cause to the state court. The complaint avers that the defendant "is a corporation duly organized, incorporated, and existing under the laws of the state of Maine, located in the city of Portland, in said state of Maine, but having a factory and place of business in" the town of Hartford, in the state of Connecticut. One of the plaintiffs, the Overman Wheel Company, is a corporation under the laws of the state of Connecticut, located in said Hartford. Albert H. Overman, the other plaintiff, is a citizen of the state of Massachusetts, but it now sufficiently appears in the record that he is simply an agent or attorney of the other plaintiff, and has no personal interest in the controversy. His presence as a plaintiff is of no importance with respect to the defendant's right of removal. *Wood v. Davis*, 18 How. 467; *Harter v. Kernochan*, 103 U. S. 562. Real estate of the defendant in Connecticut was attached. The defendant appeared generally in the state court, and filed a petition, dated May 12, 1891, to remove to this court. The matter in dispute exceeds, exclusive of interest and costs, the sum of \$2,000. The petition avers that the controversy is wholly between citizens of different states, and that the defendant was at the time of the commencement of the suit, and still is, a corporation existing under and by virtue of the laws of the state of Maine, located at Portland, in said state, and is a citizen of said state. The petition did not aver that the defendant was a non-resident of the state of

v.46f.no.10—37

Connecticut. The next succeeding term of this court is to be held in September, 1891. The plaintiff filed the removal record in this court, and has moved to remand.

The main question upon the motion arises upon the omission of the averment in regard to non-residence, which, the plaintiff insists, is an averment of an indispensable jurisdictional fact, the absence of which constitutes a fatal defect in the petition, and in support of its position great and proper reliance is placed upon *Hirschl v. Threshing-Mach. Co.*, 42 Fed. Rep. 803. The defendant insists that the averment that it is a corporation under and by virtue of the laws of Maine, and is located at Portland, in said state, is equivalent also to an averment of sole residence in that state; and in support of its proposition justly relies upon *Myers v. Murray*, 43 Fed. Rep. 695. I shall not discuss at length the meaning of the term "non-resident" as used in the clause of the act of August 13, 1888, which provides that causes removable upon the ground of diverse citizenship may be removed into the circuit court for the proper district by the defendant or defendants "being non-residents of that state." It has the limited meaning which is ordinarily applicable to the word "residence" or "inhabitaney," when an alien defendant seeks to remove. *Cooley v. McArthur*, 35 Fed. Rep. 372. It does not seem probable that congress used the term as synonymous with the expression, "not being citizens," for the ordinary and legal difference between "residence" and "citizenship" is well known. *Parker v. Overman*, 18 How. 137. The term must have been used intelligently. I am inclined to the conclusion, therefore, in accordance with the opinion of Judge BARR, that the statute, at least, means that at the time the petition is filed the defendant who seeks to remove on the ground of diverse citizenship at the commencement of and during the suit must not reside within the state wherein he is sued, and that this fact must be averred in the petition to remove, or appear affirmatively in the record which is sent from the state court. *Freeman v. Butler*, 39 Fed. Rep. 1.

The next question is, what is necessarily included in the averment that a corporation exists under and by virtue of the laws of Maine, and is located in Portland, in said state? Under the repeated decisions of the supreme court, it is a declaration of residence in Maine. It is not only an averment of citizenship of Maine, but of residence therein, because the place of residence of a corporation necessarily is the state by which it was incorporated, and cannot, by the will of the corporation, or merely by the comity of another state, be in that other state. To enable a corporation to have a residence in another state than the one by which it was originally incorporated there must be a positive and affirmative act of creation or adoption by the new state, which must be more than the permission to own property or do business therein, and more than the grant of privileges to it as an existing corporation. *Insurance Co. v. Francis*, 11 Wall. 216; *Ex parte Schollenberger*, 96 U. S. 377; *Railroad Co. v. Koontz*, 104 U. S. 11; *Railroad Co. v. Alabama*, 107 U. S. 581, 2 Sup. Ct. Rep. 432; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 6 Sup. Ct. Rep. 1094; *Goodlett v. Railroad Co.*, 122

U. S. 391, 7 Sup. Ct. Rep. 1254. Neither the fact that the defendant has a factory and place of business in Connecticut, as averred in the complaint, nor the additional fact, if the same exists, that it has officers and agents in Connecticut, creates a residence for it in this state. Neither would the fact, if it existed, that the statutes of Connecticut required a foreign manufacturing corporation to appoint an agent upon whom service of process in the courts of the state might be made, and an appointment of such resident agent, make the defendant a resident of the state, so that, if sued in a state court in the state, it could not remove the suit to the circuit court. *Insurance Co. v. Woodworth*, 111 U. S. 138, 147, 4 Sup. Ct. Rep. 364. Due service of process upon such an agent, either in a suit returnable to a state court or the circuit court in such state, is valid by reason of the consent of the defendant that the service should be valid, (*Railroad Co. v. Harris*, 12 Wall. 65; *Ex parte Schollenberger*, 96 U. S. 369,) but neither the statute nor the agency nor the consent creates a residence. It is readily seen that consent, shown by compliance with the statutes of the general character which has been stated, enables suits to be brought against foreign corporations either in a state court or in the proper federal court which sits within such state, for the reason given in the supreme court cases which have been cited; but compliance or consent does not change inhabitancy or residence, or the principle that a corporation resides where it is incorporated. These cases guard against such an idea, and the opinion in *Insurance Co. v. Woodworth*, *supra*, does not, it seems to me, establish a doctrine of residence of corporations in antagonism with the line of cases which have been referred to. I am aware that this theory of the statute is not in harmony with that which is entertained by the circuit judges of the third circuit, but it is substantially in accordance with the views of the circuit judge of the first circuit. *Riddle v. Railroad Co.*, 39 Fed. Rep. 290; *Consolidated Store Service Co. v. Lamson Consolidated, etc., Co.*, 41 Fed. Rep. 833. There is one method by which the defendant could have become a citizen and a resident of Connecticut, as well as of Maine, which is by having been also incorporated in Connecticut. *Railroad Co. v. Alabama*, *supra*. In this point of view, an averment of the non-existence of the corporation within this state at the time of filing of the petition to remove would have been good pleading, for it might be also a corporation, and therefore a resident of Connecticut, at the same time. It is said, however, that the entire record shows that such a state of things did not exist. *Steam-Ship Co. v. Tugman*, 106 U. S. 118, 1 Sup. Ct. Rep. 58. The complaint averred that the defendant was incorporated by Maine, was located in said state, but had a factory and place of business in Connecticut. If it had then been incorporated by Connecticut, the pleader would naturally have so averred, and therefore a fair inference from the language of the complaint is that the corporation did not exist as a legal person in Connecticut on April 7, 1891, when the complaint was verified. On May 12, 1891, the defendant avers that it still was a citizen of Maine. It does not affirmatively appear that it had not become a resident of Connecticut by incorporation by that state, and

there is, for that reason, a technical defect in the record. Defects of substance in the averment of jurisdictional facts cannot be amended in the circuit court, because the record in the state court must affirmatively show that the case is removable, (*Crehore v. Railroad Co.*, 131 U. S. 240, 9 Sup. Ct. Rep. 692;) but where jurisdictional facts are not properly stated in the petition, an amendment may be permitted, if seasonably applied for, in the original petition, for the purpose of stating them properly, (*Ayres v. Watson*, 113 U. S. 594, 5 Sup. Ct. Rep. 641.)

There is an apparent difference of opinion whether, if the case was remanded to the superior court, and the petition was there amended, the filing of a copy of the amended petition and record in this court would present a removable case; the point against any jurisdiction of the circuit court being that the order to remand was final and conclusive. *Johnston v. Donovan*, 30 Fed. Rep. 395; *Freeman v. Butler*, 39 Fed. Rep.

1. I therefore think it preferable not to issue an order to remand until the defendant has had a reasonable time within which to seek to amend its petition in the state court, and to take such action, upon notice to the plaintiff, in regard to the amended record in this court, as it may be advised.

The remaining ground for an order to remand which was insisted upon is the fact that the signature of the only surety upon the bond was and is without seal. This omission makes the bond a defective one, but defects arising from non-compliance with the directions of the third section of the act, which are formal, may be supplied. *Ayres v. Watson*, *supra*; *Harris v. Railroad Co.*, 18 Fed. Rep. 833. Inasmuch as there is in the petition a defective or insufficient statement of a jurisdictional fact, and the suggestion has been made that the defect may be cured by prompt amendment in the state court, the bond should be made perfect in that court also.

CURTAIN *et al.* v. TALLEY *et al.*

(Circuit Court, E. D. Virginia. June 19, 1891.)

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—RESERVATIONS.

Clauses in the assignments of insolvents, requiring releases from creditors accepting dividends, regarded with great disfavor by courts.

2. SAME—ACTION TO SET ASIDE.

Such an assignment must embrace all the estate of the insolvent, must give full information as to the character and probable value of the assets, and must allow ample time to creditors to determine whether to accept and release or not. Where all the insolvent's estate is conveyed, and the claim of plaintiff is acknowledged fully and exactly, and the plaintiff is left without redress in an action at law, in such case, a bill in equity may be brought to set aside an assignment as hindering, delaying, and defrauding creditors, before judgment is obtained at law, as required in *Scott v. Neely*, 11 Sup. Ct. Rep. 712.

(Syllabus by the Court.)

In Equity. On a general creditors' bill.

A. L. Halliday, Wm. Flegenheimer, Saml. Proskauer, and Joseph Christian, for plaintiffs.

J. Allston Cabell and Leigh R. Page, for defendants.

HUGHES, J. Ernest H. Chalkley, one of the defendants, and a citizen of Richmond, was engaged in the business there of buying raw hides, tanning them, and selling the leather in other markets. The deed which is the subject of this controversy was executed by him on the 18th January, 1889. It conveys to Williamson Talley, of Richmond, as trustee, a tannery in Manchester, Va., opposite Richmond, with all its implements, utensils, and fixtures, supposed to be worth about \$3,000; all hides on hand, and leather in process of manufacture, bark, materials, etc., supposed to be worth \$10,000; leather stored in the tannery, supposed to be worth \$150; debts and accounts due grantor, amounting to \$529; a buggy and harness worth about \$40; a lot of land in Manchester, supposed to be worth about \$6,000; all the right, title, and interest of grantor, whatever it may be, in and to real estate in the city of Richmond, consisting of five lots of land, most of them containing buildings on them; also any interest the grantor may have in the firm of J. T. Stratton & Co., and in the uncollected assets of the late firm of O. H. Chalkley & Co., consisting of uncollected debts of little or no value; and all other property of every kind and description, whether real or personal, and all debts, claims, rights, and securities to which the grantor may be entitled from any source,—but in trust to secure the payment of all the debts of the said Ernest H. Chalkley in the order set forth in the deed. Power is given the trustee to make purchases and continue the business for the purpose of preventing loss or sacrifice of property in course of manufacture, and this power is modified by conferring more or less control over the trustee upon creditors. These provisions need not be here described. The debts secured are of three classes; most of those composing the two first classes being specifically scheduled. The first class consists of debts amounting to about \$8,200. The second class consists of debts amounting to about \$42,700, so far as they are enumerated, and also of debts which are not given in detail, but are described as “all the other debts of Ernest H. Chalkley upon which he is bound as surety, and not as principal debtor.” One of the debts enumerated in this class is that of the plaintiff in this suit, which is acknowledged in the exact amount claimed in the bill. The third class consists generally of debts due to all other creditors, none of which, nor the amounts of them, severally or aggregate, are specified. After enumerating the two first classes of creditors, and before mentioning the third, the deed contains a clause in these words:

“But this deed is made upon the distinct understanding that no creditor intended to be hereby secured in the above classes shall receive any benefit whatever under it unless he shall, within ninety days from the date of its recordation, signify in writing his acceptance of the provision of this deed, and release the said Ernest H. Chalkley from all further liability for his debt.”

The deed has also a concluding clause declaring that—

“It is the intent and meaning of this instrument that each class is paid any part of the sum secured in them; and, if there is not enough assets to pay,

any class in full, all of that class shall share equally in any sum applicable to any in that class, and no one in any class shall have priority over any other in the same class."

The bill in this suit charges fraud, and is brought to set aside the deed of assignment as made to hinder, delay, and defraud creditors. In respect to jurisdiction, this case is ruled by *Griffin v. Peters*, 133 U. S. 679, 10 Sup. Ct. Rep. 354, and not by *Scott v. Neely*, 11 Sup. Ct. Rep. 712; for here the plaintiff's claim is fully acknowledged in debtor's deed, and taken for confessed in the pleadings. Here, also, the debtor, by assigning his whole estate, has left nothing for final process to reach, and has deprived the plaintiff of all redress at law.

I deem it unnecessary to consider the deed from any other point of view than that of the release and prorating clauses last quoted above. It is plain from the provisions of the deed that, if the assets conveyed should prove sufficient to pay off the \$8,200 which it mentions as first preferred debts, they will certainly fall short of discharging the \$42,700 of debts of the second class, which it enumerates in detail. The almost necessary inference is that less than 50 per cent. and most probably less than 20 per cent. of these debts can be paid; but, be the percentage what it may, the deed requires every one of the second class creditors, within 90 days after its registration, to release his claim against the grantor, as a condition of receiving the percentage which may in the end fall to him. These are the features of the deed of assignment under consideration which raise the question of its validity. Under the well-settled law, it is necessary to the validity of any deed of assignment giving preferences and containing a release clause that the deed shall convey all the estate of the insolvent, and shall give to his creditors all the information in the debtor's power as to the nature and value of the property conveyed, and the amount of the debts provided for; and also a reasonable time to enable creditors to obtain such information as the deed may not afford, in which to make up their minds deliberately and intelligently whether to accept or reject the offer made to them. In the clauses providing for the creditors of the second class, this deed, after enumerating debts amounting to about \$42,700, provides, in addition, for "all other debts of Ernest H. Chalkley upon which he is bound as surety, and not as principal debtor;" but gives no schedule of such suretyships, nor any particulars whatever of their amounts or dates, or the persons indorsed for. In the granting clause of the deed the grantor's interest in several pieces of real estate in Richmond is assigned, but the value of the property is not stated even approximately, and the interest of the grantor in it is not indicated in any manner, but, on the contrary, the most indefinite phrase that could be framed is used, the interest being described as "whatever it may be." If it be pretended that the clauses referring to this real estate are sufficient to put creditors on inquiry as to what Chalkley's interest in it really is, inquiry develops that it has required a chancery suit, not likely to be concluded for a year or more, to be instituted, to determine what that interest is. As to the property held by Chalkley in his own right, it was of a character to render it im-

practicable for creditors to arrive at any approximate estimate of its selling price within 90 days of the registration of the deed. This property consisted of a tannery and of hides in process of being tanned; the latter requiring expense and time to be incurred by the trustee in maturing them into salable condition. Tanneries are salable to but a small class of purchasers, most of whom live in different and distant localities. This circumstance made any judicious sale of the tanning establishment of E. H. Chalkley impracticable within a period as brief as 90 days from the registration of his deed.

Other provisions of this assignment contravening the conditions which the courts hold to be essential to the validity of assignments requiring releases from creditors might be pointed out, but I have stated enough to show that this deed does not give to creditors all the information which it was in the power of its grantor to give, and which it was his duty to give, as to the value of the property conveyed, as to his interest in it, and as to the amount of his indebtedness. On the contrary, it is exceptionally at fault in each of these particulars, and that to a degree which rendered it wholly impossible for any creditor to decide intelligently whether to accept its terms or not within any reasonable time after the deed went upon record, certainly within the 90 days prescribed by the deed. The Virginia court of appeals have had but very few cases of deeds of assignment by insolvents containing release clauses to deal with, and we do not find as full an adjudication of the subject in its decisions as would be desirable, and as the courts of other states have made. Turning, therefore, to the general law of the subject, it may be stated generally that assignments exacting releases from creditors are looked upon with great disfavor by the courts. These provisions are attempts on the part of the debtor to coerce his creditors to accede to his terms, and a withholding of his property from them unless they do accede.

It is to be observed that a debtor by a release clause affects to do what a sovereign state of this Union is forbidden by the national constitution to authorize. He affects to institute a proceeding in bankruptcy on an individual scale, by which he may individually be discharged from his obligations, by his own individual authority. Such a proceeding cannot command much favor in the courts. Of course they all hold that if a debtor, with his property still open to the legal pursuit of his creditors, can satisfy them that it is for their interest to accept a compromise, and give him an absolute discharge on his assigning his estate to them, he may do so. But the case is different when the debtor first assigns his whole estate away, putting it beyond the reach of legal process, and then proposes to his creditors, in the form of a release clause, terms of accommodation. He thereby obstructs their legal remedies, and hinders and delays them in the prosecution of suits against him. Naturally, therefore, the courts look upon such provisions with great disfavor. It is true they will uphold deeds containing such clauses, if the circumstances are such as to preclude the imputation of intentional fraud, and if the utmost candor and fairness are used towards creditors; but they

will not uphold them if this candor and fairness are wanting. If creditors are not afforded all the information necessary to an intelligent decision on the expediency of a full release to the debtor, and if ample time and opportunity for making up a decision be not given, then this delinquency is itself a badge of fraud; and, when it is as palpable and manifest as in this case, the deed ought to be set aside.

I will decree accordingly.

CHICAGO & A. BRIDGE CO. v. ANGLO-AMERICAN PACKING & PROVISION CO. *et al.*

(Circuit Court, W. D. Missouri, St. Joseph Division. June 18, 1891.)

1. CREDITORS' BILL—WHEN MAINTAINABLE.

A creditor of a corporation obtained a judgment *in personam* against it in a federal court of Kansas. On the return of execution unsatisfied in that state, he instituted attachment proceedings in a state court of Missouri against land there situated, the legal title to which was in the directors, and held by them in trust for the corporation. *Held* that, after securing a lien against this land by prosecuting the attachment to judgment, the creditor had the right to maintain a bill in equity in the state court to remove the obstruction of the legal title in the directors, and to subject the property to the payment of his debt, without first issuing an execution on the judgment, and having a return of *nulla bona*; and the removal of the cause into a federal court of Missouri, by the directors and the corporation, on the ground of their non-residence, does not deprive him of this right.

2. SAME—BREACH OF TRUST.

During the pendency of the original suit in the federal court of Kansas, a contract was entered into between the directors and stockholders of the corporation, by which the land in question was to be sold, and the proceeds first applied to the liquidation of the debts of the corporation. *Held*, that the failure of the directors to make the sale, and to so apply the proceeds, was a breach of their trust, and was sufficient to confer jurisdiction on a court of equity to reach the land as an equitable asset of the corporation, for the benefit of one of its creditors.

3. SAME—SERVICE BY PUBLICATION.

Since the object of the suit is to fix the trust on the land in the hands of the directors, and to subject it to liability for the creditor's debt, jurisdiction over the corporation, which is a non-resident, may be obtained by publication, under Rev. St. Mo. § 2022, which provides that in suits which have for their immediate object the enforcement or establishment of any lawful right, claim, or demand to or against any real property within the jurisdiction of the court, an order by publication may be made.

4. FRAUDULENT CONVEYANCES—WHAT ARE.

Rev. St. Mo. § 571, which gives an attaching creditor an action at law to set aside a "fraudulent" conveyance of property, does not apply where the legal title of land was in good faith taken for the use and benefit of the debtor, with a resulting trust in favor of its creditors.

5. JUDGMENT AGAINST CORPORATION—EFFECT ON DIRECTORS.

A judgment *in personam* against a corporation, obtained in a federal court of a sister state, is conclusive on the merits in the courts of every other state when made the basis of an action; and the directors and managers of the corporation are as conclusively bound by the judgment as the corporation itself.

This is a bill in equity. Its substantial averments are as follows: The complainant is a corporation under the laws of Kansas and Missouri, and the Anglo-American Packing & Provision Company is a business corporation of the state of Illinois, and the other respondents, Robert D., John, George, Anderson, William, and Alexander Fowler, are also citizens of,

and residents of, the state of Illinois. From January, 1878, to 1884 or 1885, the said Fowlers were in business as partners, under the firm name of "Fowler Bros.," engaged in butchering hogs and packing pork at the town of Winthrop, in Buchanan county, Mo. In 1878 they purchased the real estate in question, situated in said county, and caused the deed therefor to be made to the respondents Robert D. and Anderson Fowler. Said property was designed and used for the plant in conducting said packing business, and was bought, used, and treated as partnership property of said Fowler Bros. The said Fowlers were the sole incorporators and stockholders and managers of said packing company, organized as a corporation, as aforesaid; and said real estate, so held as partnership property, was put into said corporation as an asset thereof; the said corporation issuing stock to said Fowlers in amount and value equal to the value of all the partnership property, including said real estate, which was thereafter treated and regarded as a part of the assets of the corporation, although the legal title remained in said Robert D. and Anderson Fowler. From 1878 to 1884 or 1885, the said corporation respondent occupied and used said real estate, conducting thereon the business aforesaid, as formerly conducted by said Fowler Bros. In 1880 the respondent corporation contracted with the complainant the debt in question, for which the complainant brought suit in the circuit court of the United States for the district of Kansas, and on the 10th day of May, 1885, recovered judgment against the respondent corporation for the sum of \$3,404.74, and costs amounting to \$363.90. On this judgment execution was duly issued from said court, and was returned *nulla bona*. The bill avers that said respondent corporation neither at that time owned, nor has since owned, any property in said state of Kansas. It is also averred that in 1884, during the pendency of said suit in the United States court in Kansas, the said Fowlers entered into a contract with the respondent George Fowler, by which all the assets of the corporation, except the said real estate, was conveyed to said George Fowler. Among other things, said contract provided that—

"The packing-house property at Winthrop shall be sold, and, after first discharging all debts, liabilities, and outgoings affecting the same, the moneys arising from such sale shall be applied, first, in repaying to each partner the amount of capital invested in said concern, and interest thereon, and the ultimate surplus shall be divided equally among all the parties hereto; it being understood that any loss which may arise on the sale of the last-mentioned premises shall, in the final adjustment of the accounts, be borne by all the parties hereto in equal shares."

The bill avers that the property so alluded to was the real estate in question. In November, 1889, complainant instituted suit by attachment in the circuit court of Buchanan county, Mo., against the respondent corporation on said judgment, so recovered in the United States court in Kansas, and caused the real estate aforesaid to be seized under writ of attachment. Service was had in this action on the defendant therein on order of publication. There was no appearance therein by the defendant. Judgment by default was taken, which judgment was made

final May 31, 1890. Thereafter, and without issuing any execution on this judgment, the complainant filed the present bill in the said circuit court of Buchanan county, setting out the facts aforesaid, alleging that the respondent corporation and the other respondents are citizens, residents of the state of Illinois, and that the said corporation has no other property in the state of Missouri. The bill alleges that, while the legal title to the said real estate remains in the said Robert D. and Anderson Fowler, they hold the same in trust for the said corporation, with a resulting trust in favor of the complainant, as such creditor. The prayer of the bill is that said Fowlers be adjudged to so hold the said property in trust; that the court, by proper decree, subject said real estate to the payment of the judgment aforesaid, and order the sale of the said real estate for the satisfaction thereof; and for all proper relief. Service of this bill was had on order of publication. On the return-day the said Fowlers (Robert and Anderson) appeared, and on their application this cause was removed to this court, on the ground that applicants were non-residents of the state. In this court said Fowlers demur to the bill on the ground that it does not state facts sufficient to entitle the complainant to the relief sought, or to any relief whatever against respondents.

Thomas & Dowe and B. P. Waggener, for complainant.

Lancaster, Pike & Hall, for respondents.

PHILIPS, J., (*after stating the facts as above.*) It is to be kept in mind, in the consideration of this case, that the suit was instituted in the state court, and that jurisdiction in this court attaches by reason of the act of removal. It is also to be kept in mind that the plaintiff had first reduced this claim against the defendant corporation, Anglo-American Packing & Provision Company, to judgment in the United States circuit court of Kansas. That judgment was *in personam*, and, it being a court of record, every intendment is to be indulged in favor of the validity and conclusiveness of that judgment. According to the averment of the bill, the real estate in question is an asset of the debtor corporation. While the legal title thereto is in the Fowlers, in equity the property belongs to the corporation, and is held by them in trust for the payment of the corporation debts. As such it was subject to seizure under process of attachment for the complainant's debt. Section 4915, Rev. St. Mo.; *Evans v. Wilder*, 5 Mo. 313; *Rankin v. Harper*, 23 Mo. 585; *Herrington v. Herrington*, 27 Mo. 560; *Dunnica v. Coy*, 28 Mo. 525. The situs of the land drew to it the venue in the attachment proceeding in the Buchanan circuit court. The action could not have been instituted elsewhere. Sections 2010, 2011, Rev. St. Mo. The defendants therein being non-residents of the state, the statute (section 2022) expressly authorizes service by publication. After due proof of publication, judgment was taken therein by default.

It is true that it is a judgment *in rem* only, but it constituted a lien on the attached property, effectually binding it from the time of the levy of the writ of attachment, (*Lackey v. Seibert*, 23 Mo. 85,) and, when the plaintiff therein obtained its judgment, this lien became *res adjudicata*.

Having thus secured this lien by attachment prosecuted to judgment, the question arises, did the plaintiff therein have the right to resort to this bill in equity to remove the obstruction of the legal title in the Fowlers, and to subject the property to the payment of its debt, without first issuing an execution on the judgment, and having a return of *nulla bona*? Counsel for complainant invokes section 571, Rev. St. Mo., which declares that "any attaching creditor may maintain an action for the purpose of setting aside any fraudulent conveyance, assignment, charge, lien, or incumbrance of or upon any property attached in any action instituted by him." This statute clearly is not applicable to the facts of this case. It obtains solely as to fraudulent conveyances, etc., whereas the deed by which defendants obtained the legal title to the property in question was not fraudulently taken. By the averments of the bill they held it under conditions of implied trust, for the use and benefit of the debtor, with a resulting trust in favor of its creditors. The general rule of equity, as contended for by respondents, is that before the general creditor can resort to a court of equity to reach his debtor's property held under a fraudulent deed, and the like, he must reduce his claim to judgment, issue execution, and have a return of *nulla bona*; in other words, he must exhaust his legal remedies. The reason of this rule, requiring a judgment, etc., is that the claim must be rendered certain; otherwise, the proceeding to vacate the fraudulent transfer of the title, and to remove obstacles placed in the way of the successful operation of the execution, might be entirely fruitless if after all the debtor failed to obtain a judgment on his claim. But in this case the complainant had already obtained judgment *in personam* in the United States circuit court of a sister state. What was the effect of that judgment? "A judgment rendered by a court of competent authority, having jurisdiction of the parties and subject-matter, in one state, is conclusive on the merits in the courts of every other state when made the basis of an action, and in such action the merits cannot be inquired into. * * * Accordingly, the courts of one state, when called upon to recognize and enforce a judgment from another state, must admit, not only that there is a record, and that it is what it purports to be, but also that it is just, that the money awarded to the plaintiff is legally due, and that he has a right to recover it without a reinvestigation of his claim. * * * The true doctrine is that such a judgment is to receive in all courts the same faith, credit, and respect that is accorded to it at home." 2 Black, Judgm. §§ 857, 859; *Renaud v. Abbott*, 116 U. S. 277, 6 Sup. Ct. Rep. 1194. The respondents, being the principal stockholders in the corporation, and its managers, were as conclusively bound by that judgment as the corporation itself. *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. Rep. 739; 2 Black, Judgm. § 583. While such judgment, to be made available for process in another jurisdiction, would have to be sued over, yet, by the first judgment, the claim is rendered as certain as it ever can be. Its merits cannot be relitigated. The liability of the defendant corporation is fixed irreversibly. Hence, it is said by the chancellor in *Robert v. Hodges*, 16 N. J. Eq. 305:

"The objection to the interference of a court of equity, that the claim of the attaching creditor is not ascertained, if it be entitled to any consideration, can have no application in the present case, for the plaintiff's claims against the defendants have, in fact, been established by judgment. The fact that the judgment was recovered in another state does not impair the conclusiveness of the judgment as to the amount due. If the court where the judgment is recovered have jurisdiction of the person of the defendant, and of the subject-matter of the suit, its conclusiveness cannot be questioned in the forum of another state, where it is sought to be enforced. *Moulin v. Insurance Co.*, 24 N. J. Law, 222."

Where the reason of the rule ceases, the rule itself ought not longer to operate. In this case the claim was not only certain, but it had back of it a judgment conclusive and binding, and, under the law of the forum where the attachment suit was instituted, the complainant had secured and fixed his lien upon the real estate. Why should it then be compelled to proceed to execution, when all the purchaser could obtain by a sale thereunder would be a lawsuit, before he could get rid of the legal title of the respondents? He would acquire only the equitable interest of the debtor corporation in the land, after which he would be compelled to resort to a court of equity to divest the legal title. There is much practical sense in the distinction drawn by the supreme court of Maine in *Brisay v. Hogan*, 53 Me. 544:

"It is only when the debtor once had a title to the land, and has conveyed it away fraudulently, that a levy can be of any use. In such case, the conveyance being fraudulent, it is, as to the creditor, no conveyance, and he may treat the title as still remaining in the debtor. But when, as in this case, the debtor never had any title, treating the conveyance to his wife as either valid or void will not give him a title. It will be either in the wife, or in her grantor; it will not be in the debtor, and a levy on it as his property would be an idle and useless ceremony. No title could possibly be obtained by it."

In *Case v. Beaugerard*, 101 U. S. 691, the equity rule in this respect is succinctly stated thus:

"It may be said that, whenever a creditor has a trust in his favor, or a lien upon property for the debt due him, he may go into equity without exhausting legal processes or remedies. *Tappan v. Evans*, 11 N. H. 311; *Holt v. Bancroft*, 30 Ala. 193. Indeed, in those cases in which it has been held that obtaining a judgment and issuing an execution is necessary before a court of equity can be asked to set aside fraudulent dispositions of a debtor's property, the reason given is that a general creditor has no lien; and, when such bills have been sustained without a judgment at law, it has been to enable the creditor to obtain a lien, either by judgment or execution. But when the bill asserts a lien or a trust, and shows that it can be made available only by the aid of a chancellor, it obviously makes a case for his interference."

In *Tappan v. Evans*, 11 N. H. 311, cited by Mr. Justice STRONG in support of the rule above quoted, the court say, (page 327:)

"The general principle deducible from the authorities applicable to this case is that, where property is subject to execution, and a creditor seeks to have a fraudulent conveyance or obstruction to the levy or sale removed, he may file a bill as soon as he has obtained a specific lien upon the property, whether the lien be obtained by attachment, judgment, or the issuing of an execution."

Again, on page 330, it is said:

"In relation to real estate fraudulently conveyed by the debtor, one mode of relief in equity is to remove the fraudulent title either before or after a levy, so as to perfect the title acquired under the proceedings at law."

This was followed in *Sheafe v. Sheafe*, 40 N. H. 518. See, also, *Stone v. Anderson*, 6 Fost. (N. H.) 516, in which the authorities are cited holding that, whenever the attaching creditor has obtained his lien, he "has a title to maintain a bill to set aside a fraudulent conveyance of the real estate." See, also, *Bank v. Harvey*, 16 Iowa, 146-148.

In *Conroy v. Woods*, 13 Cal. 633, it is said:

"In this case the plaintiff had, before the filing of his bill, a lien by attachment and a judgment. There was no necessity for the levy of an execution. It would have answered no beneficial purpose. It was not necessary to give a lien. That had already accrued from the levy of the attachment, and it was not necessary for a sale, for a sale was not desired. * * * The authorities do not place the right to go into equity upon the ground that the complainants must show themselves to be creditors by judgment, but they go on the ground that they must show a lien upon the property, and this lien exists as well by the levy of an attachment as by execution."

In New Jersey (*Robert v. Hodges*, 16 N. J. Eq. 305) it is held that an attaching creditor, even before judgment *in rem*, is entitled to go into equity to remove obstacles to the title of the land, "because the creditor has a valid subsisting lien."

In *Lackland v. Smith*, 5 Mo. App. 162, the court, after conceding that the judgment there was only *in rem*, and could not be *in personam*, because of the non-residence of the non-appearing defendant, say:

"It was a judgment, however, binding Smith's interest in the property described in the attachment, and within the jurisdiction of the court. It gave to plaintiff a right also to proper proceedings to subject the equitable interest of Smith in this real estate to the payment of the amount found to be due. Under this execution plaintiff declined to sell any interest of Smith's, declaring that he was unwilling by such a sale to sacrifice valuable property, and he very properly, on this state of facts, commenced proceedings in equity to enforce, without any unnecessary sacrifice of a valuable interest in real estate, the legal rights which he had in his action of law established against any interest Smith may have in the property attached."

The authorities touching the right of an attaching creditor after his lien on the property is fixed to go into equity are cited, *pro* and *con*, in 3 Pom. Eq. Jur. note, p. 465. Whatever may have been the earlier view of the supreme court of Missouri, it is apparent from its later utterances that, as its horizon extends, it gives a much broader and efficacious office to equity than first entertained. The highest office of equity is to serve the best interests of justice, and, while securing this end in enforcing the rights of the creditor, it will also have regard to the interest of the debtor.

In *Bobb v. Woodward*, 50 Mo. 95, the practice of the creditor, after obtaining his judgment, proceeding to execution and sale, was deservedly censured. The court say:

"There is little doubt that the interest of both debtors and creditors would be better subserved if in all these resulting trusts the creditor were required to ascertain, by judicial decision, the actual interest of the debtor in the property before offering it for sale. * * * If the property is sold before the doubt is solved, it necessarily follows that the purchase is subject to all the uncertainty of a gambling adventure. All our observation shows that such interests are bid off at a nominal sum, and, while the debtor is stripped, the creditor receives nothing."

Accordingly, in *Zoll v. Soper*, 75 Mo. 460, the court held that—

"So long as the right to the execution upon the judgment obtained continues, the creditor may go into equity to subject the land to the payment of his debt, for the reason that a sale under an execution in such case would be, in effect, but the sale of a lawsuit, and the land would be sacrificed, and no one could possibly be benefited materially but the purchaser, and he only in the event that he succeeded in setting aside the fraudulent deed. While the creditor might have the land sold on execution, equity will not compel him to pursue that ruinous course."

This is reaffirmed as late as in *Lionberger v. Baker*, 88 Mo. 455, 456. It certainly is to the interest of all parties here concerned that the rights and equities of the debtor corporation and of the Fowlers in the real estate in question should be ascertained and definitely settled before the sale. Such was clearly the right of the complainant in the state court, where it instituted this suit. Has it lost that right by the mere act of removal into this court at the behest of the respondents? The complainant could not have brought the attachment suit in this court, as the defendants are not residents of this district. Having obtained this lien by the attachment and judgment in the state court, the present suit is ancillary to that judgment,—a continuation, in effect, of that action, to work out the satisfaction of the judgment.

The bill in equity could not have been, in the first instance, brought in this court, as the federal court cannot be employed in an ancillary or auxiliary service of the state court. *Tarbell v. Griggs*, 3 Paige, 207; *Davis v. Bruns*, 23 Hun, 648; *Clafin v. McDermott*, 12 Fed. Rep. 375. When the cause was removed here by the respondents, the other party should not be deprived of the substantial rights secured to it in the forum where it was compelled by law to bring its action. This court takes the cause precisely in the condition which the law affixed to it in the state court at the time of the removal. We take the cause as we find it, beginning where the state court left it, "with full recognition of all substantial rights." *Sutro v. Simpson*, 14 Fed. Rep. 370; *Fidelity Trust Co. v. Gill Car Co.*, 25 Fed. Rep. 741; *Goldstein v. City of New Orleans*, 38 Fed. Rep. 628, 629; *Duncan v. Gegan*, 101 U. S. 810.

It would be a travesty upon justice that a defendant, by virtue of the removal act of congress, predicated alone upon the incident of the defendant being a non-resident of the state, could escape the liability which the law places upon him in the state court, where the complainant rightfully brought his action. The complainant, having a lien and judgment in the state court giving it the right in the same court to proceed by bill in equity as it did, presents a case distinguishable from that of *Scott v.*

Neely, 11 Sup. Ct. Rep. 712. There the suit was brought in the federal court on a simple contract debt, and when there was no antecedent lien. Mr. Justice FIELD in that opinion recognizes the right here contended for, for he says:

"It is the existence, before the suit in equity is instituted, of a lien upon or interest in the property, created by contract, or by contribution to its value by labor or material, or by judicial proceedings had, which distinguishes causes for the enforcement of such lien or interest from the case at bar."

Superadded to all this, there is another ground upon which this bill possibly may be sustained. Under the provisions of the contract of 1884, made during the pendency of the suit in the United States court in Kansas, the packing-house property, which is alleged to be the real estate in question, was to be sold, and the proceeds first applied to the liquidation of the debts of the corporation. If that was a part of the consideration of the contract then made between the stockholders and directors of the corporation, it was not only an express recognition of the fact that this real estate was held in trust for the use and benefit of the corporation, but it was by all the parties in interest charged with the payment of this debt, among others. To thereafter fail to so apply it was a breach of the trust by the holders of the legal title, and would seem to bring the case especially within the province of a court of equity, to reach an equitable asset of the debtor for the benefit of the creditor. Be this as it may, the court ought to retain the bill, to see what the real facts are respecting said contract.

It is finally urged that the Anglo-American Packing & Provision Company being a necessary party to this suit, and it being a non-resident of the state, jurisdiction over it in this action cannot be obtained by order of publication. The Code of Practice of the state directs that all attachment suits shall be brought in the county where the property attached may be found, and that suits for the possession of real property, "or whereby the title may be affected, shall be brought in the county within which such real estate, or some part thereof, is situated." Sections 2010, 2011, Rev. St. As the purpose of this action is to affect the title to real estate, it had to be instituted in Buchanan county. As the object of this suit is to fix upon the real estate in the hands of the Fowlers the trust, and to subject it to liability for complainant's debt, it affects the title to real estate, and therefore the court of the *situs* of the property alone can give jurisdiction over the subject-matter. The practice act would be lame indeed, if, after making the foregoing provisions, it had stopped short of prescribing some means of bringing the parties to be affected by the judgment before the court in such manner as to give the court jurisdiction over the *res*. This the statute has undertaken to do by section 2022, which provides, *inter alia*:

"In suits in attachment, and in all actions at law or equity, which have for their immediate object the enforcement or establishment of any lawful right, claim, or demand to or against any real property within the jurisdiction of the court, an order of publication may be made," etc.

Within the purview of section 2022, this action has for its immediate object the enforcement or establishment of a lawful right, claim, or demand against the land in question. There is no intermediate claim, no ulterior object.

It follows that the demurrer is overruled.

NORTHERN PAC. R. CO. *v.* BARDEN *et al.*

(Circuit Court, D. Montana. June 12, 1891.)

1. RAILROAD GRANTS—EXCEPTIONS—MINERAL LANDS.

The provision of Act Cong. July 2, 1864, (13 St. 365,) granting land to the Northern Pacific Railroad Company, "that all mineral lands be, and the same are hereby, excluded from the operation of this act," applied only to "known" mineral lands.

2. SAME.

The lands granted being the odd-numbered sections within a certain distance of the road owned by the United States at the time when the road should be definitely fixed, and a plat thereof filed in the general land-office, to exclude land from the operation of the grant as mineral land it must have been known to be such at the time of such definite location and filing.

KNOWLES, J., dissenting.

At Law. On demurrer to complaint.

Demurrer to a complaint in an action to recover possession of portions of section 27, township 10 N., range 4 W., P. M. Montana. Plaintiff alleges its incorporation under the act of congress of July 2, 1864, (13 St. 365,) for the purpose of building the Northern Pacific Railroad; that by that act there was granted to plaintiff every alternate section of public land not mineral, designated by odd numbers to the amount of 20 sections per mile, on each side of such railroad line as said company might adopt through the territories of the United States, whenever, on the line thereof, the United States had full title, not reserved, sold or granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time when the line of said road should be definitely fixed, and a plat thereof filed in the office of the commissioner of the general land-office; also other provisions of the act; that plaintiff duly accepted the terms and conditions of said act in the mode prescribed by law, within two years after the passage of the act, to-wit: on December 24, 1864; that the *general* route of said road extending through the state of Montana, was duly fixed, on February 21, 1872; that the said lands in question in said section 27 are within the 40 miles of the line of said railroad as so fixed, and were on said February 21, 1872, public lands to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights; that at the date of said act, July 2, 1864, and the date of fixing said line of general route, to-wit: February 21, 1872, no part of said land in question was *known mineral land*, but said land was more valu-

able for grazing than for mining purposes, and that no part of said land was within any *exceptions* from said grant; that afterwards, on July 6, 1882, plaintiff definitely fixed the line of said railroad extending opposite to and past said land, and filed a plat thereof, in the office of the commissioner of the general land-office; and that said land is within 40 miles of said line of railroad as so definitely fixed; that thereafter, the plaintiff duly constructed said portion of said road and telegraph line over, and along the line of definite location so fixed, and upon reports of commissioners, as required by said act, the president of the United States duly accepted said railroad and telegraph line so constructed and completed; that at the date of so definitely locating said line of railroad and filing the plat thereof in the office of the commissioner of the general land-office, on July 6, 1882, the said land was *not known mineral land*, and was more valuable for grazing than mining purposes, and that said land was on said day public land to which the United States had full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights; that said lands were surveyed in 1868 and township plat filed in the proper land-office on September 9, 1868; that the character of said land was ascertained and determined, and reported and shown upon said plat to be agricultural and not mineral land, and that said determination, report and showing have continually remained and they still remain of full force and effect; that after the completion of said railroad aforesaid, the said plaintiff listed said lands with other lands as a portion of said grant, and thereafter on November, 1886, duly filed said list in the district land-office at Helena, and paid the receiver of said land-office the lawful fees for filing such list; and said register and receiver duly accepted and allowed said list; and certified the same to the commissioner of the general land-office; and said list has since remained and it is now of record in said general land-office, and no part of said fees has been returned or tendered to said plaintiff; that at the time of the acceptance, approval and allowance by said district land officers, and at all times prior thereto, no part of said land was known mineral land, or was of greater value for mining than for grazing or agricultural purposes, or town-site purposes, *or had any value for mining purposes whatever*; that during the year 1888 certain veins or lodes in place of rock in place bearing gold, silver and other precious metals were discovered in said land, and thereafter certain parties named, being citizens of the United States, without the consent and against the will of plaintiff, entered upon said land and made locations of said veins or lodes, to-wit: on June 20, 1888, the Vanderbilt Quartz Lode Mining Claim on lot 68, on August 10, 1888, the Four Jacks, N. Y. Central, and Hudson River Quartz Lode Mining Claim, number 72, 74, and 75, respectively; and on May 9, 1889, the Chauncey Depew Quartz Lode Mining Claim on lot number 73 of said lots, being within the said disputed premises; that said defendants are in possession of said lots 68, 72, 73, 74, and 75, claiming title under said locations through mesne conveyances from said locators, and they have been and now are extracting ore therefrom; and that although title has vested in said plaintiff, under said

act of congress, and the acts performed by it as alleged, and plaintiff has thereby become the owner of said land, the United States have failed and refused to issue a patent to said plaintiff, as required by said act. The value of the disputed premises is alleged to be \$6,000, and of the ore extracted, over \$100. Plaintiff prays judgment for possession of the premises and of the value of the ore extracted.

F. M. Dudley and Cullen, Sanders & Shelton, for plaintiff.

Adkinson & Miller, for defendants.

Before SAWYER, Circuit Judge, and KNOWLES, District Judge.

SAWYER, J., (*after stating the facts as above.*) The complaint undoubtedly states many facts, not necessary to be stated in a complaint to recover land. It not only sets up the probative, as well as, the ultimate, facts necessary to be stated to make a good complaint, but the facts which the defendants will rely upon to defeat the action. The object doubtless, is, to state all the facts, as they really exist, or are supposed to exist, with a view to having the rights of the parties on that state of facts determined in the simplest form upon a demurrer to the complaint. Although somewhat cumbersome in a pleading in an action at law, I see no objection, the defendants making none, to taking the course pursued by plaintiff in this case, provided it has set out sufficient facts, to show upon the whole case, a good cause of action. The defendant has not moved to strike out any part, as being irrelevant or redundant, but has met the case fairly by a demurrer, both parties, doubtless, being desirous of having their rights determined in the shortest, easiest, and least expensive manner.

Taking all the facts as alleged in the complaint, I think there can be no doubt, that the title to the land in controversy is in the plaintiff, unless the allegation of the discovery of mines in 1888, is sufficient to show that the land containing them is mineral, within the meaning of the term as used in the act of congress; and, that the lands are, therefore, within the exception from the grant to plaintiff of mineral land. This being the case it becomes necessary to determine, definitely, what congress meant by the words "not mineral" in the first part of section 3, and the words "mineral lands," in the clause "that all *mineral lands* be, and the same are hereby excluded from the operation of this act," in the third proviso of the same section. And the meaning of these terms is the great question, so elaborately and ably discussed by counsel of the respective parties, upon which the decision of the demurrer, it is conceded, must turn. For the purposes of this decision, I shall assume, that the complaint shows a discovery of valuable mines in 1888, when the several claims alleged were located—such as would have taken them out of the grant, had they been *known*, at the time when the line of the road was definitely fixed. This question is not new to the circuit court for the northern district of California; or to the state courts of California and Nevada, as a reference to the decisions of the supreme courts of these states will show. The circuit court had occasion to consider the precise point, fully, and directly decide it in *Francoeur v. Newhouse*, 14 Sawy.

351, 40 Fed. Rep. 618, arising under the legislative grant to the Central Pacific Railroad Company, of July 1, 1862, (12 St. 489.) The words of exception in the act are "that *all mineral lands* shall be excepted from the operation of this act." After mature consideration, in that case, it was held, the circuit and district judges concurring, that, the meaning of the term, "mineral lands," as used in the exception, is, lands that were not only mineral, in fact, at the time the grant attached and took effect, but that they must be lands that were *known* to be mineral, or at least, such as were apparently mineral, and generally recognized as such, 14 Sawy. 355, 40 Fed. Rep. 622. The court there said:

"The next question is, did the land in question pass, by the grant of 1862, perfected in 1866-67, in which a gold mine was discovered in 1883, twenty-one years after the grant attached, by the filing of a plat of the general route of the railroad, and the withdrawal of the lands in pursuance of the statute, by the secretary of the interior, and more than seventeen years after the completion of the road, and its acceptance by the president; and more than sixteen years after the final survey, and report of the lands as agricultural, and not mineral. The parties to this grant, both the United States and the grantee, must be presumed to have contemplated a grant in view of the condition of the lands as they were known, or appeared to be, at the time the grant took effect. In the exception of 'mineral lands' from the grant, congress could not have contemplated that the discovery of a paying mine, fifteen or twenty years after the making of the grant, and the performance of all the conditions by the grantee, required to perfect the title, and render it irrevocable, should vitiate the grant. If so, then such a discovery fifty, or one hundred years after, would effect the same result. In granting the public lands, congress must be presumed to deal with them in view of the conditions as they are known, or supposed to be, at the time. Exceptions must be presumed to refer to matters that are readily apparent upon inspection. Any others would be altogether too indefinite to be valid. The conditions constituting the exception ought, certainly, to be ascertainable at the time the grant takes effect, or they ought not to be operative; otherwise, the greatest confusion and inconvenience, public and private, must, necessarily, result. The grant should point out what is granted in such certain terms, that the grantee may be able to ascertain by inspection, and know at the time the location is, definitely, fixed; and it becomes operative, what specific tracts of land are granted, and what are excepted from the grant. These lands soon after the grant, were conveyed, in trust, under authority of the law, as security for the bonds issued, out of the proceeds of which the road was constructed; and the proceeds of these sales are devoted by the trustees to the redemption of the bonds. Is this security to be impaired, or destroyed, by taking from the operation of the grant all lands in which at any future time gold, or other valuable metals may be discovered? If so, all of the lands may, sooner or later revert to the United States, and bondholders, and those, who in good faith, have purchased the lands of the company, without being aware of the mines secluded in their lower depths, will be largely injured. These words 'mineral lands,' as used in the act, must be construed in a practical sense—as practical men would use them in contracting about them—must be construed with reference to their present known, or at least, obviously apparent, condition." 14 Sawy. 355, 356, 40 Fed. Rep. 620, 621.

The circuit court had before made, substantially, the same ruling in *Cowell v. Lammers*, 10 Sawy. 257, 21 Fed. Rep. 200, and in *Milling Co. v. Spargo*, 8 Sawy. 645, 16 Fed. Rep. 348. The supreme court of the United

States, although the precise question had not been necessarily presented, had by implication held the same way in the several cases referred to in the decision in *Francoeur v. Newhouse*, cited. Upon further consideration, I am still satisfied, upon principle, with the ruling in those cases, and think, that to hold otherwise, would be disastrous to the great interests of all the states having mines of the precious metals, and to none more so than the state of Montana. The defendants' counsel assail the decision in *Francoeur v. Newhouse*, and insist that the title to no land which, *in fact*, contained valuable mines secreted in its lower depths at the time the grant attached to the specific lands and became perfect, passed to the company under the railroad grant, though the existence of the mineral was unknown, and unsuspected, at the *time*, and there was nothing to indicate that any mine was there—even though the existence of the mine could not by reasonable diligence have been ascertained. And one of the senators from Montana, in an elaborate speech in the senate during a session of the last congress, criticising the opinion in *Francoeur v. Newhouse*, with great ability supported the same view. Said he, in the course of his speech:

"If one thousand years hence, a mine is discovered in an odd section of land which it will pay to work, thereby it will be demonstrated that on the 2d day of July, A. D. 1864, congress had that particular land in view, when it said 'we except that mineral land out of the grant,' and that it not only then becomes, but it is thereby demonstrated that it has always been, during the thousand years the property of the United States." 21 Cong. Rec. p. 10946.

And a senator from California, a most skillful mining expert, and a large owner of mines in Montana, interrupted the senator's speech with the observation, "*In a thousand years from now, I have no doubt mines will be found in many of those lands.*" Id. 10,947. Either the doctrine of *Francoeur v. Newhouse*, or that stated by the senator from Montana, as quoted, must be the true doctrine. There is no middle ground upon which to stand. No middle line can be drawn, and statutes of limitations do not run against the United States. Nearly all statutes require construction. Such is the imperfection of the human intellect, and human language that it is difficult, if not impossible, to draft an act, that shall, exactly, cover every possible case contemplated by the author, and nothing more; and that his intent shall be apparent to every intelligent mind. The statute of frauds of England, drawn by one of England's ablest lawyers, is a good illustration. It is said by English law-writers, that it has required a great many more suits to settle the meaning of the statute of frauds, than there are words in the statute. This act of congress, evidently, requires construction, otherwise there could be no possible ground for difference of opinion as to its meaning among, reasonably, intelligent persons. And it must receive a reasonably sensible construction; a reasonably practical construction; a construction that will enable reasonably intelligent men to determine at the time the grant attaches, what was granted, and what excepted from the operation of the grant; a construction that will afford reasonable certainty, as to land

titles. A meaning must be given to it, that reasonably intelligent practical men would be likely to *deliberately contemplate* in passing the act. Such a construction I conceive was given to the Central Pacific grant in *Francœur v. Newhouse*. But the construction urged by the senator, and counsel in this case, would be unreasonable in the extreme, and *utterly impracticable and absurd in its consequences*—a construction as it appears to me, that no sensible practical man could ever *deliberately contemplate*. It would be, absolutely, destructive and subversive of all titles to land in the state of Montana, and all new states wherein are similar grants; or, at least, destructive and subversive of all confidence in and security of titles. A severer blow could not well be struck at the interest and prosperity of the state, at large, of Montana, and other states similarly situated, than to adopt that construction, and thereby destroy all confidence in titles to land. Nothing is more conducive to the prosperity of a state, than unassailable land-titles, and a feeling of confidence, and a sense of security in such titles. Adopt the construction insisted upon, and no man from Lake Superior to Puget sound, within the exterior bounds of the railroad grant, whether on the odd, or even sections, would know whether he has a title to land purchased either from the government or the railroad company, until a mine either has been, or shall hereafter, at some time in the future more or less distant, be discovered on it, when he will, know for the first time, that he has no title. Indeed this state of things would not be confined to the lands of the railroad grants, but would extend to all lands in the state. Mineral lands have always been, and they are, now, excepted and reserved from pre-emption, homestead entry, and all other ordinary modes of disposition except congressional, in, substantially, the same language, as that in the railroad grant. Every patent issued for mineral lands to a pre-emptor, homesteader, or other purchaser, *within the meaning of the exception*, is utterly void and passes no title, at least, upon a direct, and not collateral attack. This is conceded by the senator from Montana, and must be by counsel. They all stand upon the same footing with the railroad company, and its grantees, except, that, the latter can do without a patent, as the title passes irrevocably by the congressional grant, and the performance of the conditions subsequent. The patent adds nothing as a title. It is only a convenient instrument of evidence, in the language of the statute "*confirming not transferring to said company the right and title to said lands.*"

It does not seem possible that congress, deliberately, intended to leave the titles to all lands in the new states in a state of such lamentable *uncertainty*,—a condition of things utterly destructive to the interests, and obstructive of the prosperity and progress of those states. The mining interests, whatever the case may now be, will, ultimately, become one of the least important. If congress had intended such unnatural and undesirable results, it could have easily expressed its intention in unmistakable language. It provided no means, and no tribunal to determine, upon examination for the purpose, what lands were mineral, within the meaning of the act. It did not require the railroad company, or anybody

on behalf of the government, to prospect the lands to ascertain what were mineral. And had it done so, in most instances it would have been unavailing, so far as ascertaining the real condition of the land is concerned. Repeated prospecting, at different times, and, by different parties, in practical work, is often required to disclose a mine. Without any provision for, positively, determining what lands are mineral, for the purposes of the act, at the time the grant attaches, there can be but one reasonable and safe rule, and that is to exclude those which are known to be mineral, or which upon inspection can be readily ascertained to be mineral. The odd sections are the subject-matter of the grant, and the mineral lands in the odd sections are the exceptions. The latter are taken out of the former. Now, the exceptions should be readily identified by inspection. If they cannot be identified by inspection, they are too indefinite and uncertain to be valid, and they must be void for uncertainty. The exception must be specifically pointed out, so that it can be readily ascertained. Exceptions are strictly construed. As an illustration, take a case on a section of the road where the line of the road is definitely located; the road is finished, and all the conditions subsequent are fully performed, the road accepted, and the title to whatever is within the grant, be it more or less, irrevocably vested in the railroad company. The lands are surveyed. So far as can be known by inspection and superficial examination, the lands appear to be timber lands, agricultural lands, or grazing lands, and they are in good faith purchased as such from the railroad company, and occupied as such by the purchaser. Are these lands, so situated, against the will of the purchasers, open to wandering prospectors to enter at will upon them, dig up the earth, sink shafts, run drifts, tunnels, etc., to see if they can find a mine? And failing to find a mine, is the land open year after year for other bands of prospectors to enter and repeat the performance *ad infinitum*? And should a mine, at last, after years of prospecting be found, is the purchaser to have his land taken from him on this exception? Yet such must be the consequence of the construction insisted upon by the defendants. If one quarter section is thus open to exploration, and the title thereto liable to be thereby defeated, by a discovery of a mine at any time, no matter how long, in the future, then every foot of land within the limits of the railroad grant, and even outside these limits, from Lake Superior to Puget sound, is in the same situation, and the title liable to be defeated in the same manner. No man can ever know whether he has a title or not, until a mine is discovered, when he learns that he has no title, but that the land belongs to the United States. I cannot bring my mind to believe it possible, that men of the intelligence and sound sense of those who constitute the senators, and members of the house of representatives in congress, could have *deliberately and knowingly intended or contemplated any such result*. And what adequate object is to be attained by such a construction as will destroy titles and be subversive of all confidence in titles to land in all these new states? For whose benefit is this extraordinary and hurtful condition of things to be imposed on the new states? Is it, that the government may obtain the insignificant

sum of \$6 per acre for a small strip of land here and there at long distances apart, not exceeding 1,500 feet long by 600 feet wide? Or is it to give a preference to purchasers at that insignificant price, over permanent settlers, who have already purchased, paid for and improved lands in good faith, to a comparatively few nomadic prospectors, who remain at the same place but a short time?

Should it turn out in course of time, that indications of mines appear, the owners will be quite as likely to prospect for and discover any mine, that may be concealed in the depths of the earth there, as the professional prospectors; and the country, at large, will, in the end, be equally benefited by the result. Is there any object to be accomplished by such an unreasonable, and impracticable construction of the grant as is claimed for it, leading to such absurd consequences, that will compensate for the great wrong and injury that must, necessarily, be inflicted on the new states by removing all grounds for confidence in land-titles? When a dispute arises as to whether the land was *known* mineral land when the grant attached, it may always be safely intrusted to a jury to determine the point. As an instance see the special verdict and charge of the court on the trial of this same case cited of *Francoeur v. Newhouse*, 14 Sawy. 600, 43 Fed. Rep. 236. When the United States made the railroad grant, in order to secure the construction of that great transcontinental road through thousands of miles of a comparatively unsettled region, it intended to offer something *substantial* as an inducement. It gave nothing, for as usual, it doubled the price of all alternate sections, and, by the completion of the road made a market for these lands at the enhanced price. A large development of the resources of the country was also, thereby induced. Besides the government saved millions in the cost of transporting the mails, military forces, supplies, etc. For the United States, now, years after the road has been built, and been in successful operation, to insist upon the construction maintained by defendants is to discredit all the titles of the railroad company, and of those holding titles under it; to throw insuperable obstacles in the way of selling these lands by thus discrediting the titles, and to thereby deprive the company of the substantial aid, which it had reason to believe it was to receive upon the performance of the conditions of the contract on its part. There can, possibly, no benefit result to the United States, or to any persons, or classes of persons, designed to be favored thereby, by the construction of the act of congress insisted upon by defendants, that will at all compensate for the wrong to the railroad company and its grantees, occasioned by discrediting these titles, and the blight put upon the prosperity of all those new states, by destroying and subverting all grounds for confidence in the land-titles of those states. I am, myself, still satisfied with the rule laid down in *Francoeur v. Newhouse*. The court did not, it is true, pass upon the Northern Pacific grant, but it did construe substantially, the same language in a strictly cognate, and analogous provision, and I do not, myself, see how it can hold differently with reference to the railroad grant now in question, without overruling its prior decision. But the supreme court of the United

States, in *Davis v. Webbald*, 139 U. S. 507, 11 Sup. Ct. Rep. 628, a case but recently decided, has, as it appears to me, authoritatively, decided the question now involved, in strict accordance with the foregoing views. But for the fact, that it has been questioned by counsel, and my associate, whether this ruling, because arising under a town-site act, and not a railroad grant, is applicable to the case in hand, I should myself have supposed that the point was not open to any further doubt or discussion. Had it not been for this contention on their part I should have deemed it necessary, only, to refer to the case, and leave the matter there without further history of the question, and the prior discussion upon it, or further argument. The plaintiff in that case, relied upon a patent for a mine, bearing date January 15, 1880. The defendant upon a prior patent, issued under the town-site act, for the town-site of Butte, in Deer Lodge county, Montana, dated September 26, 1867, and conveyances from the patentee to the defendant. The latter being the earlier patent contained the clause, that "*no title shall be hereby acquired to any mine of gold, silver, cinnabar, or copper.*" The town-site act, under which the patent issued, provides that "*no title shall be acquired,*" under its provisions, "*to any mine of gold, silver, cinnabar or copper.*" (Rev. St. § 2392.) And the general statute also provides: that "*in all cases lands valuable for minerals shall be reserved from sale, except as otherwise directed by law.*" Section 2318. At the trial, after introducing this patent for the town-site and subsequent conveyance to him, defendant offered to prove by sundry witnesses that, "*at the time the patent to the town-site was issued, the premises embraced by the Gold Hill lode were not known to be valuable for minerals of any kind.*" Objection was made to this evidence on the ground that the patent to defendants *proved* that the premises in fact contained valuable minerals, and therefore, could not under the statute be granted by patent for a town-site, which objection was sustained, an exception entered, and an appeal thereon taken. The question before the supreme court, and upon which the decision turned, was, whether the provision of the statute, that "*no title shall be acquired*" under the act "*to any mine*" merely, meant "*any known mine;*" or in other words, whether if there was no "*known mine*" on the land at the date of the patent, a mine *existing in fact*, but not discovered till some years afterwards, passed by the patent, notwithstanding the express prohibitory provision in terms so broad and comprehensive, of the statute? Or whether the provision only meant "*known mine?*" And the supreme court held that it was limited to *known* mines, and that the title to a valuable mine *not known* at the date of the patent; that is to say when the grant attached to the land, did pass under the patent, notwithstanding this prohibitory provision, so comprehensive in its terms, and, that, there was nothing left in the government to pass under the subsequent patent to those who had discovered the mine after the issue of the first patent. The court, consequently, held, that the exclusion of the evidence offered to prove that there was no "*known mine*" at the date of the patent, was erroneous; and it reversed the judgment on that ground alone.

It is urged, in this case, that to hold that a mine must have been known to exist at the date, when the railroad grant attached, in order to exclude it from the grant, is to unreasonably and without authority, introduce into the statute the word "known." If that be so, then the same must be true as to the provision of exception or exclusion in the town-site act, that "no title shall be acquired" under its provisions "to any mine of gold, silver, cinnabar or copper," construed by the supreme court, in *Davis v. Weibbold*. Will it be seriously said, that the supreme court unwarrantably introduced the word "known" into that act, thereby largely limiting the scope of the exception, and largely enlarging the scope of the granting power of the act, as intended by congress? If this is the result, it was not attained, and this construction of the act, was not adopted, by any hasty ill-considered action of the court, for that tribunal deliberately reached its conclusion "after much consideration." Says the court:

"When the entry of the town-site was had, and the patent issued, and the sale was made to the defendant of the lots held by him, it was not known—at least it does not appear that it was known—that there were any valuable mineral lands within the town-site, and the important question, is, whether in the absence of this knowledge the defendant can be deprived under the laws of the United States of the premises purchased and occupied by him because of a subsequent discovery of minerals in them and the issue of a patent to the discoverer. After much consideration we have come to the conclusion that this question must be answered in the negative. It is true that the language of the Revised Statutes touching the acquisition of title to mineral lands within the limits of town-sites is very broad. The declaration that 'no title shall be acquired' under the provisions relating to such town-sites, and the sale of lands therein 'to any mine of gold, silver, cinnabar, or copper; or to any valid mining claim or possession held under existing laws,' would seem on first impression to constitute a reservation of such mines in the land sold, and of mining claims on them, to the United States; but such is not the necessary meaning of the terms used; in strictness, they import only that the provisions by which the title to the land in such town-sites is transferred shall not be the means of passing a title also to mines of gold, silver, cinnabar, or copper in the land, or to valid mining claims or possessions thereon. They are to be read in connection with the clause protecting existing rights to mineral veins; and with the qualification uniformly accompanying exceptions in acts of congress of mineral lands from grant or sale. Thus read they must be held, we think, merely to prohibit the passage of title under the provisions of the town-site laws to mines of gold, silver, cinnabar or copper, which are known to exist, on the issue of the town-site patent, and to mining claims and mining possessions, in respect to which proceedings have been taken under the law or custom of miners, as to render them valid, creating a property right in the holder, and not to prohibit the acquisition for all time of mines which then lay buried unknown in the depths of the earth. The exceptions of mineral lands from pre-emption and settlement and from grants to states for universities and schools, for the construction of public buildings, and in aid of railroads and other works of internal improvement, are held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify expenditure for its extraction, and known to be so at the date of the grant. There are vast tracts of country in the mining states which contain precious metals in small quantities, but not to a sufficient extent to justify the expense of their

exploitation. It is not to such lands that the term 'mineral' in the sense of this statute is applicable." 139 U. S. 518, 11 Sup. Ct. Rep. 632.

The closing paragraph shows that the court did not consider itself as limiting its construction to the town-site act, and such provisions, only, as have been here seriously contended, whether correctly or not, were alone *in pari materia*. It shows that the court considered the ruling as applicable to "grants for the construction of public buildings: *in aid of railroads and other works of internal improvement*," as well as to pre-emption, town-site, etc., grants. The cases cited from the state, and circuit courts of the United States, are nearly all cases of railroad grants, and the long citation, with approbation, from *Cowell v. Lammers*, 10 Sawy. 246, 257, 21 Fed. Rep. 200,—a case arising under a railroad grant,—contains the passage laying down the rule as now established by the supreme court in the case cited, to-wit: "By the words 'mineral lands' must be understood lands *known* to be such, or which there is satisfactory reason to believe are such at the time of the grant or patent." After citing numerous rulings of the departments, the uniform decisions of the state and circuit courts, and *its own implied recognition of the rule as stated in Cowell v. Lammers, and, now adopted in Davis v. Webbald*, where the decision of the point, as it is the great issue in the case, could not be avoided, the court proceeds:

"In connection with these views it is to be borne in mind also, that the object of the town-site act was to afford relief to the inhabitants of cities and towns upon the public lands, by giving titles to the lands occupied by them, and thus induce them to erect suitable buildings for residence and business. Under such protection many towns have grown up on lands which previously to the patent, were part of the public domain of the United States, with buildings of great value for residence, trade and manufacture. It would be in many instances a great impediment to the progress of such towns if the titles to the lots occupied by their inhabitants were subject to be overthrown by a subsequent discovery of mineral deposits under their surface. If their title would not protect them against a discovery of mines in them, neither would it protect them against the invasion of their property for the purpose of exploring for mines. The temptation to such exploration would be according to the suspected extent of the minerals, and being thus subject to indiscriminate invasion, the land would be to one having the title, poor and valueless, just in proportion to the supposed richness and abundance of its products. We do not think that any such results were contemplated by the act of congress or that any construction should be given to the provision in question which would lead to such results. Our conclusion as already substantially stated, is, that congress only intended to preserve existing rights to known mines of gold, silver, cinnabar or copper, and to known mining claims and possessions, against any assertion of title to them by virtue of the conveyances received under the town-site act, and not to leave the titles of purchasers on the town-sites to be disturbed by future discoveries." 139 U. S. 525, 11 Sup. Ct. Rep. 635.

These observations as to the great impediment which the construction insisted upon by defendants, would throw in the way of the prosperity of towns, apply, as we have already seen, with, at least, equal if not greater force with reference to the obstruction to the progress and pros-

perity of the state at large, should that construction be adopted as to the railroad grants in question. If the decision in *Davis v. Weibbold*, does not, strictly, apply to, and, fully, cover the question we are now called upon to decide, I confess I do not know to what it does apply, except to another case arising under the same town-site act, wherein the mines were discovered, located, and patented years after the issue of the patent to the town-site. The court intimates no such limitation. It refers to the various forms of the exception in the various acts making grants for *public improvements, universities, railroads, and acts excluding mines from pre-emption, and homestead acts, etc.*, and cites the decisions arising under them all, tending in the same direction, as though they all stood upon the same footing, as they, evidently, do. Each only provides for carrying out the public policy of the nation to exclude mineral lands from the operation of all these statutes. Though differently expressed, in the different acts, they all were intended to accomplish the same object, and all mean the same thing. What difference can there be in the meaning of the following phrases found in different acts? "That all mineral lands, be and the same are hereby excluded from the operation of this act." N. P. Co. grant act, (13 St. 367, § 3.) "That all mineral lands shall be excepted from the operation of this act." C. P. R. Co. grant act, (12 St. 492, § 3.) "In all cases, lands valuable for minerals shall be reserved from sale, except as otherwise, expressly, directed by law." Rev. St. 2318. "No title shall be acquired under the foregoing provisions of this chapter to any mine of gold, silver, cinnabar or copper." Town-site act, (Rev. St. 2392.) "No lands on which are situated any known salines or mines shall be liable to entry under and by virtue of the provisions of this act." Pre-emption law of 1841, (5 St. 456, carried into Rev. St. § 2258.) Now all these acts with reference to the questions now under consideration appear to me to be *in pari materia*, and I am satisfied that they were intended to carry out the same line of public policy, and were intended to mean the same thing. The first act of 1841, says "*known salines or mines*;" and such, doubtless with reference to mines was what was intended by the subsequent acts. If there is any difference in the other provisions on this point, the town-site act is stronger against the construction adopted by the supreme court than those in the railroad acts, as it forbids the acquisition of title "to *any* mine of gold," etc.,—no *one* mine can pass. But the same constructions as to this point must be given to all these provisions. There can be no distinction made. In my judgment therefore, the decision in *Davis v. Weibbold*, covers, and concludes, this case. This case also affirms the ruling in *Cowell v. Lammers*, 10 Sawy. 246, 21 Fed. Rep. 200, and in *Deffeback v. Hawke*, 115 U. S. 392, 406, 6 Sup. Ct. Rep. 95, that the insertion in a patent of an exception, not expressly authorized by law, is void.

A question has also been suggested in this case, as to when there must be a "*known mine*" in order to take it out of a grant to the railroad company under the exception in the grant? The four points of time suggested, are, the date of the act of congress making the grant; the time of the filing of a map of the general route; the time of the definite loca-

tion and filing a plat thereof in the office of the commissioner of the general land-office, and the date of the issue of a patent. The ruling of the circuit court for the district of California, heretofore has been, that the date of the definite location of the line of the road, is the date at which the mineral character of the land must be known, in order to take it out of the grant. Thus upon the trial of *Francoeur v. Newhouse*, the court so charged the jury. The following is the language of the charge:

"The words 'mineral lands,' as used in the act of congress, mean lands known to be mineral at the time the grant took effect, and attached to the specific land in question, or which there was satisfactory reason to believe were such at said time. Only such land as was known to be mineral, or which there was satisfactory reason to believe was mineral at the time the grant attached to the land, is excepted from the grant. * * * The question then arises, whether or not they were known, or there was sufficient reason to believe, at the time this grant attached—and that is when the line of the road became definitely fixed, according to my construction of the act—to be mineral land." 14 Sawy. 603, 604, 43 Fed. Rep. 238.

Until that time the grant is *a float*, and does not attach to any particular land. No one, till then, can know upon what land the grant will, ultimately, fall. Up to the definite fixing of the line of the road, it is all public land, and there is nothing to prevent any interest recognized by this law, not otherwise prohibited, from being acquired. The railroad company up to that time has acquired no interest in any specific odd section of land; but at the moment the line is definitely fixed, and a plat filed in the office designated by law, the grant attaches itself to all odd sections not embraced in any of the exceptions; and the title of the company becomes indefeasible except by a failure to perform the conditions subsequent, and the taking of proper means to forfeit the grant by the government. Upon the performance of the conditions, the title in the company, before, in a certain sense inchoate, becomes perfected and indefeasible. If none of the exceptions are operative to prevent the title from vesting when the line is so definitely fixed, of course, the title takes effect, by relation from the date of the act, without affecting any other vested interest whatever. But if the land is within one, or more, of the exceptions, at the time the grant would, otherwise, attach, it is taken out of the grant altogether, and nothing passes, either present, or by relation to the date of the granting act. Thus, if an odd section is *known mineral land*, at the date when the grant would otherwise attach, it is not within the grant, and no vested interest is affected, either present, or by relation. So, under section 6, which protects the lands for the company within 40 miles of the *general line* after it shall be fixed, from sale, entry or pre-emption by other parties, till the company can, definitely, fix its line, does not prevent the discovery of a mine, or prevent a mine from becoming *known* at any time before the line is definitely fixed, as prescribed by law; and should there be a *known* mine, when the company's grant attaches to the specific lands by definitely fixing its line, I apprehend, that it would not pass by the grant, whether anybody else, by "purchase, entry or pre-emption," could acquire an interest in the *known* mine or not. There is no provision in the act against the discovery of

a mine, or against a mine becoming known during the withdrawal from sale, in such sense as not to bring it within the exceptions of the grant to the railroad company, and thus take it out of the operation of the grant. And when a discovery of a mine is once made, *before the grant attaches*, the land is at once brought within the exception, and taken out of the scope of the grant, and is no longer within the prohibitory clause of section 6, and it is not perceived why a mining claim may not be at once located. It can no longer be regarded as one of "the odd sections of land hereby granted," within the meaning of the provision of section 6 that "the odd sections *hereby granted* shall not be liable to sale, or entry, or pre-emption," except to the company. The following passage from the decision of *Davis v. Weibbold*, referring to a former decision would seem to reach and cover this point. Says the court:

"We stated there that land embraced within a town-site on the public domain, when unoccupied, was not exempt from location and sale for mining purposes, and referred to the fact that some of the most valuable mines in the country were within the limits of incorporated cities, which had grown up on what was on its first settlement a part of the public domain. We were speaking at that time of town-sites *for which no patent had been issued*, and of mines in public lands, for immediately after using these expressions, we said: '*Whenever, therefore, mines are found in lands belonging to the United States, whether within or without town-sites, they may be claimed and worked, provided existing rights of others, from prior occupation, are not interfered with.*'"

If this view be correct, and I think it is, then the ground of the *objection suggested* that the limitations of the exception of the grant to *mines known* at the date when the grant attaches by a definite fixing of the line of the road, would take from the holders all mines discovered between the date of the act of July 2, 1864, and the definite location of the road, 18 years thereafter, on July 6, 1882, *fails*; for such mines, so discovered, and *known before July 6, 1882, would be excluded from the grant*, by the exception.

It has been urged, also, that, in some instances, the line of the road, as finally definitely located, and fixed, and upon which it is now constructed, is not within 100 miles from the *general* line at first fixed, and under the provisions of section 6, the lands within 40 miles of which were for the time being withdrawn from "sale, or entry or pre-emption" except by the railroad company; and that the construction insisted upon by defendants, would be disastrous to all parties, discovering, and locating, mines within that 40-mile belt from the date of the act till the final definite location of the line in 1882. But this objection is answered by what is said in the last paragraph, that there is no provision in the act against mines becoming *known*, at any time, before the grant attaches by the definite location. If the mines are *then known*, they fall within the exception. Besides, the moment the line of the road becomes, definitely fixed, in the mode prescribed by the act, no matter when it is, the lands within 40 miles of the *general* line, not within the prescribed distance from the line as finally definitely fixed, are, necessarily, discharged from the disabilities imposed in section 6, for they, thereafter,

never can become "the odd sections of land hereby granted," within the meaning of that section. The decision in *Davis v. Weibbold*, also, affirms the ruling in *Francoeur v. Newhouse*, 14 Sawy. 358, 359; 40 Fed. Rep. 618, that a patent issued to land in which the title has already passed out of the United States, is utterly void, and may be shown to be void even in an action at law to recover the land. If it is necessary that the land should be known to contain valuable mines in order to bring it within the exception of the grant, then in opposition to the rule hereinbefore expressed, it is insisted that the point of time when the land should be known to be mineral, in order to exclude it, is, not when the line of the road is definitely fixed, but the time when the patent issues—that the title to the land does not vest until the issue of the patent, and the character of the land, as it is then known, or supposed to be, is to control. The passage from the decision of the circuit court in *Cowell v. Lammers*, 10 Sawy. 257, 21 Fed. Rep. 200, that "there must be some point of time, when the character of the land must be finally determined, and, for the interest of all concerned, there can be no better point to determine the question, than at the time of issuing the patent," is quoted, to sustain this view. This observation, perhaps a little too general, was made with special reference to the facts of that case, wherein, the railroad company had not only fixed its line, and completed its road, but a patent had issued to it in conformity with the statute, covering the mine, years before the mine was discovered, and located. The title therefore had not only vested under the legislative grant, but the question as to the right of the company to the land as being non-mineral, had been determined in its favor, and the grant was confirmed by the patent, while the locator of the mine had nothing as evidence of title. He had simply by a trespass upon lands, thus determined to be private property, discovered, and located a mine. He was, therefore, in no position to, collaterally, assail the title of the plaintiff, as is well settled by numerous decisions of the supreme court. It was with reference to this condition of things, that the observation was made, proper enough, as applicable to the facts of that case, but certainly not intended to impugn the decision of the supreme court, as to the time, when the title to the lands, under the statute, *actually first* vested in the railroad company. That the title vests upon the definite location of the road, subject only to be defeated by failure to perform the conditions subsequent and proper measures thereupon taken to forfeit the grant, had been so often decided by the supreme court, that it did not seem open to further argument. Yet, the question was again raised under the identical act now in question, in the case of *St. Paul, etc., R. Co. v. Northern Pac. R. Co.*, 11 Sup. Ct. Rep. 389, (recently decided,) and that construction was emphatically reaffirmed. If possible, the point of the ruling is stated in more perspicuous and unmistakable language than in any former case; and I shall, therefore, quote liberally from the decision, as it appears to place beyond all possible grounds of doubt, the time when the lands must be *known* to be valuable for its minerals, in order to bring them within the exceptions of the legislative grant. Says the court:

"As seen by the terms of the third section of the act, the grant is one *in præsenti*, that is, it purports to pass a present title to the lands designated by alternate sections, subject to such exceptions and reservations as may arise from sale, grant, pre-emption, or other disposition previous to the time the definite route of the road is fixed. The language of the statute is 'that *there be and hereby is granted*' to the company every alternate section of the lands designated, *which implies that the property itself is passed, not any special or limited interest in it.* The words also import a transfer of a present title, not a promise to transfer one in the future. The route not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification; but, when once identified, the title attached to them as of the date of the grant, except as to such sections as were specifically reserved. It is in this sense, that the grant is termed one *in præsenti*; that is to say, it is of that character as to all lands within the terms of the grant, and not reserved from it at the time of the definite location of the route." 139 U. S. 5, 11 Sup. Ct. Rep. 390.

Thus, it is said, the language—

"Implies that the *property itself* is passed, *not any specific or limited interest in it.* The words also import a transfer of a present title, not a promise to transfer one in future. * * * The title does not attach to any specific sections until they were capable of identification, but when once identified, the title attached to them, as of the date of the grant, except as to such sections as were specially reserved. It is a grant '*in præsenti*,' as to all lands within the terms of the grant, and not reserved from it at the time of the definite location of the grant."

Is it possible to express, more clearly, the idea maintained in this opinion, as to when the grant attached and title passed, and, consequently, when the lands must be known to be mineral, in order to bring them within the exceptions of the grant? And lands known to be mineral, as the provision is construed by the supreme court, and, then only, are the lands excluded on the ground that they are mineral. Again, says the court:

"It is contended that they are qualified and restricted by the provision of the fourth section, that whenever 25 miles of the road are completed in a good, substantial and workman-like manner, and the commissioners appointed to examine the same have made a report to that effect to the president, patents shall be issued 'confirming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road.' This provision, it is urged, is inconsistent with the theory that a title to the lands had previously vested in the company. We do not think so." 139 U. S. 6, 11 Sup. Ct. Rep. 390.

Thus, the court recognizes the fact, that the provisions of the act as to issuing patents, describes the patent as only "*confirming*" the title already vested, not as, originally, granting, or passing the title. And again:

"The construction we give to the granting terms of the act, as qualified by subsequent provisions, not only secures the application of the property to the construction of the road and telegraph line, and thus carries out the purposes of the government, but also secures the company against any attempted alienation of the land to other parties." 139 U. S. 7, 11 Sup. Ct. Rep. 391.

Thus, the legislative grant *in præsenti*, in the act, "*secures the company against any attempted alienation of the land to other parties.*" So, in *Davis v. Weibbold*, already cited, reaffirming prior decisions, the court says:

"We agree to all that is urged by counsel as to the conclusiveness of the patents of the land department when assailed collaterally in actions at law. We have had occasion to assert their unassailability in such cases in the strongest terms, both in *Smelting Co. v. Kemp*, 104 U. S. 636, 640-646, and in *Steel v. Smelting Co.*, 106 U. S. 447, 451, 452, 1 Sup. Ct. Rep. 389. They are conclusive in such actions of all matters of fact necessary to their issue, where the department had jurisdiction to act upon such matters and to determine them; *but if the lands patented were not at the time public property, having been previously disposed of*, or no provision had been made for their sale, or other disposition, or they had been reserved from sale, *the department had no jurisdiction to transfer the land, and their attempted conveyance by patent is inoperative and void, no matter with what seeming regularity the forms of law have been observed.* In the several cases to which we have been referred in the fifth and sixth Montana Reports, (*Milling Co. v. Clark*, 5 Mont. 378, 5 Pac. Rep. 570; *Talbott v. King*, 6 Mont. 76, 9 Pac. Rep. 434; *Butte City Smoke-House Lode Cases*, 6 Mont. 397, 12 Pac. Rep. 858,) which involved contests between parties claiming under mining patents and others claiming under town-site patents, and in which very able and learned opinions were given by the supreme court of the territory of Montana, the mining claim patented had been located and the rights of the mining claimant had thus attached before the town-site patent was issued. The patent, which, subsequently, followed was a mere perfection of the right originated by the location, and to which it took effect by relation. It was held in accordance with this opinion, that the prior mining location was not affected by the town-site entry." 139 U. S. 529, 11 Sup. Ct. Rep. 636.

So, that, in this class of cases, the ascertainment, and final determination as to the mineral character of the land, as against the company, cannot, as contended be left to the commissioner on the issue of the patent. And if the determination be so made, his decision against the company would not be conclusive, as to whether the title to the land had or had not already passed out of the United States under the congressional grant. A patent wrongfully issued to others, however, could be collaterally attacked, by the company on its patent, even in an action at law, and the company without a patent could stand upon its legislative grant attaching upon the definite location and completion of the road as required by the act, even against subsequent patents, wrongfully, issued to other parties. Indeed the commissioner is not in a position, in this class of cases, to summon witnesses and, intelligently, investigate, and finally decide the facts as to the mineral character of all the odd sections of lands, either at the date of the attaching of the grant, or of the issue of the patent; and if he were invested with such final jurisdiction, the point of time to which the investigation should be directed, would be, the date when the line of the road became definitely fixed, and a plat thereof filed in the office of the commissioner of the land-office—the date at which the grant became attached to the specific sections of land, and not the date of the issue of the mere *confirmatory* patent. Again on his views of the law, the commissioner often refuses to issue patents to the railroad company in cases where it is entitled to them. In such cases the company would have no remedy, as to those lands, unless the foregoing views are correct. There could then be no patent to settle the question.

Under these various decisions of the supreme court, and others cited by that tribunal, with approbation, I am satisfied that to exclude the lands from the operation of the grant, they *must be known to be mineral at the date when the line of the road becomes definitely fixed, and a plat thereof filed in the general land-office*,—in this case on July 6, 1882,—and that the demurrer to the complaint must be overruled. My associate dissents in a very able opinion, in which he very, forcibly, and lucidly, presents, as it seems to me, all that can be said in opposition to the views herein expressed. My own conclusions, however, I have reached after repeated and thorough examination, and I cannot see the case in any other light. The points of difference between us, therefore, must be left to the supreme court, to authoritatively, determine.

This, I believe, is a representative case—several others depending upon its decision. I suppose the facts in the complaint are alleged as they must turn out in the proofs. If that be so, then a default might be safely suffered, and a judgment entered before the 1st of July, and an appeal taken to the United States supreme court. Otherwise, the appeal will go to the circuit court of appeals. It is desirable that a question affecting interests so vast should be determined by the highest court in the land. Under the provisions of section 650, Rev. St., when there is a difference of opinion between the circuit and district judges, sitting together, the opinion of the presiding judge prevails for the time being. In pursuance of these provisions, let the demurrer to the complaint be overruled, and the defendants have 10 days within which to file their answer.

KNOWLES, J., (*dissenting*.) This is an action at law. The complaint sets forth sufficient facts to show that plaintiff received a grant from the United States of all odd alternate sections of land within 40 miles of the line of its railroad as definitely located in Montana, not mineral, and which at the time its line of railroad was definitely fixed, were not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights. It is further set forth that the land described in the complaint was a portion of one of the said odd sections within 40 miles of the line of the road of plaintiff as definitely located; that defendants have taken possession of the same, and now withhold the possession thereof from plaintiff. It is not stated directly that the said land is non-mineral, but that it was not known to be such at the date of said grant on July 2, 1864, nor, at the time the general route of said railroad was located in 1872. It is alleged, however, that it was more valuable at said dates for grazing, than mining purposes and that when the land was surveyed in 1868, it was returned by the surveyor as non-mineral. In 1886, it is alleged that plaintiff listed in the United States land-office at Helena, with other lands, the premises in controversy, and paid for filing such list the fees allowed by law, and the receiver duly accepted the same and approved of said list, and certified the same to the commissioner of the general land-office, and that that list remains in both land-offices, and no part of the fees so paid have been returned to

plaintiff. It is also alleged that at the time of filing said list said land was not known to be mineral, or had any value for mining purposes, but that during the year 1888, certain veins or lodes of rock in place bearing gold, silver and other precious metals were discovered thereon, and thereafter to-wit, on the 20th day of June, 1888, a portion of defendants and under whom the others claim located said lodes as mineral land under the name of the "Vanderbilt," "Four Jacks," "N. Y. Central" and "Hudson River" respectively, and on the 9th day of May, of said year, another lode under the name of the "Chauncey Depew" lode, and that they are now in possession of said locations and are extracting ore therefrom, and have taken therefrom ore of over the value of \$100, and that the value of all the property is over \$6,000. The defendants have demurred to this complaint, on the ground that the same does not state facts sufficient to constitute a cause of action.

There is, undoubtedly, much in this complaint that might be called redundant or irrelevant matter. But concerning this the court is not called to rule. If a complaint states facts which show that plaintiff is not entitled to recover, then the ground of demurrer, that it does not state facts sufficient to constitute a cause of action will lie. In this case plaintiff undertook to set up certain facts which would show that the land in controversy was within the grant to it, and not within the exception of that grant as being mineral, as that grant, it claims, should be interpreted. In order to recover for rents, issues and profits, the location of lodes on the premises and the extracting of ore therefrom is averred. It appears also that no patent had ever issued to plaintiff for the premises. While the complaint is not as satisfactory as it might be, upon the point as to whether the premises are now known to be mineral land or not, still, I think enough appears to show that they are of that character. It appears that they are over the value of \$6,000, and that over \$100 worth of ore has been taken from them, and that the lodes located contain gold and silver. I do not conceive that in determining whether or not land is mineral land the question is whether or not it is more valuable for the mineral therein, than it is for grazing or agriculture. The statute of the United States, upon mineral lands is "in all cases land valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law." Rev. St. U. S. § 2318. So I would say, that lands which have a market value for the minerals therein, without any reference to any other character or quality connected therewith are mineral lands. I do not think it is necessary to show that the lands contain paying mines. Such has not been the accepted definition of mineral lands in the land department of the United States, or by those engaged in mining avocations in this country. Land is being claimed almost every day as mineral, which contain no such mines, and the United States land department is almost daily issuing patents for such lands as mineral. The term "mineral lands" must be considered as having been used by congress in the sense in which that term was used by practical men in mining engaged in that industry at the date of the grant. Lands are often sold for large sums of money on account of the

minerals therein which have never been worked to a profit for such. With this definition of mineral lands, I think it safe to say that the premises in controversy must be classed as mineral.

The question then arises, whether, not having been known to be mineral at the date of the grant of land to plaintiff on July 2, 1864, nor at the date when the general route of its road was located in 1872, nor at the time it was listed by plaintiff for patent as within its grant, in 1886, but now, known to be mineral, it must be classed as within plaintiff's grant. The grant of land to the Northern Pacific Railroad Company, is contained in the third section of the statute of the United States organizing that company, and the part necessary to be considered in this case is as follows:

"That there be and is hereby granted to the Northern Pacific Railroad Company, its successors and assigns for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe transportation of the mails, troops, munitions of war and public stores, over the route of said railway, every alternate section of public land not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line as said company may adopt through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad where it passes through any state, and whenever on the line thereof the United States have full title not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land-office: * * * Provided, further, that all mineral lands be, and the same are hereby excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road may be selected as above provided."

The contention of plaintiff is that the above grant is one *in presenti* conveying the fee to it at the date thereof, and that it should embrace all lands within the limits of its grant not known to be mineral, or which there was no reasonable ground for believing to be mineral at such date. In other words, in the exception, and in the proviso in the grant in regard to mineral lands it should read, not known to be mineral or which there was no reasonable ground for believing to be mineral. This brings up for consideration the question, as to how this grant should be construed. It is a public or legislative grant made by a statute of congress.

"In all questions of construction arising under grants between the government and the citizen, a different rule prevails in one respect from that adopted in questions between individuals. Between the latter, the construction if doubtful, is always to be in favor of the grantee and against the grantor, whereas in the case of the government, the construction is always against the grantee and in favor of the government." 3 Washb. Real Prop. (4th Ed.) p. 190.

One of the leading cases upon the subject of legislative grants is that of *Charles River Bridge v. Warren Bridge*, 11 Pet. 420. It is a case very often referred to, and is the foundation of much of the federal jurisprudence upon this point. The decision was delivered by the distinguished

Chief Justice TANEY, and in it the court said: "The rule of construction in such cases is well settled both in England, and by the decisions of our own tribunals." In 2 Barn. & Adol. 793, in the case of *Stourbridge v. Wheeley*, the court says:

"The canal having been made under an act of parliament, the rights of the plaintiff are derived entirely from that act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute, and the rule of construction in all such cases is now fully established to be this, that any ambiguity in the terms of the contract must operate against the adventurers, and in favor of the public, and the plaintiff can claim nothing that is not clearly given by the act."

This rule of construction is fully adopted by the supreme court in the above case. This question came again before the supreme court in the case of *Railroad Co. v. Litchfield*, 23 How. 66, and it holds this language, in referring to a legislative grant similar to the one of plaintiff's under consideration:

"All grants of this description are strictly construed *against* the grantees; nothing passes but what is conveyed in clear and explicit language, and as the rights here claimed are derived entirely from the act of congress, the donation stands on the same footing of a grant by the public to a private company, the terms of which must be plainly expressed in the statute, and if not thus expressed they cannot be implied."

And in this case the court quotes with approval, the reason for this rule of construction from, *Gildart v. Gladstone*, 11 East, 675:

"The reason of the above rule is obvious—parties seeking grants for private purposes usually draw the bills making them. If they do not make the language explicit and clear to pass everything that is intended to be passed, it is their own fault, while on the other hand such a construction has a tendency to prevent parties from inserting ambiguous language for the purpose of taking by ingenious interpretation and insinuation, that which cannot be obtained by plain and express terms."

In the case of *Rice v. Railroad Co.*, 1 Black, 360, the supreme court say: "It is the settled rule of construction that public grants are to be construed strictly and that nothing passes by implication." It has been urged, however, that the legislative or public grant in the case at bar was for a valuable consideration and should therefore be subject to the same rule of construction as grants between private parties, and hence liberally in favor of the grantee, and in such a manner as to give it a full and liberal operation, so as to carry out the legislative intent. It is not necessary now to discuss this rule of interpretation and show its limitations.

Every one of the above legislative grants referred to were made upon the same consideration as the grant to plaintiff, namely the construction of an internal improvement of some value to the public. The supreme court, however, has held that all these grants are subject to be strictly construed, and in the case of *Leavenworth, etc., R. Co. v. U. S.*, 92 U. S. 733, it was held that all these railroad grants should receive a strict construction against the grantee. In that case the court held this language:

"The difference would seem to imply obscurity in the act; but be this as it may, the rules which govern the interpretation of legislative grants are so well settled by this court, that they hardly need be reasserted. They apply as well to grants of land to states to aid in building railroads as to grants of special privileges to private corporations. In both cases the legislature, prompted by the supposed wants of the public, confers on others the means of securing an object the accomplishment of which it desires to promote, but declines to undertake."

Here is a distinct assertion that these rules of interpretation apply to all such railroad grants as plaintiff's. And in this case, again, in regard to the rules of construction of the grant then under consideration says:

"It should be neither enlarged by ingenious reasoning, nor diminished by strained construction, the interpretation must be reasonable, and such as will give effect to the intent of congress. This is to be ascertained from the terms employed, the situation of the parties, and the nature of the grant. If the terms are plain and unambiguous, there can be no difficulty in interpreting them, but if they admit of different meanings, one of extension, and the other of limitation, they must be accepted in a sense favorable to the grantor. And if rights claimed under the government be set up against it, they must be so clearly defined that there can be no question of the purpose of congress to confer them. In other words what is not given expressly, or by necessary implication, is withheld."

Upon this point of the construction of legislative grants I have quoted liberally from the masters in the domain of our jurisprudence, and their language gives no uncertain sound. Legislative grants must be construed most strongly against the grantee, and must not be enlarged by implication. In looking at the terms in the grant we find mineral lands are excepted therefrom. This was in accordance with the settled policy of the government. In the case of *Mining Co. v. Consolidated Min. Co.*, 102 U. S. 167, the supreme court held that it was the public policy of the United States not to dispose of its mineral lands as agricultural, or in any other way than as mineral lands to be devoted to the pursuit of mining, and as provided in a special statute upon that subject. And in that case the court on account of this well-known policy inserted into a grant of the sixteenth and thirty-second sections of land to the state of California for common schools, an exception of mineral lands, although, no such terms appear in the grant. This was based upon the ground, that considering this settled policy of congress, it could not have intended to grant to California, for school purposes, mineral lands. The Northern Pacific Railroad Company grant was one *in presenti* as I have said conveying the legal title. This view although I conceive to be in conflict with other decisions of the supreme court, upon this point, is supported it appears, to me, by the later decisions of that distinguished tribunal. *Buttz v. Railroad Co.*, 119 U. S. 55, 7 Sup. Ct. Rep. 100; *Railroad Co. v. Price Co.*, 133 U. S. 496, 10 Sup. Ct. Rep. 341; *Denny v. Dodson*, 13 Sawy. 68, 32 Fed. Rep. 899. The title of plaintiff took effect on July 2, 1864. By inserting the words into its grant, known mineral lands or lands which there were reasonable grounds for supposing were mineral, and it is apparent, then, that in Montana, and northern Idaho, along the route of plaintiff's road, its grant would be materially enlarged. On

July 2, 1864, comparatively little was known of the great mineral resources of this section. There were but two mining camps of any importance in Montana, at that time and one of these was south of the 40-mile limit of that road. The great quartz mining interests of Montana, were then almost, if not entirely, unprospected. In northern Idaho no mineral developments had been made worthy of mention, nothing was known of its great mineral resources. It may be said that the only mines then sought for were placers. But few miners in this section knew anything of silver or copper mining, and none had any knowledge of the extent of these mines along the route of plaintiff's road. Silver mining had not existed in the United States for more than five years previous to 1864, and gold quartz mining in the western states and territories, not more than ten years. Copper mining was only known on the shores of Lake Superior in Michigan. None of this country had been surveyed. Plaintiff did not know just what route would be selected for its road. It had not been surveyed even in a preliminary way. Large portions of the country had never been explored, except by wandering bands of trappers. Gold mining confined to placers, had existed in Montana, for only two years. Under these circumstances it is reasonable to suppose that congress knew that there was but little known of the mineral resources of this section. That if it intended to exclude only known mineral lands, or those concerning which there were reasonable grounds for considering were mineral, it was not excepting any extent of mineral lands, and it might as well have left out that exception in the grant. Considering the settled policy of the government in regard to its mineral lands, and the rules of construction of legislative grants and the limited knowledge which prevailed in regard to the mineral resources along the route of plaintiff's road at the date of the grant, and I do not think it proper to extend that grant by inserting the words desired in the exception of mineral lands therein. I see no reason for enlarging that grant by adding words or terms not placed there by congress. In the case of *Leavenworth, etc., R. Co. v. U. S.*, 92 U. S. 733-751, the supreme court quoted with approval these words from *Rex v. Burrell*, 12 Adol. & E. 460: "I see the necessity of not importing into statutes words which are not found there, such a mode of interpretation only gives occasion to endless difficulty." And the supreme court adds: "Courts have always treated the subject in the same way when asked to supply words in order to give a statute a particular meaning which it would not bear without them." In the case of *Newhall v. Sanger*, 92 U. S. 761-765, the court said, in interpreting a statute: "It is said this means, lawfully claimed, but there is no authority to import a word into a statute in order to change its meaning." We were met in the argument in this case with the assertion that it was not sought by plaintiff to insert any words into the grant. That the word "known" was a part of the definition of mineral lands; that lands were not mineral lands until they were known to be such. In other words the Comstock lode of Nevada; the rich placers of Alder gulch and Confederate gulch; and the valuable lodes at Butte City in Montana, were not mineral lands until they were

discovered to be such. Up to this time they were agricultural land. It appears to me that this is a novel and original term to be imported into the definition of mineral land, and I cannot consent to its use. I think hereafter I may show how this word "known" came to be used in connection with mineral lands, and that it had nothing to do with the definition of the same. I do not see how congress could have declared more emphatically than it did in this act, that it did not intend to grant to plaintiff mineral lands. In the granting clause in the section making the grant, it excepted mineral lands; then in a proviso attached to the same said: "That all mineral lands be, and the same are hereby excluded from the operation of this act."

The only question of difficulty is, to determine, what are mineral lands, and when this is reached they did not pass to plaintiff in its grant. I cannot consent to any construction of that grant which will modify and enlarge its terms. It is true that the learned court, in the case of *Francoeur v. Newhouse*, 40 Fed. Rep. 618, made a construction of the legislative grant of land to the Central Pacific Railroad Company which is adverse to this view. The grant of land to that company was made in terms almost identical to that made to plaintiff. The construction of that grant in that case in effect placed the word "known" before mineral in that grant, or the terms "which there was reasonable ground to suppose or believe were mineral." The distinguished judge who rendered that opinion gave the weight of his great reputation, to that construction. He has given many years of labor to interpreting congressional and other grants, and to the construction of the mineral statutes of the United States. For years, upon the subject of the law in regard to mineral lands, I have been accustomed to follow him. He is the presiding judge of this circuit; hence it is with much hesitancy and some trepidation that I assume to differ with him in this matter. He held that he was forced to his conclusions on account of the rulings of the supreme court in the cases of *Deffeback v. Hawke*, 115 U. S. 399, 6 Sup. Ct. Rep. 95, and *Colorado Coal, etc., Co. v. U. S.*, 123 U. S. 309, 8 Sup. Ct. Rep. 131. In neither of these cases was the supreme court considering statutes like the grant to the plaintiff. In the first the court was called upon to construe the statute in relation to the entry and purchase of town-sites. In this case the policy of the government was reviewed in regard to mineral lands. In this connection the court considered the pre-emption and homestead laws as well as the town-site act. They were classed together, and it was held that only the same character of lands could be purchased under any of these acts. It was found that under the pre-emption and homestead acts, lands containing known salines and mines, could not be purchased. In the town-site act it was provided that by virtue of its provisions no title should be acquired "to any mine of gold, silver, cinnabar or copper, or to any valid mining claim or possession held under existing laws." The court was then confronted by the mineral act of congress, the first section of which provides: "In all cases lands valuable for minerals shall be reserved from sale except as otherwise expressly provided." These statutes were all *in pari materia*, and hence the court

was authorized to construe them together. They are general statutes relating to one subject, the sale and disposal of the public lands. They had to be harmonized. And the court held that under the above acts, in regard to pre-emptions, homesteads and town-sites, land could be purchased which was not known to be mineral. In this case, nowhere, was there anything that would bear upon grants of land to private corporations in aid of the construction of railroads. Here for the first time, we find the phrase "lands known at the time of the sale to be valuable for minerals." The court said:

"It is plain from this brief statement of the legislation of congress, that no title from the United States, to land known at the time of the sale to be valuable for its minerals of gold, silver, cinnabar or copper, can be obtained under the pre-emption or homestead laws, or the town-site laws, or in any other way than as prescribed by the laws specially authorizing the sale of such lands except, in the states of Michigan, Wisconsin, Minnesota, Missouri, and Kansas."

I think hereafter I may be able to show why the court used the above language: "lands known at the time of its sale to be valuable for its minerals," etc. In the case of *Colorado Coal, etc., Co. v. U. S.*, *supra*, the court was called upon to construe the pre-emption act, and the mineral act. It classed coal lands as mineral lands and following *Deffeback v. Hawke, supra*, said, that lands known at the time of sale to contain mines, or which were at that time known to be valuable for the minerals therein contained, could not be obtained under the pre-emption act. In this, there was no construction of any such grant as plaintiff's.

In the argument in this case, the recent decision in the supreme court of *Davis v. Weibbold*, was cited. This was an action on the part of a mineral claimant who had obtained a patent to a parcel of land within the exterior limits of the Butte town-site, which patent was subsequent to that of the patent for the town-site. The defendant, Davis, offered to prove that at the time of the issuing of the patent which would relate of course, to the time when the sale of the Butte town-site was consummated, that the premises embraced within the Weibbold patent, were not known to be valuable for minerals. This evidence was introduced for the purpose of showing that the land was subject to purchase as a town-site at that time. This was excluded, and the defendant, Davis, appealed to the supreme court of the United States, assigning this ruling among others, as error. Now in this case all that the court was called upon to consider was the mineral act and town-site act, and statutes *in pari materia*. There are some declarations in that opinion which taken by themselves, might lead to the inference, that the court had expressed its opinion upon the point at issue. For instance it says:

"It would seem from this uniform construction of that department of the government specially intrusted with the supervision of proceedings required for the alienation of the public lands including those that embrace minerals, and also of the courts of the mining states, federal, and state, whose attention has been called to the subject, that the exception of mineral lands from grants, in the acts of congress, should be considered to apply only to such lands as were at the time of the grant known to be so valuable for their minerals as to justify expenditure for their extraction. *The grant or patent when issued*

would thus be held to carry with it the determination of the proper authorities that the land patented was not subject to the exception stated."

In connection with a railroad grant like plaintiff's, which was made by an act of congress, it would be difficult to speak of it as having issued to plaintiff. "Issued," when we speak of a deed or patent usually means "delivered." In considering a legislative grant the term does not apply. What are the proper authorities to determine that any lands were not subject to an exception stated in a grant, if we confine ourselves to the date of the grant? Congress when acting officially usually expresses its determination in laws. It is a legislative, not a judicial body. If congress has not determined this matter by the terms of its enactments, I cannot see how it has determined it at all. The grant to plaintiff was in the nature of a float, and attached to no specific land until the date the line of its road was definitely fixed, and a plat thereof filed in the office of the commissioner of the general land-office. It was some 18 years after the date of the grant before this definite route was fixed in Montana. Can it be, that congress, 18 years before the grant took precision in any way, determined what land was not subject to the exception stated in the grant? I think this cannot be maintained. I cannot help thinking, that the term "grant" used in the above quotation, was used as synonymous with the term "patent," or of land specifically described. The land department is a special tribunal intrusted with the power, I think, of determining such matters, and does determine them when awarding a patent. If, however, it should be considered that the term "grant" as used in that clause referred to legislative grants like plaintiff's, then that question in that case was not before the court for consideration, and the rule of the supreme court as expressed in *Cohens v. Virginia*, 6 Wheat. 264, applies: "That general expressions in every opinion are to be taken in connection with the case in which these expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." There was no argument or facts, in the case of *Davis v. Weibbold*, upon which to base any ruling upon the construction of the terms of plaintiff's grant. It is said, however, that the statute making plaintiffs grant, and the town-site act are *in pari materia*, and the construction of one applies to the other. In the first place, the terms in the town-site act the court was called upon to construe, are very different from those in plaintiff's grant. In the next place, the statutes are not *in pari materia*. They do not relate to the same subject. The town-site act is a general law providing for the disposal of public lands in certain cases. It is part of a system of laws upon the subject of the disposal of such lands. The grant to plaintiff, is one to a private corporation, to aid it in constructing a railroad. If it is *in pari materia* with the general laws upon the subject of the disposal of public lands, then every grant to a private or public corporation in aid of railroad construction is *in pari materia* with such general laws, and it follows must be *in pari materia* with each other. In the case of *United Soc. v. Eagle Bank*, 7 Conn. 457, the supreme court of that state said:

"But private acts of the legislature, conferring distinct rights on different individuals which never can be considered as being one statute or the parts of a general system are not to be interpreted by a mutual reference to each other. As well might a contract between two persons be construed by the terms of another contract between different persons."

And in speaking of the phrase "*pari materia*," the court said: "It is a phrase applicable to public statutes or general laws made at different times, and in reference to the same subject." The act making the grant to the plaintiff is not a public statute or general law. It does not therefore appear to me that the case of *Francoeur v. Newhouse*, *supra*, can be considered as supported by the cases cited in the opinion rendered in that case, or when properly considered by the case of *Davis v. Weibbold*, *supra*.

I come now to the consideration of how the phrase "known mineral lands," came to be used. In the case of *Johnson v. Towsley*, 13 Wall. 72, the doctrine was recognized, that the land department was a special tribunal, having authority to hear and determine questions which might arise in the sale and patenting of public lands. In the case of *Steel v. Smelting Co.*, 106 U. S. 447, 1 Sup. Ct. Rep. 389, in speaking of the land department, the supreme court said:

"That department as we have repeatedly said was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of congress are fully complied with. Necessarily therefore, it must consider and pass upon the qualifications of the applicant, the acts he has to perform to secure the title, *the nature of the land* and whether it is of the class open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable, except by direct proceedings for its annulment or limitation."

In the case of *French v. Ryan*, 93 U. S. 169, the land department having determined that a certain tract of land was swamp land, the supreme court treated this as the determination of a special tribunal which was binding in all actions not brought to annul the patent. In that case the court said: "The patent therefore which is the evidence that the lands contained in it have been identified as swamp land under the act relates back and gives certainty to the title of the date of the grant." This and the preceding decision referred to, certainly maintain the doctrine that the land department is clothed with authority to determine whether land is mineral or swamp, or not. Following these decisions are the cases of *Milling Co. v. Spargo*, 8 Sawy. 645, 16 Fed. Rep. 348, and *Cowell v. Lammers*, 10 Sawy. 246, 21 Fed. Rep. 200. The opinions in both of these cases was delivered by the distinguished judge who delivered the opinion in the case of *Francoeur v. Newhouse*, *supra*. In the first, he said: "The land-officers were charged with the duty of ascertaining whether the lands were subject to be patented or not, and that determination is conclusive at least in this action." In the latter case he said: "There must be some point of time when the character of land must be finally determined, and for the interest of all concerned there can be no better point to determine this question *than at the time of issuing the patent*." The learned judge then proceeds to show how disastrous to his section of the

country any other ruling would be. The case of *Davis v. Weibbold*, *supra*, fully sustains the view that the land department is intrusted with the determination of the question, as to whether land is mineral or not. And shows that this is in accordance with the view in several cases in both state and federal courts, and in accordance with the view the land department has of its own powers and its practices. But while the land department is intrusted with these powers, still, if in determining these facts, as to whether land is mineral or not, it is imposed upon by fraud, or there has occurred a mistake, their determination may be set aside and the patent they have issued annulled. If the land was known to be mineral at the time of issuing of the patent by the grantee, it has been treated as fraud sufficient to annul the patent thereto. *U. S. v. Rose*, 11 Sawy. 83, 24 Fed. Rep. 196; *U. S. v. Iron Silver Min. Co.*, 24 Fed. Rep. 568, 128 U. S. 673, 9 Sup. Ct. Rep. 195; *Colorado Coal, etc., Co. v. U. S.*, 123 U. S. 307, 8 Sup. Ct. Rep. 131. In the case of *Mullan v. U. S.*, 118 U. S. 271, 6 Sup. Ct. Rep. 1041, the supreme court set aside a patent for former coal-lands where there was no fraud practiced, but because there was a mistake in regard to the law as to coal-lands being included in the term "mineral lands." In the case of *McLaughlin v. U. S.*, 107 U. S. 526, 2 Sup. Ct. Rep. 802, the supreme court set aside a patent because it was known at the time the patent was issued, that the land embraced in the patent was mineral land, and hence the patent was issued through inadvertence and mistake and without authority of law. I have found no cases where the land department has passed upon the question of the character of land patented, that the patent has been sought to be set aside, except for some fraud practiced upon the land department, or there was some mistake, such as would entitle the United States to relief in a court of equity. If the land was not known to be mineral, no fraud was practiced in that department, and the title to such land was unassailable. Sedg. St. & Const. Law, 390. These were the reasons that induced the supreme court in *Deffebach v. Hawke*, *supra*, to declare if the land was not known to be mineral at the date of the sale or issuing a patent, there was no cloud upon a patent title for such land purchased as agricultural. And this is the reason why the term "known mineral lands" was used. The same rules which apply to agricultural lands obtained under the homestead, pre-emption or town-site acts would undoubtedly apply in issuing patents to railroad lands. The case of *Cowell v. Lammers*, *supra*, was a patent for earned railroad lands. In the case of *Denny v. Dodson*, 13 Sawy. 68, 32 Fed. Rep. 899, the court said that a patent would identify the lands which are coterminous with the road completed, and in the case of *Railroad Co. v. Price Co.*, *supra*, the supreme court said of patents to lands granted *in presenti* to railroads: "They would serve to identify the lands as coterminous with the road completed." The land department is charged with the duty of issuing patents for earned railroad lands to plaintiff, and in so doing it must determine the character of the lands to which a patent is to issue, and as to whether they are such as are within the terms of the grant, and hence must determine as to whether they are mineral or not.

Until a patent is issued these lands are not fully identified, and in any action concerning them the railroad company must resort to other evidence to identify them, and show that they are the lands granted. When a patent issues this will show that the land described in the same, are lands granted to the company, and no other identification will be needed. And this patent only can be impeached by an action in equity brought by the government to set the same aside for fraud or on some other ground cognizable in a court of equity, and will prevail in any action against any one claiming by a junior title. *Meador v. Norton*, 11 Wall. 442.

I do not think congress intended to leave it always an open question to be settled by the verdict of a jury as to whether or not any specific portion of an odd section within the limits of plaintiff's grant were granted to it or not. But if the question for consideration is whether or not, a given piece of land was known to be mineral at the date of plaintiff's grant, how is it to be otherwise determined? It cannot be supposed that the land department before it issues to plaintiff a patent for any tract of land is to enter upon the investigation as to whether it was known to be mineral or not on the 2d day of July, 1864. What means has the land department for entering upon such an investigation? If the grant attaches to all lands not known to be mineral at the date of the grant the determination of the land department that any land was not known to be mineral at any date subsequent to the date of the grant, ought to have no effect upon the grant or any binding force upon any body. There was something said in the argument presented in this case that the grant of plaintiff would attach to all lands not known to be mineral at the time the line of plaintiff's railroad was definitely fixed and a plat thereof filed in the office of the commissioner of the general land-office, and the grant of plaintiff received precision. This is not a doctrine I supposed, was contended for in any other case but the one at bar. It was not generally supposed that the case of *Francoeur v. Newhouse*, *supra*, maintained such a doctrine. The general scope of the opinion of the court in ruling upon the demurrer in that case leaves a very different impression. In that case, (14 Sawy. 355, 40 Fed. Rep. 620, 621,) the learned judge said:

"The parties to this grant, both the United States, and the grantee, must be presumed to have contemplated a grant in view of the condition of the lands as they were known or appeared to be at the time the grant took effect. * * * The conditions constituting the exception ought certainly to be as ascertainable at the time the grant takes effect, or they ought not to be operative."

Considering this language in connection with that used in the case of *Railroad Co. v. Price Co.*, *supra*, and there cannot be much doubt as to its force. In that case the supreme court in construing a grant in terms similar to that of plaintiff's said:

"The grant was therefore, until such location a float. But when the route of the road was definitely fixed the sections granted became susceptible of identification, and the title attached to them and took effect as of the date of the grant so as to cut off all intervening claims."

The same language is used in *Missouri, etc., Ry. Co. v. Kansas Pac. Ry. Co.*, 97 U. S. 491. In the light of these decisions it was natural to suppose the court had said the land should be viewed when considering this question, at the date of the grant. When that case came on for trial, the court instructed the jury that in his opinion the time when the land must be known to be mineral, to except it from the grant of the Central Pacific Railroad Company, must be, when the "grant attached," and that was, "when the line of the road was definitely fixed." This language is not in accordance, in my opinion, with the previous opinions of that learned judge, upon this subject, nor in accordance with that used in *Denny v. Dodson*, *supra*, where the court says: "The grant therefore is in the nature of a float, and the title does not become definitely attached to specific sections until they are capable of identification. But when they are once identified the title attaches as of the date of the grant." Nor in accordance with that used by the supreme court, in the case of *St. Paul, etc., R. Co. v. Northern Pac. R. Co.*, 11 Sup. Ct. Rep. 389, (not yet officially reported.) In that case the supreme court says: "The route at the time, not being determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification, but when once identified, the title attached to them as of the date of the grant."

If there is any legal difference between the term, "the title attached by virtue of the grant," or "the grant attached," I have been unable to discover it. As the grant was one *in presenti* it must have attached at its date, although the property conveyed by it was not identified, or described, until the route of plaintiff's road was definitely fixed. It can hardly be contended that the title to land within plaintiff's grant, concerning which there should arise no dispute as to its agricultural character, would attach as of the date of the grant, but that as to land which should be discovered to be mineral subsequent to the location of the fixed route of the road, it would attach when the line of that road should be definitely located, and not at the date of the grant. The act of fixing the definite line of plaintiff's railroad had no tendency to determine or identify the nature of the odd sections within plaintiff's grant, although it determined what odd sections were within the limits of that grant. This fixed route, was an object from which they could be ascertained, but not the character of these odd sections. The fixing of the definite line of plaintiff's road, was its own act, and a matter which involved no action on the part of the government. How then can it be said that at this time, any department of the government determined whether any given piece of land was mineral or not, or it was known to be mineral, or there was reasonable ground for believing it mineral? The view that in construing plaintiff's grant, we should insert into the same, "was known to be mineral," or "there was reasonable ground for believing was mineral," or "it was apparently mineral at the time the route of plaintiff's road should be definitely fixed," involves more difficulties than the first construction discussed. The land department has no means of determining such facts. The issue would still be an open one to be de-

terminated by a jury. It seems to be contended that so much land might be found to be mineral within the limits of plaintiff's grant as to render the same worthless. When such proves to be the fact, there will be an occasion for considering this question.

The question as to whether the terms of this grant to plaintiff should have been so specific as to fully identify all lands excepted from the grant to the end that it might appear what lands were granted to plaintiff, is not a matter for judicial, but legislative, consideration. If the grant is too indefinite, that is a matter between congress, who made the grant, and plaintiff, who accepted it. If the terms of the grant do not fully identify the lands embraced, or sought to be embraced in a legislative grant, a court has no right to supply terms to remove the difficulty. As I have before shown, there are no implications to be indulged in, when construing a legislative grant. In interpreting a statute, a court ought not to consider what reasonable men should have intended when acting in a legislative capacity, but what they did intend, by the language used. Said the learned Justice FIELD, in *Hadden v. Collector*, 5 Wall. 107:

"What is termed the policy of the government with reference to any particular legislation, is generally a very uncertain thing upon which all sorts of opinions, each variant from the other may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes."

When the language of a statute is free from ambiguity, the court has no right to consider the consequences of the act. The business of a court is not to improve, but interpret a statute. Endl. Interp. St. p. 9, § 6.

It appears to me, that the learned circuit judge, in this case has allowed himself to consider too much the consequences of interpreting the statute under consideration according to its terms, rather than the meaning of those terms. Consequences should be in the mind of the legislature. But if we are to consider the consequences of a certain interpretation, it does seem to me that the construction, that the land must be considered at the time of the definite location of the road, as to whether it is known to be mineral, or it is apparently mineral, or there is reasonable ground for believing it to be mineral, would result in about as much dispute as to land-titles within plaintiff's grant, as any other construction that could be made. As I understand the learned circuit judge, he does not say, that the land must be known to be mineral by any particular person, or any one person must have reasonable ground for believing it to be mineral, or it must be apparently mineral to any one person at the time the definite route of the road is fixed, but if upon inspection by any experienced person, such would be found to be the condition of the land, it should be classed as mineral. Some of our experienced prospectors have great confidence in their ability to determine whether or not land is apparently mineral from a very casual observation of the same. In questions arising upon disputes upon this point their services would be in great demand. The surest means of quieting titles would appear to be, the determining the question of the mineral character

of the land upon issuing of patents to the same. As I have said, this would be conclusive upon all subsequent purchasers. It is perhaps true, that if it was determined that land was mineral, which was in fact agricultural, the railroad company would not be precluded thereby, as it is a prior, not a subsequent purchaser, to the issuing of the patent. But there would not be as much litigation arising from this source, nor so much anxiety about titles therefrom, as from the construction that would leave it an open question as to whether land was known to be mineral, or there was reasonable ground for believing it mineral, at the time the route of the road should be definitely fixed. I do not think it can be maintained, that a patent would determine these questions. It could only determine the nature of the land at the date it is awarded. The land department has always acted upon this theory. For more than 20 years it has been the practice of the land department, to recognize mineral locations and issue patents for mineral land found within the limits of the Northern Pacific Railroad Company's grant upon odd sections which have been discovered to be such since the date of that grant, and for about 10 years since the date of the definite fixing of the route of plaintiff's road, sometimes these patents have issued without any reference as to whether they were for lands upon odd, or even sections, the general surveys of the government not having extended to such locations. The land department, has thus left it to the prospecting miner, up to this date, to identify the mineral lands which are excepted and excluded from plaintiff's grant. Until patents are issued which will identify the lands granted to plaintiff, the government can perform any acts it may think necessary to enable it to identify the mineral lands excepted from plaintiff's grant, and the government can avail itself of all information given it, even by prospecting miners, which has resulted in disclosing and identifying mineral lands within the limits of plaintiff's grant. A long and uninterrupted practice under a statute, by the officers of the executive department of the government who are compelled to act under it, is entitled to great weight in construing it, and in cases of doubt is controlling. *McKeen v. Delancy*, 5 Cranch, 22; *U. S. v. Graham*, 110 U. S. 219, 3 Sup. Ct. Rep. 582; *The Laura*, 114 U. S. 411, 5 Sup. Ct. Rep. 881; *Brown v. U. S.*, 113 U. S. 568, 5 Sup. Ct. Rep. 648; *Peabody v. Stark*, 16 Wall. 240.

The action of the land department, which has been called upon to act under the land laws of the United States, shows that it has never considered that lands which were not known to be mineral at the date of plaintiff's grant, or at the time the route of its road was definitely fixed passed with it. It has recognized the location for mining purposes upon mineral lands upon odd sections which has been discovered to be mineral since the date of that grant, and since the date of the fixing of the definite route of plaintiff's road, and as I have said, has not hesitated to award patents for such mineral claims. Some of the most valuable mining properties in this state are upon odd sections of land within plaintiff's grant, the mineral character of which was discovered since the said dates. The filing of the list by plaintiff of the lands claimed by it, and

for which it desired a patent, in my judgment, constitutes no element in determining the question at issue. That was the act of plaintiff, and no action which would amount to a determination of the character of the land claimed, appears to have been taken by the land department, and there was no law authorizing such action in filing a list of lands by plaintiff.

For these reasons, I hold that the defendants having discovered that the premises in dispute were mineral land, had a right to locate them as such, and that they are not lands granted to plaintiff, and that the demurrer of defendants ought to have been sustained to plaintiff's complaint.

L. H. HARRIS DRUG CO. *v.* STUCKY.

(Circuit Court, W. D. Pennsylvania. June 11, 1891.)

1. TRADE-MARKS—WHAT WILL BE PROTECTED.

An application for a trade-mark stated that it consisted "essentially of the illustration of a boy in a position indicating suffering from cramps." Immediately below the figure of the boy were the words "Cramp cure," forming part of the expression, "Cramp cure for every ache or pain," but the applicant stated that this descriptive matter might be altered or omitted at pleasure, without affecting the character of the trade-mark. *Held*, that the trade-mark consisted in the design of the suffering boy, which the application stated to be the essential feature, and that the words "Cramp cure" formed no part thereof.

2. SAME—DESCRIPTIVE WORDS—"CRAMP CURE."

The words "Cramp cure" are descriptive of the purpose and character of the medicine, and cannot, therefore, be appropriated as a trade-mark by the manufacturers of a remedy for the disease.

3. SAME—STATUTORY REGULATIONS.

The right to trade-marks, and the remedies for their protection, exist independently of statutory regulations; and therefore the fact that Act Cong. March 3, 1881, § 3, fails to enumerate descriptive words in the list of limitations on the right to the registry of trade-marks, does not by implication validate a trade-mark consisting of such words.

In Equity.

J. H. Porte and W. Bakewell & Sons, for complainant.

W. B. Negley and Bruce Miller, for defendant.

Before *ACHESON*, C. J., and *REED*, J.

REED, J. The plaintiff in this case, claiming to be the owner, as the assignee and successor of Dr. L. H. Harris, of a certain trade-mark registered by him, February 3, 1885, under the provisions of the act of congress of March 3, 1881, alleged infringement by the defendant, and prayed for an injunction and account. The defendant denied the right of the plaintiff to the exclusive use of the words "Cramp cure," which were the words used by plaintiff and defendant, and in controversy, because not part of the registered trade-mark, or, if held to be part of the registered trade-mark, denied that any exclusive right to the use of those words could legally be claimed by Dr. Harris or his successors, and de-

nied infringement of any trade-mark to which plaintiff has an exclusive and legal right. The case was heard on bill, answer, and proofs.

The first question to be considered is the dispute between the parties as to what the trade-mark which was registered really is. The application filed by Dr. Harris states that he has adopted for his use a trade-mark for a medicine for the cure of cramps, and further says:

"The said trade-mark consists essentially of the illustration of a boy in a position indicating suffering from cramps. In connection with this figure are the words 'Cramp cure,' placed just below the figure. The figure of the boy is shown in connection with a landscape, and on either side of the figure is a basket, containing various kinds of fruits. The basket on the right hand side of the boy is standing upright, while the other is tilted over on one side, with the fruit partially scattered over the ground. At the top of the picture is the title and name 'Dr. Harris,' and below, near the bottom of the same, are arranged the words, 'Cramp cure for every ache and pain.' These have generally been arranged as shown in the accompanying *fac simile*, but the landscape, baskets, and descriptive matter may be omitted or changed at pleasure, without materially altering the character of the trade-mark, the essential feature of which is the illustration of the boy apparently in great pain."

From the description in the application it would appear that the words "Cramp cure" are used twice, but the accompanying *fac simile* shows the words to be used but once, forming, just below the figure of the boy, part of the expression, "Cramp cure for every ache or pain." The proper construction of the statement is that the trade-mark registered was the design of the suffering boy, which the application states to be the essential feature. The reservation of the right to omit the descriptive matter, which includes the words "Cramp cure," shows that the applicant did not regard those words as part of the trade-mark.

But conceding for the present that the words "Cramp cure," are a portion of the trade-mark, as claimed by plaintiff, are they such words as can properly be claimed and used exclusively by the plaintiff as a trade-mark? "The object of a trade-mark is to indicate, either by its own meaning, or by association, the origin or ownership of the article to which it is applied. If it did not, it would serve no useful purpose, either to the manufacturer or the public; it would afford no protection to either against the sale of a spurious, in place of the genuine, article." *Manufacturing Co. v. Trainer*, 101 U. S. 51. "No one can claim protection for the exclusive use of a trade-mark or trade-name, which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured, rather than protected, for competition would be destroyed. Nor can a generic name, or a name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics, be employed as a trade-mark, and the exclusive use of it be entitled to protection." *Canal Co. v. Clark*, 13 Wall. 311; *Lawrence Manuf'g Co. v. Tennessee Manuf'g Co.*, 138 U. S. 537, 11 Sup. Ct. Rep. 396. "The general proposition is well established that words which are merely descriptive of the character, qualities, or composition of an article, or of the place where it is manufactured or produced, cannot be monopolized as a trade-mark; and we think

the words 'Iron Bitters' so far indicative of the ingredients, characteristics, and purposes of the plaintiff's preparation as to fall within the scope of the decisions." *Chemical Co. v. Meyer*, 11 Sup. Ct. Rep. 625, 139 U. S. 540. "The general rule is against appropriating mere words as a trade-mark. An exception is of those indicating origin or ownership, having no reference to use. Words are but symbols. When they are used to signify a fact, or when, with what purpose soever used, they do signify a fact, which others may, by the use of them, express with equal truth, others may have an equal right to them for that purpose." *Caswell v. Davis*, 58 N. Y. 230. A mere general description, by words in common use, of a kind of article, or of its nature or qualities, cannot, of itself, be the subject of a trade-mark. *Gilman v. Humnevell*, 122 Mass. 148. And in that case the court held that the plaintiff could not have a trade-mark in the descriptive words "Cough remedy." "Cramp" is a common term, well understood to relate to a painful affection of the muscles, and frequently associated with an acute disease of the stomach or bowels. Dr. Harris, in his statement filed when the trade-mark was registered, states that the description of goods on which he uses the trade-mark is a medicine for the cure of cramps. In *Dunglison's Medical Dictionary*, "Cramp" is defined as "a sudden, involuntary, and highly painful contraction of a muscle or muscles. It is most frequently experienced in the lower extremities, and is a common symptom of certain affections, as of *colica pictonum* and *cholera morbus*." "Cramp of the stomach" he defines as "a sudden, violent, and most painful affection of the stomach, with sense of constriction in the *epigastrium*." In a work entitled "Reference Handbook of Medical Sciences," referred to by defendant's counsel, "cramp" is defined as "a term applied to a painful tonic muscular contraction, of some moments' or minutes' duration. As several of these painful contractions generally occur successively, the term 'cramps' is used to designate the disease." The *Century Dictionary* defines "cramps" as "an involuntary and painful contraction of a muscle; a variety of tonic spasm. Cramp is often associated with constriction and griping pains of the stomach or intestines." When Dr. Harris in his statement described his medicine as intended for the cure of cramps, he evidently used the word "cramps" as a common and well-understood term, relating to a painful disease of the stomach or bowels. The words "Cramp cure" are therefore descriptive of the purpose and character of the medicine, and cannot, under the rulings, be exclusively appropriated by the manufacturer of a remedy for the disease.

Plaintiff's counsel, however, while insisting that, according to the general rules upon the subject, the words "Cramp cure" are a portion and a valid portion of the trade-mark, and are not words simply descriptive of the purpose and character of the medicine, have argued that the trade-mark, being registered under the act of congress of March 3, 1881, the decisions of the courts upon this question, when not made as to trade-marks registered under the act of congress, are not generally pertinent, and should not be controlling. That the act of 1881 contains certain limitations upon the registry of trade-marks, limitations so ex-

plicit as to warrant the necessary conclusion that all else that comes within the idea of a trade-mark may be lawfully used as such. That these limitations are in the following words, taken from section 3 of the act:

"No alleged trade-mark shall be registered, unless the same appear to be lawfully used as such by the applicant in foreign commerce or commerce with Indian tribes, as above mentioned; or is within the provision of a treaty, convention, or declaration, with a foreign power; nor which is merely the name of the applicant; nor which is identical with a registered or known trade-mark owned by another, and appropriate to the same class of merchandise; or which so nearly resembles some other persons' lawful trade-mark as to be likely to cause confusion or mistake in the mind of the public, or to deceive purchasers."

Plaintiff's counsel argue that, as to the specific character of the trade-mark, and the words or signs that may be employed, there is no limitation as to the use of descriptive names, or names indicative of the purpose of the article, or to which it may be applied; that the tests set up by the act of congress are that the proposed trade-mark shall not be the mere name of the applicant, and that it shall not have been used before by others as applied to the same class of merchandise. An examination of the act of congress shows that it does not sustain plaintiff's position. The act does not define a trade-mark. It provides that the owner of a trade-mark, used in commerce with foreign nations, etc., may obtain registration of such trade-mark by complying with certain requirements and regulations, among which is the filing of a written declaration that the registering party has a right to the use of the trade-mark sought to be registered. It provides, as quoted above, that no alleged trade-mark shall be registered, unless the same appear to be lawfully used by the applicant in foreign commerce, etc. It provides that, in an application for registration, the commissioner of patents shall decide the presumptive lawfulness of claim to the alleged trade-mark, provides that the registration shall be *prima facie* evidence of ownership, and provides that nothing in the act shall prevent, lessen, impeach, or avoid any remedy, at law or in equity, which any party aggrieved might have had if the act had not been passed. The evident purpose of the act was, by registration, to protect an existing valid trade-mark, when used in certain cases, not to create, by the registration, a trade-mark which had otherwise no existence or validity. As in the construction of the penal statutes of the United States it is frequently necessary to look to the common law, in order to ascertain the nature of the crime, and the definition of the term used by the statutes, so, in applying the act of 1881, and ascertaining the rights conferred by it, it is necessary to turn to the decisions of the courts for the rule which will define the valid legal trade-mark which is protected by registration under the act. By the exception of certain specified things from registry, congress has limited the trade-marks which may be registered, but it has not said that those which are registered are thereby made valid trade-marks. Such a construction of the act would be contrary to the well-known doctrine of the *Trade-Mark Cases*, 100 U. S. 82, where the supreme court say that a

right to adopt and use a trade-mark to distinguish the goods or property made or sold by the person whose mark it is, to the exclusion of use by all other persons, has long been recognized by the common law and chancery courts of England and this country; that it is a property right, which was not created by the act of congress, and does not depend upon it for enforcement; and that the whole system of trade-mark property, and the civil remedies for its protection, existed long anterior to that act, and have remained in full force since its passage; and the court having in that case declared the act of 1870 unconstitutional, and having said, in that case, that the only constitutional authority, which might possibly be invoked to justify congressional legislation upon the subject of trade-marks, was the power to regulate interstate and foreign commerce, it would require very positive and clear language in the act of 1881 to warrant the conclusion that congress intended, by the mere act of registration, to make that a trade-mark which would have been held invalid by the common-law and chancery courts. "The act of congress fortifies the common-law right to a trade-mark by conferring a statutory title upon the owner, but, as was said of a former act, 'property in trade-marks does not derive its existence from an act of congress.' The present act does not abridge or qualify the common-law right, but by the express terms of section 10 preserves it intact." *La Croix v. May*, 15 Fed. Rep. 236. "It will be observed that the statute [Act 1870] under which the claim is made does not define the term 'trade-mark,' or say of what it shall consist. The term is used as though its signification was already known in the law. It speaks of it as an already existing thing, and protects it as such. The thing to be protected must be an existing lawful trade-mark, or something that may then for the first time be adopted as a lawful trade-mark independent of the statute. There must be a lawful trade-mark adopted without reference to the statute, and then, by taking the prescribed steps, that trade-mark, so already created and existing, may receive certain further protection under the statute." *Moorman v. Hoge*, 2 Sawy. 78. The reasoning of this opinion, referring to the act of 1870, is also applicable to the act of 1881, the prohibitions against registry being substantially the same in both acts.

Aside from the use of the words "Cramp cure," there is no resemblance between the label used by the defendant and that used by the plaintiff. The defendant's label bears the words, "Stucky's diarrhœa and cramp cure. This preparation will be found invaluable for the cure and relief of diarrhœa, cramps, *cholera morbus*, dysentery, summer complaint, and pains in the stomach." Then follow the directions for use, and at the foot of the label are the words, "Prepared only by Emil G. Stucky, Druggist, Cor. 24th St. and Penn Ave., Pittsburgh, Pa." This label, which is used on the bottle containing the medicine, and which has been offered in evidence, is printed in black ink. The wrapper or box in which the bottle is inclosed has substantially the same inscription printed in black ink. The plaintiff's label bears the words, "Dr. Harris' cramp cure. A specific for cholera, cramps, pain in the stomach, &c., &c." Then follow the directions, and at the foot of the label are the words,

"L. H. Harris Drug Co." The label is printed in red and gold letters. The wrapper or box has substantially the same inscription, together with the design of the "boy apparently in great pain," and the baskets referred to in the statement filed in the patent-office, and under the design are printed the words, "Trade-mark." The inscription and design are printed in red ink. The bottles are the ordinary medicine bottles used in the trade. The defendant's label and package do not bear such a resemblance to those of the plaintiff as to lead a purchaser to buy either under the impression that he is buying the other, and there is no imitation or infringement of what is here held to be the plaintiff's trade-mark, nor is there such resemblance as to suggest an apparent intention to deceive or mislead the public, or injure the sale of the goods of the plaintiff. The plaintiff has failed to make out its case, and the bill must be dismissed. Let a decree be prepared accordingly.

WOODCOCK v. WOODCOCK.

(Circuit Court, S. D. Ohio, E. D. June 22, 1891.)

PATENTS FOR INVENTIONS—ANTICIPATION—GRINDING MILLS.

In letters patent No. 382,302, issued May 1, 1888, to James S. Woodcock, claim 3 is for—"In a grinding mill, a stationary burr, a running burr within the latter, composed of a burr section or sections, and a dome-plate, insertible through said burr section or sections, and from which the latter are suspended with the means of attachment." Claim 4 is for—"In a grinding mill, the combination with the running burr, the fixed or stationary burr, and the case, having an exterior bottom flange, provided with holes for its attachment, of the annular meal trough, having the perforated lugs, m, and the bolts, a, securing said meal trough, said stationary burr, and the case together, and a ring conveyer having radial blades, located within said annular meal trough, and having means thereon for connecting it with the running burr, said meal trough being provided with a discharge orifice." *Held*, that each feature of the combination is old. The combination itself anticipates by the patents, and hence this patent is invalid.

In Equity.

R. H. Parkinson and J. W. Firestone, for complainant.

Staley & Shepherd, for respondent.

SAGE, J. The complainant's patent, No. 382,302, issued May 1, 1888, application filed May 26, 1887, contains five claims, the third and fourth of which, it is alleged, defendant has infringed. They are as follows:

"(3) In a grinding-mill, a stationary burr, a running burr within the latter, composed of a burr section or sections, and a dome-plate, insertible through said burr section or sections, and from which the latter are suspended with the means of attachment, substantially as described, for the purpose hereinbefore set forth.

"(4) In a grinding-mill, the combination with the running burr, the fixed or stationary burr, and the case, having an exterior bottom flange, provided with holes for its attachment, of the annular meal trough, having the perforated lugs, m', and the bolts, a', securing said meal trough, said stationary

burr, and the case together, and a ring conveyer having radial blades located within said annular meal trough, and having means thereon for connecting it with the running burr, said meal trough being provided with a discharge orifice, substantially as set forth."

The bill includes also patent No. 213,273, issued to J. W. and S. J. Woodcock March 11, 1879, and by them assigned to complainant, March 27, 1888. Both patents relate to grinding mills; patent No. 382,202 being for an improvement on the other of earlier date. The mills are what are known as "feed grinding-mills," commercially as "sweep mills," and technically as "cone and shell" mills. In construction and appearance they are not unlike an ordinary hand coffee-mill enlarged, to receive and dispose of corn in the ear, or other substances, and reduce the same to meal suitable for feeding stock, or other purposes. Patent No. 213,273 was withdrawn upon the hearing, and may therefore be dismissed without further consideration.

Claim No. 3 in patent No. 382,202 is essentially for the sectional construction of the inner grinder or cone. The burr section is the lower outer periphery or skirt of the cone, having the final grinding teeth. The dome-plate is the upper part of the cone usually provided with breaking teeth, or preliminary grinders. These parts in the claim must be separable. The dome-plate is so formed that when put into place from below it projects through the top of the burr section, leaving the sections suspended therefrom. The means for supporting and attaching the parts described in the specification are over-lapping flanges and rectangular lugs, which fit into recesses or depressions of like shape on the dome-plate, and bolts which pass through these lugs and flanges.

The means for connecting the conveyer to the running burr, and the meal trough to the fixed stationary burr, in the fourth claim, consist, in the first instance, of engaging lugs, and, in the second, of perforated lugs and flanges, and bolts which pass through said lugs and flanges.

Prior patents show each and every separate feature of these claims. Patent No. 12,461, February 27, 1855, to Charles Leavitt, for improvements in portable grain-mills, shows the sectional grinders or removable burr sections both on the inner and outer grinders; the inner burr section supported on a dome-plate, which projects up through the same; the meal trough, connected to the stationary base plate of the mill by overlapping flanges; and the ring conveyer, having blades in the meal trough connected to the running burr, so as to revolve therewith. The inner cone is the stationary part of the mill, the outer shell being adapted to revolve.

Patent to Leavitt, May 11, 1858, shows sectional grinders or burr sections on both the cone and shell, the inner burr section being supported on or suspended by the cone, and the outer burr section secured in the outer shell or casing. This mill has also an annular meal trough, with a breaking flange, which is connected by bolts to an exterior flange on the outer casing. In this mill the inner burr revolves, and it is provided with radial blades, which revolve in the meal trough, and convey the meal to the discharge point.

Patent No. 22,997, to John De Frain, for an improvement in corn and cob mills, has a stationary removable burr section in the outer shell or casing, a meal trough, with a breaking flange connected by bolts to an exterior flange on the shell or casing; also radial blades, which operate in the meal trough, and are connected to the inner running burr.

Baugh's patent, issued April 30, 1867, for an improvement in grinding-mills, shows the removable outer and inner burr sections, the outer shell or case, with an exterior bottom flange and an inner revolving cone, the burr sections of which have inwardly projecting flanges at the top, by which they are connected to the dome-plate.

Patent November 23, 1875, to Hedges, shows an inner running cone or grinder, made in two sections, the lower burr section being bolted to the dome-plate. It has an outer stationary casing, with an exterior bottom flange, and a removable sectional grinder forming a part of the casing. The inner grinder revolves in an outside casing, as it does in complainant's patent.

The Hiscock and Sumner patent, February 15, 1876, No. 173,632, shows the inner and outer removable sectional grinders or upper sections, and a dome-plate from which the inner sectional grinder is supported, and which is inserted through the upper section. This mill has also an annular meal trough supported from the stationary frame of the mill, and radial blades or scrapers connected with the inner movable grinder, and revolving in the meal trough to convey the meal to the discharge. In this mill both the outer and the inner grinders revolve, but in opposite directions.

The Powers patent, March 16, 1877, No. 188,184, is for a mill having outer and inner sectional grinders. The inner section is provided with an interior flange, connected by bolts to the dome-plate. The outer section is connected by perforated lugs and bolts to the outer casing. In this mill the outer grinder rotates, and the inner grinder is stationary.

The Litchfield patent, No. 219,166, September 2, 1879, has inner sectional grinders with interlocking projecting lugs, connecting the burr section with the dome-plate, to take the strain off the connecting bolt. The lugs or projections fit into corresponding recesses in the dome-plate and grinding sections, respectively.

Baugh's patent, No. 233,833, November 2, 1880, is for a mill for reduction, particularly designed to grind ores of a silicious nature, as quartz, but relating to grinding or holding blades in crushing and grinding mills in general. It shows sectional inner and outer grinders; the exterior perforated flange in the stationary casing having bolts, which pass through ears or flanges on a feed trough, and connect the same and the inner stationary burr together. The inner burr sections have projecting flanges connecting them to the driving parts, and answering to the dome-plate in complainant's patent. A moving radial blade or scraper connected with the inner revolving grinder travels in the meal trough, and carries the meal to the discharge point.

The Field and McGee patent, for feed-mill, No. 246,877, September

13, 1881, shows the inner and outer sectional burrs and grinders, the inner burr section having inwardly projecting flanges, which are connected by bolts to the dome-plate. The outer stationary burr or lower shell is connected by bolts and perforated lugs to the outer casing or upper shell.

In the Schofield patent No. 272,334, February 13, 1883, the inner burr section is supported on a dome-plate which projects through the burr, and the outer stationary burr is provided with perforated lugs, connected by bolts to the stationary frame. A central revolving grinding ring operates between the inner and the outer stationary grinding device. This ring is driven by lugs, which engage with the revolving breaker arms without the aid of bolts.

Schofield's patent, No. 210,916, January 20, 1885, shows an outer stationary grinder, and a running burr within the same. This burr consists of a burr section, and a dome-plate insertible through said section, the section being suspended by overlapping flanges from the dome-plate, and bolts and screws for connecting the dome-plate and burr section together. The outer stationary burr is provided with perforated lugs, and secured in the outer stationary casing by bolts, which pass through the lugs, and through perforated flanges or ears on the outer casing.

Patent No. 365,583, issued January 28, 1887, to Davies, application filed March 16, 1886, shows outer and inner burr sections, secured, respectively, to the outer case or shell and the inner dome-plate or cone by bolts. The inner burr section is supported on the dome-plate, which projects through, or is insertible through, the same.

The defendant also produces in evidence Exhibit Leavitt Mill, which was put into public use prior to 1870. This exhibit shows the outer and inner sectional grinders. The inner burr section is supported on a dome-plate, which projects through the section. The burr sections are secured by bolts to the outer shell and to the inner dome-plate or cone. This mill has a feed trough and a ring conveyor with radial blades, with means for connecting the feed trough to the stationary burr, and the conveyor to the running burr. This is accomplished by the use of engaging lugs on one part, which engage between shoulders or projections on the other part.

The defendant has also put in evidence what was called the "Stover Mill," which was in use on the farm of Mr. Bashore in December, 1884, and has an inner revolving grinder and an outer shell or casing. The inner grinder is composed of a dome-plate insertible through a burr section and provided with overlapping flanges from which the burr section is suspended. Projecting lugs on one of the parts fit into corresponding recesses on the other part, causing them to revolve together. This mill has a meal trough, and radial blades operated therein to convey the meal to its discharge orifice. Both the outer and inner grinders revolve, but in opposite directions.

Exhibit Farmers' Choice Mill, of 1882, introduced into public use by complainant five years prior to his application for the patent in suit, shows, with the exception of the feed trough and conveyor, identically

the outer construction of the patent sued upon; that is to say, the outer casing, the exterior bottom flange, the stationary burr section, with perforated lugs, and bolts passing through the lugs and flange for securing the stationary burr section and casing together. This mill shows also the inner sectional grinder, with the burr section secured to the dome-plate by bolts, lugs, and flanges. When the complainant's mill is compared with these prior constructions it becomes apparent that, not only is each and every separate feature of the combination old, but that the combination itself is clearly anticipated. The record shows that frequent changes were made by manufacturers engaged in the construction of mills of the class to which the complainant's belongs, and that the firm or company of which the complainant was a member had almost every season, up to the spring of 1888, changed, in one respect or another, the form of its mills, so as to offer to the public continually what were called "improvements;" and, while this feature of their business called into constant play the exercise of mechanical skill, it did not require invention. Certainly there is no invention in the mill described in the complainant's patent.

The bill will be dismissed.

UNITED STATES v. CLARK.

(District Court, D. Alaska. May, 1891.)

1. MURDER—JURISDICTION IN ALASKA—CONFLICT OF LAWS.

The organic act of the district of Alaska (Act Cong. May 17, 1884, 23 St. at Large, 24) declares the general laws of the state of Oregon in force at that date to be the law of the district so far as the same may be applicable, and not in conflict with the provisions of that act or the laws of the United States, and, in another section, that the laws of the United States not locally inapplicable, and not inconsistent with the provisions of that act, are thereby extended thereto. *Held*, that the laws of the United States would take precedence of the laws of Oregon relating to the same subjects, and the crime of murder committed in such district would be punished in accordance with Rev. St. U. S. § 5359, and not with Crim. Code Or. § 506.

2. SAME—PROCEDURE—LAWS OF OREGON.

Rev. St. U. S. § 5339, providing for the punishment of the crime of murder, having made no provision as to the form of procedure, resort must be had, in testing the sufficiency of an indictment for a murder committed in Alaska, to the laws of Oregon in force May 17, 1884, rather than to the rules of the common law.

3. SAME—DISQUALIFICATION OF GRAND JURORS.

The provision of Civil Code Or. § 918, as amended by St. Or. 1882, p. 61, that no person shall be summoned as a juror more than once in one year, applies only to petit jurors, and the fact that several grand jurors on a panel have served as petit jurors within the year past will not disqualify them, or render the indictment insufficient.

At Law.

C. S. Johnson, U. S. Dist. Atty.

Delaney & Gamel, for defendant.

BUGBEF, J. This is a demurrer and motion to quash the indictment, which is in the words and figures following:

"IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA, DISTRICT OF ALASKA.

"The United States vs. J. E. W. Clark.

"U. S. Rev. St. § 5339; Or. Crim. Code, § 506. Of the special November term of the district court of the United States of America within and for the district of Alaska, in the year of our Lord one thousand eight hundred and ninety, begun and held at Sitka, in said district. The grand jurors of the United States of America, selected, impaneled, sworn, and charged within and for the district of Alaska, accuse J. E. W. Clark by this indictment of the crime of murder, committed as follows: The said J. E. W. Clark, at or near Ounga, within the said district of Alaska, and within the jurisdiction of this court, on or about the 13th day of August, in the year of our Lord one thousand eight hundred and ninety, purposely, and of deliberate and premeditated malice, killed George Hemmingway, by then and there shooting him in the body with a double-barreled shot gun; and so the grand jurors, duly selected, impaneled, sworn, and charged, as aforesaid, upon their oaths do say that J. E. W. Clark did then and there murder George Hemmingway in the manner and form aforesaid, contrary to the form of the statutes of the United States of America and of the state of Oregon, made applicable thereto, in such cases made and provided, and against the peace and dignity of the United States.

"C. S. JOHNSON, District Attorney."

The grounds of objection are: (1) That it appears upon the face of the indictment that it was found under the laws of the state of Oregon, and not under the laws of the United States; (2) that the indictment does not charge a crime under the laws of the United States, and that the allegations thereof are not sufficient to put the defendant upon trial; (3) that the panel of grand jurors who found said indictment is illegal and void, several of the grand jurors being disqualified by reason of service as petit jurors in this court within the past year. Whereupon defendant challenged the array of said grand jury.

The case presents the very important question as to whether the crime of homicide committed within the territory of Alaska is punishable under the statutes of the United States or under those of the state of Oregon. By the terms of the "Act providing a civil government for Alaska," passed May 17, 1884, (23 St. at Large, 24,) this court is vested with the criminal jurisdiction of district courts of the United States exercising the jurisdiction of circuit courts, (section 3,) and with exclusive jurisdiction in all criminal offenses which are capital, (section 7.) The general laws of the state of Oregon in force May 17, 1884, were, by the terms of the organic act, "declared to be the law in the district so far as the same may be applicable, and not in conflict with the provisions of this act or the laws of the United States," (section 7;) and the act further declares that "the laws of the United States, not locally inapplicable to said district, and not inconsistent with the provisions of this act, are hereby extended thereto," (section 9.) It is left for the court to decide, as occasion may demand, whether or not any particular law of the United States is or is not "locally inapplicable" to the district; whether any general law

of Oregon is or is not in conflict with the provisions of the organic act or the laws of the United States; and whether it is or is not applicable to the territory of Alaska.

Under this indictment the question first to be considered is as to the applicability of section 5339 of chapter 3, tit. 70, of the Revised Statutes of the United States, entitled, "Crimes arising within the maritime and territorial jurisdiction of the United States." The section is as follows: "Every person who commits murder * * * within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States, * * * shall suffer death." The statute is silent as to what constitutes the crime of murder, and we must resort to the common law as it stood at the time of the passage of the judiciary act, in 1789, for its definition. *U. S. v. Outerbridge*, 5 Sawy. 620; *U. S. v. Reid*, 12 How. 365. The definition of "murder" commonly found in the books is said to be well represented by Hawkins, who defines it to be the willful killing of any subject whatever through malice aforethought. 2 Bish. Crim. Law, § 732. Murder at common law was not divided into degrees, nor do the United States laws make such a division as do the laws of Oregon. Congress has provided that—

"In all criminal causes the defendant may be found guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged, provided that such attempt be itself a separate offense." Rev. St. U. S. 1035.

It has further provided that—

"Every person who, within any of the places or upon any of the waters described in section 5339, unlawfully and willfully, but without malice, strikes, stabs, wounds, or shoots at, or otherwise injures, another, of which striking, stabbing, wounding, shooting, or other injury such other person dies, either on land or sea, within or without the United States, is guilty of the crime of manslaughter." Id. § 5341.

It has also provided that—

"Every person who, within any of the places or upon any of the waters described in section 5339, attempts to commit the crime of murder or manslaughter by any means not constituting the offense of assault with a dangerous weapon, shall be punished by imprisonment," etc. Id. § 5342.

By the more recent act of March 3, 1875, (Rev. St. Supp. 177,) it is provided—

"That whoever shall be convicted of the crime of manslaughter in any court of the United States in any state or territory, including the District of Columbia, shall be imprisoned," etc.

A further section of the United States laws is as follows:

"If any offense be committed in any place which has been or may hereafter be ceded to and under the jurisdiction of the United States, which offense is not prohibited, or the punishment thereof is not specially provided for, by any law of the United States, such offense shall be liable to and receive the same punishment as the laws of the state in which such place is situated, now in

force, provided for the like offense when committed within the jurisdiction of such state; and no subsequent repeal of any such state law shall affect any prosecution for such offense in any court of the United States." Rev. St. U. S. § 5391.

If murder were not prohibited, or the punishment thereof were not specially provided for, by any law of the United States, the crime committed within the territory of Alaska, which was a place "thereafter ceded to and under the jurisdiction of the United States," might, under the section last cited and the provisions of the organic act, receive the same punishment as the laws of the state of Oregon then in force provided for the like offense when committed within the jurisdiction of that state. The general laws of the state of Oregon in force May 17, 1884, provide that "if any person shall purposely and of deliberate malice * * * kill another, such person shall be deemed guilty of murder in the first degree." Crim. Code Or., § 506. "If he shall purposely and maliciously, but without deliberation and premeditation, * * * kill another, he shall be deemed guilty of murder in the second degree." Id. § 507. If without malice, express or implied, and without deliberation, upon a sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible, voluntarily kill another, he shall be deemed guilty of manslaughter. And certain other acts are also enumerated which are declared to constitute the crimes of murder in the second degree and manslaughter. Id. §§ 507-515. The Oregon laws also provide that the punishment for murder in the first degree is death; for murder in the second degree, imprisonment for life; and for manslaughter, not less than one nor more than fifteen years, and by fine. Id. §§ 516-518.

It therefore follows that if the laws of the United States above referred to are not locally inapplicable to the district, and not inconsistent with the provisions of the organic act, and if the territory or district of Alaska be a place or district or country under the exclusive jurisdiction of the United States, every person who commits murder therein, (that is, with malice aforethought, willfully kills another,) must suffer death; for under that law his crime is not divisible into two degrees. If he unlawfully and willfully, but without malice, kills another, he is guilty of manslaughter; and, in accordance with the facts shown, he may be convicted of the crime of murder, or of the crime of manslaughter, or of an attempt to commit either.

It is claimed by the prosecution, however, that the laws of the United States are, in this case, locally inapplicable to the district; that they are inconsistent with the organic act, and that the territory or district of Alaska is not a place or district of country under the exclusive jurisdiction of the United States, within the meaning of section 5339 of the Revised Statutes of the United States; that the intention of congress was to place it, in a sense, within the jurisdiction of the laws of Oregon; that the general laws of Oregon in force May 17, 1884, are not in conflict with the organic act, nor with the laws of the United States, and should govern here as to the definition and punishment of the crime for which the defendant is indicted. No authority has been cited by the govern-

ment to maintain its contention, probably because none exists; at least, in the extended examination I have given, with the very limited means of research at my command, I have been unable to find any. The organic act did not give to Alaska any power of legislation, but in making the general laws of Oregon, then in force, applicable to the district, the evident intention of congress was to furnish it with a ready-made code of laws, which should stand in immediate stead of the codes which in other territories have been enacted by their legislatures. It retained, however, as superior to the laws of Oregon, all the general laws of the United States which were applicable to all territories and other places under the exclusive jurisdiction of the United States, and which were not locally inapplicable to Alaska. However harsh it may seem to apply to Alaska, with its large population of uncivilized natives, the law of 1790, making murder under all circumstances a capital crime; however strongly the punishments for crime, such as murder, rape, arson, piracy, and the like, contrast with the more humane punitive legislation of states and territories,—it is difficult to see wherein the United States law is locally inapplicable to this district, or in any degree inconsistent with the organic act; and, if this be so, it must be conceded to be one of the laws extended to the district by the provisions of section 9 of that act, and necessarily superior to and superseding the general laws of Oregon. As has been said by Judge FIELD:

“The cases in which the legislation of congress will supersede the legislation of a state or territory, without specific provision to that effect, are those in which the same matter is the subject of legislation by both; for then the action of congress may well be considered as covering the entire ground.” *Davis v. Beason*, 133 U. S. 333, 10 Sup. Ct. Rep. 299.

The law punishing the crime of murder is undoubtedly a general law, applicable to all places and districts of country under the exclusive jurisdiction of the United States; and that the district of Alaska is such a district of country has been decided already, in a case arising in this district, by the circuit court of the United States for the district of Oregon, which, under the organic act, has power to issue to this court its writs of error in criminal cases. There it was held that, so far as the laws of the United States prescribe the jurisdiction of this court, or define a crime, or prescribe its punishment, this court is to be governed by them; that it is only when these laws are silent, or make no provision on the subject, that resort can be had to the laws of Oregon, so far as they are applicable; that since 1867, the time of its cession by Russia to the United States, Alaska has been and is a district of country under the exclusive jurisdiction of the United States, and therefore the statutory provisions of congress concerning the commission and punishment of murder and manslaughter are in force therein, and necessarily exclude the operation or application here of any law of Oregon on those subjects. *Kie v. U. S.*, 11 Sawy. 587, 27 Fed. Rep. 351. See, also, *U. S. v. Williams*, 6 Sawy. 244, 2 Fed. Rep. 61.

Although the appellate jurisdiction of the circuit court of the United States for the district of Oregon is restricted to criminal cases alone, and

this court might not in civil cases feel obliged to follow its rulings, its opinions in all matters are entitled to the greatest respect, and in this instance I feel bound to adhere to the doctrines it has enunciated in the case last quoted from.

The next question is as to the sufficiency of the indictment to sustain a conviction under the laws of the United States. The objection that in the caption it is intimated that the prosecution is under section 506 of the Oregon Criminal Code, and that it is stated that the offense is contrary to the form of the statutes of the state of Oregon, may be disposed of at once by saying that the caption forms no part of the indictment, and that the words, "of the state of Oregon," may, in view of the allegation that the offense was contrary to the form of the statutes of the United States, be rejected as surplusage. *Burchard v. State*, 2 Or. 79; *State v. Lee Ping Bow*, 10 Or. 27; *State v. Abrams*, 11 Or. 169, 8 Pac. Rep. 327; *U. S. v. Borne-man*, 13 Sawy. 359, 35 Fed. Rep. 824. Congress has provided that—

"No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceedings thereon be affected, by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant." Rev. St. § 1025.

It is claimed that, inasmuch as congress has left the definition of the crime to the common law, the indictment should be good under the rules of the common law, and that what may be deemed a defect or imperfection in matter of form only under the statutes might be a defect or imperfection in substance at the common law, which the defendant is entitled to take advantage of. The object of the indictment is to furnish the accused with such a description of the charges against him as will enable him to make his defense, and to avail himself of prior conviction or acquittal, for protection against a further prosecution for the same cause; also to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. A crime is made up of acts and intent, and these must be set forth in the indictment with reasonable particularity of time, place, and circumstance. It is a fundamental rule that the accused must be apprised with reasonable certainty of the nature of the accusation against him. *U. S. v. Cruikshank*, 92 U. S. 542; *U. S. v. Simmons*, 96 U. S. 360; *U. S. v. Curll*, 105 U. S. 611; *U. S. v. Hess*, 124 U. S. 483, 8 Sup. Ct. Rep. 571. But, as has been said by SANDERSON, J., in *People v. King*, 27 Cal. 507:

"Under the pretense of informing the defendant of the nature of the charge against which he was called to defend, it was necessary at the ancient common law to describe the means by which the homicide was committed, and the nature and extent of the wound and its precise locality; from which it necessarily followed that a trifling variance between the proof and the allegation frequently defeated a conviction, no matter how manifest the guilt of the defendant. It was a long time before legislators and judges discovered that this rule had nothing but the most flimsy pretext to support it. If the defendant is guilty, he stands in need of no information to be derived from a peru-

sal of the indictment as to the means used by him in committing the act, or the manner in which it was done, for as to both his own knowledge is quite as reliable as any statement contained in the indictment; if he is not guilty, the information could not aid in the preparation of the defense. A disposition to relax much of this ancient strictness in criminal proceedings has manifested itself in modern practice."

The indictment here omits many of the well-known features of the old indictment at common law. It does not state that the weapon with which the killing is alleged to have been done was loaded, nor in what part of the body the wound was inflicted, nor that the deceased died thereof; but it distinctly alleges that at a certain time and place the defendant purposely and of deliberate and premeditated malice killed the deceased, by then and there shooting him in the body with a double-barreled shotgun; and it seems to me that there is such a description of the charge against the accused, and such reasonable certainty as to the nature of the accusation, time, place, and circumstances, as will enable the accused to make his defense, and inform the court of the facts, so that it may decide whether they are sufficient in law to support a conviction, if one should be had.

There is no allegation that Alaska, wherein the killing is alleged to have been done, is a place or district of country within the exclusive jurisdiction of the United States, but it is alleged that the crime was committed within the jurisdiction of the court. No proof would be required to establish either proposition, for the court would take judicial notice of the fact. The failure to make an allegation as to the jurisdiction of the United States, if a defect, must be considered such a defect or imperfection in matter of form only that it will not tend to the prejudice of the defendant, nor make the indictment insufficient.

It has been held that when congress declares an act a crime, a person charged with the commission of the same may be prosecuted therefor according to the course of the common law, unless the constitution or congress has otherwise provided. *U. S. v. Block*, 4 Sawy. 211. Also that the national courts are unquestionably to look to the common law, in the absence of statutable provisions, for rules to guide them in the exercise of their functions in criminal as well as civil cases. *Conk. Tr. (3d Ed.)* p. 167. However true this may be in other jurisdictions, this court, under the authority of the organic act, must follow the course of procedure in all cases, civil or criminal, laid down in the general laws of Oregon in force May 17, 1884, so far as the same may be applicable and not in conflict with the provisions of the organic act or the laws of the United States which have been extended to the territory. The laws of Oregon do not conflict, so far as indictment, arraignment, and pleas are concerned, with any law of the United States. The United States statutes are silent and make no provision upon the subject, and resort must be had to the laws of Oregon. *Kie v. U. S.*, *supra*. The indictment follows the form adopted by the general laws of that state, and sanctioned by the repeated decisions of its highest court. *Gen. Laws Or. 1843-72*, p. 457; *State v.*

Dodson, 4 Or. 64; *State v. Spencer*, 6 Or. 152; *State v. Brown*, 7 Or. 186; *State v. Lee Yan Yan*, 10 Or. 365.

The only question remaining is upon the motion to quash the indictment on account of the alleged illegality of the panel of grand jurors. It is provided by the laws of the United States that—

"Jurors to serve in the courts of the United States in each state respectively shall have the same qualifications, * * * and be entitled to the same exemptions, as jurors of the highest court in such state may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned; and they shall be designated by ballot, lot, or otherwise, according to the mode of forming such juries then practiced in such state court, so far as such mode may be practicable by the courts of the United States, or the officers thereof." Rev. St. U. S. § 830.

Under this statute it was held in the case of *Kie v. U. S.*, *supra*, that the qualifications of jurors in Alaska, and the liabilities of persons to serve as such, must be determined by a reference to the laws of Oregon. The attention of the court was not called, perhaps, nor was it necessary to give consideration in that case, to section 812 of the Revised Statutes of the United States, providing that no person shall be summoned as a juror in any circuit or district court more than once in two years; nor to the act of congress of June 30, 1879, (Rev. St. Supp. p. 497,) regulating the mode of drawing jurors in the United States courts, which contains the provision, evidently intended to repeal and take the place of section 812 above mentioned, that no person shall serve as a petit juror more than one term in any one year. The statute is silent, however, as to incompetency to serve as a grand juror, and it is reasonable to assume that, if congress had intended to make such prior service a disqualification to serve as a grand juror, it would have been so declared in the act last cited. It was held in the case of *U. S. v. Reeves*, 3 Woods, 199, cited in *Roe*, Crim. Proc. in U. S. Cts. p. 49, under section 812, Rev. St. U. S., that the fact that a grand juror has served before as such within two years is not ground for quashing the indictment. I have not the case at hand to refer to. But if we are to be governed by the laws of Oregon alone, I do not think the objection can be sustained. Section 918 of the Civil Code of that state, as the same was amended October 24, 1882, (St. 1882, p. 61,) says that "no person shall be summoned as a juror in any circuit court more than once in one year;" referring, of course, to the circuit courts of that state. This act was undoubtedly meant to apply only to petit jurors in the circuit court, for the grand jury in Oregon is not summoned in that court, but in the county court. Civil Code Or. c. 12, tits. 2, 3.

For these reasons, the demurrer of defendant is overruled, his motion to quash the indictment is denied, and he is ordered to plead forthwith.

CUTTING v. FLORIDA RY. & NAV. CO. *et al.*, (HARRIS *et al.*, Intervenor.) MEYER v. SAME. BROWN v. SAME. CENTRAL TRUST CO. OF NEW YORK v. SAME. GUARANTY TRUST & SAFE-DEPOSIT CO. v. SAME.

(*Circuit Court, N. D. Florida. June 26, 1891.*)

INTERSTATE COMMERCE—STATE RAILWAY COMMISSION.

Orange growers in Florida shipped their fruit from one point in that state to another point in the same state, consigned to their agent at the latter point, for re-shipment, who immediately forwarded them to their destination in another state. *Held*, that the shipment from the growers to the forwarding agent was interstate commerce, not subject to the control of the Florida Railway Commission. Following *The Daniel Ball*, 10 Wall. 557.

In Equity.

H. Bisbee, for intervenors.

John A. Henderson, for receiver.

PARDEE, J. The several petitions of intervention are alike in their allegations, and severally claim that the petitioners shipped over the Florida Railway & Navigation Company's railroad, then in the possession of the court, H. Reiman Duval, Esq., receiver, from Citra, Marion county, Fla., to Callahan, or Baldwin, Fla., and from Wildwood, Sumter county, Fla., to Baldwin, or Callahan, Fla., between the 1st day of November, 1888, to the 1st day of February, 1890, sundry boxes of oranges, consigned to sundry persons, for the carriage and transportation of which the said receiver demanded and collected 25 cents per box, against the protests of petitioners; that the railroad commissions, existing and exercising authority under the laws of the state of Florida, previous to the shipment of any of said boxes of oranges, had duly fixed the freight charges for carriage and transportation of the said fruit as 15 cents per box between the points aforesaid, and had duly issued freight rates, and notified the said receiver thereof; that they loaded the said fruit upon the cars furnished by said receiver, and that he was subjected to no expense or trouble in loading and handling said fruit, and that the whole service performed by said receiver was in the hauling of said fruit from the place of shipment to the point of consignment; that the 10 cents per box in excess of commission rates charged and exacted by the said receiver for the carriage and transportation of said fruit was unjust and illegal; and they pray that the court will decree that the receiver shall pay the said petitioners the sum of 10 cents per box, so alleged to have been illegally exacted from them for the carriage and transportation of said fruit. Said petitions are indorsed, "Filed by leave of the court," though the record does not show that any order for filing or for process or reference was made thereon. No answers appear to have been filed to the said interventions, but the same appear to have gone to the special master without being in anywise put at issue. The master heard the several petitions together, took a large amount of evidence, oral and documentary, and returned the same to the court without specifically find-

v.46f.no.11—41

ing any facts in the case, or making any recommendation as to disposition of the cases. Thereupon the petitions have been submitted to the court for determination upon written briefs, as though distinct issues were made on each and every allegation of the several interventions.

As a matter of course, in considering these interventions, the court will take judicial notice of all facts appearing of record in the main suit, particularly with regard to the lines and extent of the Florida Railway & Navigation Company's railroad, and of the financial condition and general management of the property. Baldwin is the station where the Fernandina & Cedar Keys line and the Jacksonville & Chattahoochee line cross; both lines belonging to the Florida Railway & Navigation Company. Callahan is a station on the Fernandina & Cedar Keys line, in the extreme north-east corner of the state of Florida, near the Georgia state line, where the Florida Railway & Navigation line is crossed by the Savannah, Florida & Western Railway. Neither Baldwin nor Callahan is a town or place of any importance, except from the railroad connection; neither is a market place for oranges, nor a distributing point for such fruit. Citra is a station on the Florida Railway & Navigation Railroad, southern division, in an orange growing and producing country, and is a competitive railway point; the Florida Southern Railway reaching the place via Gainesville. In the year 1888 the Florida Railway Commission established rates on fruit, oranges, and lemons, carried by the Florida Railway & Navigation Railroad from points within the state to points within the state, fixing extremely low rates in comparison with the rates previously charged. From Citra to Baldwin and Callahan, as points within the state, the rate was fixed at 12 cents per box, 20 per cent. added, making about 15 cents per box. Prior to this, the standard railroad rate between the points in question had been 25 cents per box, with a rebate to Citra shippers of 5 cents per box. At the beginning of the season of 1888, the receiver of the Florida Railway & Navigation Company adopted, under protest, the commission rates, and charged and collected accordingly with regard to shipments over the Florida Railway & Navigation line within the state. At this time a yellow-fever epidemic prevailed in Florida, and railroad business was completely prostrated, trains being run only for the public interest. Under these circumstances, and finding that the commission rates on oranges were unremunerative to the property, and not sufficient for the service rendered, the receiver of the Florida Railway & Navigation Company ordered the old rate of 25 cents per box to be restored, and thereafter on all shipments it was charged. The intervenors are large growers and shippers of oranges from points mainly about Citra, in Florida, to northern and western cities, who, during the season of 1888, under arrangements previously made, shipped large quantities of oranges, shipments in all cases being made to ultimate consignees at points in other states than Florida. Up to December 1st shipments appear to have been regularly made on through bills of lading at the joint rate established by the several lines respectively carrying the goods. After December 1, 1888, in pursuance of an arrangement among orange growers to that end, and with a view

to characterize the shipments as local commerce entirely within the state, so as to claim for such shipments the rates given by the railway commission of the state of Florida, intervenors' consignments were made to an agent at Callahan, although the ultimate destination of the fruit was not changed, nor was the manner of transacting the business substantially changed from what it had been before December 1st. As before, the receiver furnished the cars to carry the fruit to its ultimate destination. At Callahan the goods were not unloaded, bulk was not broken, nor the cars delayed to any extent. As in the case of through shipments generally, the loaded cars were at once transferred to other carriers, to be forwarded to their destination; in other words, the character of the shipment was not changed, but after December 1st, as before, the fruit, when loaded on the cars at Citra, was started for and destined to markets in other states, and then and there at Citra began what was in fact one continuous journey to an ultimate destination without the state of Florida. The difference in the transaction of the business was solely in calling for a local bill of lading instead of a through bill, the interposition of a forwarding agent, and in preparing the charges demanded under protest.

From the evidence submitted, considering all the circumstances attendant upon the carriage of the intervenors' goods, putting aside all considerations arising from the fact that the Florida Railway Commission had established much lower rates between the points in question, the charges actually made by the receiver for the carrying of the goods of the intervenors do not appear to have been unreasonable, nor in any sense illegal or unjust. Section 7 of the interstate commerce act provides—

"That it shall be unlawful for any common carrier, subject to the provisions of this act, to enter into any combination, contract, or agreement, express or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from place of shipment to place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freight from being, and being treated as, one continuous carriage from place of shipment to place of destination, unless such break, stoppage, or interruption was made in good faith, for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage, or to evade any of the provisions of this act."

"In this case it is admitted that the steamer was engaged in shipping and transporting down Grand river goods destined and marked for other states than Michigan, and in receiving and transporting up the river goods brought in the state, and without its limits; but in so much as her agency in transportation was entirely within the limits of the state, and she did not run in connection with, or in continuation of, any lines of vessels or railways leading to other states, it is contended that she was engaged entirely in domestic commerce. But this conclusion does not follow. So far as she was employed in transporting goods destined for other states, or goods brought from without the limits of Michigan, and destined to places within that state, she was engaged in commerce between the states; and, however limited that commerce may have been, she was, so far as it went, subject to the legislation of congress. She was employed as an

instrument of that commerce; for, whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one state and some acting through two or more states, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation it is subject to the regulation of congress." *The Daniel Ball*, 10 Wall. 557.

The doctrine of *The Daniel Ball* has been repeatedly recognized and approved in later decisions of the supreme court. See *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. Rep. 475; *Wabash, etc., Ry. v. Illinois*, 118 U. S. 557, 7 Sup. Ct. Rep. 4; *Kidd v. Pearson*, 128 U. S. 25, 9 Sup. Ct. Rep. 6; *Louisville, etc., Ry. Co. v. Mississippi*, 133 U. S. 587, 10 Sup. Ct. Rep. 348; *Norfolk, etc., R. Co. v. Pennsylvania*, 136 U. S. 114, 10 Sup. Ct. Rep. 958.

Under the facts of this case and the law, as declared by the supreme court, I have no doubt the commerce of the intervenors in the shipment and transportation of fruit was interstate commerce, and was in no wise under the control and regulation of the Florida Railway Commission. If the rates established by the Florida Railway Commission were not binding on the receiver of the Florida Railway & Navigation Company, then the intervenors have no case, because the proof does not establish that the rates actually charged by the receiver were unreasonable or unjust.

The interventions should be dismissed, and it is so ordered.

BURKE *et al.* v. BUNKER HILL & S. MINING & CONCENTRATING Co.

(Circuit Court, D. Idaho. June 18, 1891.)

1. NATIONAL JURISDICTION—MINING CLAIMS.

A suit brought in support of an adverse claim, in pursuance of the requirements of section 2326, Rev. St. U. S., as amended in March 1881, (1 Sup. Rev. St. 609) is for that reason a suit arising under the laws of the United States, within the meaning of the statute giving jurisdiction on that ground, irrespective of the character of the question involved in the litigation.

2. SAME.

Such an action has for one of its objects the determination as to whether either party has divested the United States of the possessory title to the premises in controversy. It is not only intended to determine the rights of the two parties as between themselves, but also as between each of the parties and the United States; thereby making the United States substantially, though not formally, a party to the suit, and entitled to have their rights determined in the national courts. On that ground the United States are entitled to have their rights determined in the national courts.

3. SAME.

Such cases are not within the decision of *Trafton v. Nougues*, 4 Sawy. 178, and *Water Co. v. Keyes*, 96 U. S. 199.

4. ADMISSION OF IDAHO—TRANSFER OF CAUSES.

Where an action was commenced in territorial courts before admission, it was not necessary to state jurisdictional facts sufficient to give jurisdiction to this court; and such facts may be stated in request for transfer or by affidavit. Such request,

like the petition in a removal case, becomes, upon filing and transfer thereafter, a part of the record, for the purpose of determining the question of jurisdiction. It is sufficient when the jurisdictional facts appear in the request for transfer, even though not set up in the pleadings.

5. SAME.

When such request is filed in the state court, that court should transmit the papers to the circuit court, and, upon filing such request, the jurisdiction of the state court ceases.

6. SAME.

National courts cannot compel state courts to transmit original papers, but, when a state court refuses so to do, may proceed upon certified transcripts.

(*Syllabus by the Court.*)

At Law.

W. B. Heyburn, for plaintiffs.

Wm. H. Claggett, F. Ganahl, and J. R. McBride, for defendants.

Before SAWYER, Circuit Judge, and BEATTY, District Judge.

SAWYER, J. This is a suit brought in the territorial district court, before the admission of Idaho into the Union as a state, where it was still pending at the date of admission. It was brought in pursuance of the provisions of section 2326, Rev. St., to determine the adverse claims of the parties to a mining claim, for which defendant had made application for a patent under section 2325. After the admission of Idaho as a state, the plaintiff, in pursuance of the provisions of section 18 of the act of admission, filed a request in the state court, which had acquired possession of the records, based upon an affidavit showing what is claimed to be the necessary jurisdictional facts for a transfer of the case to the United States circuit court for the district of Idaho. Among other things, it is alleged, as follows, in the affidavit forming a part of the request, and upon which it is in part based:

"That plaintiffs claim to be the owners of the Mammoth Mining Claim by virtue of a valid location of the same under the provisions of chapter 6, tit. 32, of the Revised Statutes of the United States, and claim to have posted a notice of location at the point of discovery and recorded a substantial copy of said notice in the office of the recorder of Shoshone county, but do not claim to have recorded said notice in the office of the local recorder of the Yreka mining district, in which the claim is situated. The legislature of Idaho territory prior to said law enacted a law requiring the notice to be so recorded in said local mining district, which the defendant will maintain on the trial was a mandatory law, and that a failure to comply with its provisions rendered the record and location of plaintiff void, while plaintiffs will maintain that the said act if mandatory is in conflict with the section 2324 of the Revised Statutes of the United States and a failure to comply with its terms would not affect the validity of plaintiffs' title. That the defendants will insist on said trial that the location of plaintiffs' claim to be valid against the defendants must be made in strict conformity with the statutes of Idaho territory, and plaintiffs will contend that said statutes are in conflict with the provisions of said chapter 6, tit. 32, of the Revised Statutes of the United States. Plaintiffs will also introduce at the trial of said cause the notice of location as the same was recorded in the said county recorder's office which plaintiffs will maintain is in compliance with the said acts of congress. Defendants contend that said notice of location is not in compliance with said act of congress. Plaintiffs will also offer evidence of the marking of their said claim on the ground so that its boundaries could be readily traced. Defendants will contend that the claim

was not so marked because the posts marking the same were not placed within the limits of the claim as allowed by law, and that the claim was staked in excess of the length allowed by law, and therefore void, while plaintiffs will admit the fact that the claim was staked in excess of the size allowed by law, but contend that under the act of congress of May 10, 1872, under which plaintiffs claim, the claim was not rendered void thereby but only void as to the excess."

Upon filing the request and affidavit, plaintiffs made application to the state district court, which then had the custody of the records, for an order directing the clerk to transmit all papers, pleadings, files, etc., in said court to the circuit court of the United States, which application the court denied. Whereupon the plaintiffs procured a certified transcript of the record, and filed it in this court.

The plaintiffs now move for an order of this court, commanding the said district court, and the clerk thereof, to forthwith transmit to this court all papers, pleadings, and files in said cause in said district court. And the defendant makes a counter-motion to strike from the records of this court the transcript of the record of said case filed herein, on the ground that the original pleadings, files and proceedings are to be transmitted, and that they only can constitute, or furnish a record upon which this court can act—a transcript thereof being insufficient, under the laws to authorize any judicial action in the case in this court.

Objections by defendant are made that the pleadings and affidavit forming part of the request, on various grounds do not show a case over which this court has jurisdiction. The value of the mine is not alleged, as would have been better, but we think upon the whole, that the allegation in the complaint that plaintiff has sustained by the action of the defendant in depreciating the value of the mine, damages to the amount of \$10,000, and a claim for a judgment for that amount, shows a case for jurisdiction, so far as the amount in controversy is concerned. It is claimed on one side and denied on the other, that this suit having been brought to determine the title to a mining claim in pursuance to the requirements of section 2326 of the Revised Statutes, as amended in March, 1881, (1 Supp. Rev. St. 609,) is, for that reason, a suit arising under the laws of the United States, within the meaning of the statute giving jurisdiction on that ground, irrespective of the character of the questions involved in the litigation. It seems to us, that all the authorities, as they now stand, have determined the question in favor of the affirmative of this proposition. Thus the point was directly decided on the circuit on a motion to remand, this being the only point on the motion, by Mr. Justice MILLER of the supreme court, in *Frank G. & S. M. Co. v. Larimer M. & S. Co.*, 8 Fed. Rep. 724. A like decision was made by Justice BREWER, then circuit judge, in *Cheesman v. Shreeve*, 37 Fed. Rep. 36. So the same ruling was made by KNOWLES, J., in *Strasburger v. Beecher*, 44 Fed. Rep. 213. Says the judge:

"As to this suit, I am clearly of the opinion that it is one which arises under the laws of the United States. It is a suit instituted in pursuance of the provisions of section 2326 of the Revised Statutes of the United States. See *Frank G. & S. M. Co. v. Larimer M. & S. Co.*, 8 Fed. Rep. 724. One of the

objects of such an action is to determine who is entitled to a patent to the premises in dispute. The judgment is filed in the United States land-office on the determination of the action. To some extent the United States is a party to the action. See *Jackson v. Roby*, 109 U. S. 440, 3 Sup. St. Rep. 301. This decision must be based upon the theory, it appears to me, that the action, pursuant to an adverse claim, has for one of its objects the determination as to whether either party has divested the United States of the possessory title to the premises in dispute."

That is to say, it is not only intended to determine the rights of the two parties as *between themselves*, but also as *between each of the parties and the United States*, so as to determine finally whether either party has so far performed the conditions prescribed by the statute as to entitle him to pay for the mine and receive a patent from the United States, *thereby making the United States, substantially, though not formally, a party to the suit, and entitled to have their rights determined in the national courts*. This idea is supported by the amendment to section 2326 of 1881, (1 Supp. Rev. St. 609,) which provides as follows:

"That if, in any action brought pursuant to section twenty-three hundred and twenty-six of the Revised Statutes, title to the ground in controversy *shall not be established by either party; the jury shall so find, and judgment shall be entered according to the verdict*. In such cases costs shall not be allowed to either party, and the claimant shall not proceed in the land-office or be entitled to a patent for *the ground in controversy until he shall have perfected his title*."

It would seem that, under section 2326, as it originally stood, when a party applied for a patent to a mine, and there was an adverse claimant, the parties were referred to the ordinary courts to determine in the usual actions, applicable to the cases, the rights of the adverse claimant only as between themselves; such as an action to recover possession when out of possession and a suit to determine an adverse claim when in possession; the question between the successful party and the government being left to the determination of the commissioner of the land-office. But the amendment seems designed to change the whole proceedings, and refer, not only the question of the rights of the parties as between themselves, but also, without making the United States formally a party, to transfer the whole matter, as between the United States and the successful party to the courts, thereby making the United States, substantially, though not formally, parties to the suit; and on that ground, it would seem, that the United States are entitled to have their rights determined in the national courts. *Jackson v. Roby*, 109 U. S. 444, 3 Sup. Ct. Rep: 301, and *Wolverton v. Nichols*, 119 U. S. 485, 7 Sup. Ct. Rep. 289, seem to support the idea, also, that not only the rights of the parties, as between themselves, but, also, the rights, as between the parties, respectively, and the United States, are to be, conclusively determined. These rulings cited from the Federal Reporter appear to be sustained by the supreme court of the United States in *Chambers v. Harrington*, 111 U. S. 350, 4 Sup. Ct. Rep. 428, where the supreme court entertained an appeal, apparently, because it was an action brought under section 2326, Rev. St. See, also, *Doe v. Mining Co.*, 43 Fed. Rep. 219. What-

ever we might think, were this a case of first impression, arising under section 2326 *before its amendment*, we do not feel at liberty now, to question the ruling of so many cases decided by eminent judges, and by the United States supreme court, as we understand their decisions. We, therefore, hold upon these authorities that the record shows a case for national jurisdiction, as arising under the laws of the United States for the reason, that it was brought in pursuance of the requirements of section 2326, as amended, and therefore, it is not within the decisions of *Trafton v. Nougues*, 4 Sawy. 178, and *Water Co. v. Keyes*, 96 U. S. 199, and cases following those decisions. These jurisdictional facts all appear in the pleadings, and are not required to be otherwise shown in the request, or petition, to transfer to this court.

We are, also, of the opinion that the affidavit upon which the request to transfer was in part based, as quoted in the statement, presents at least two, if not three points of a disputed construction of a statute of the United States which brings the case within the principles announced in the decisions in *Trafton v. Nougues*, and *Water Co. v. Keyes*, unless one of them has, already, been finally disposed of by the supreme court, in such sense, that it is not open to further discussion; and that the petition is sufficient in this respect, also on that ground to show jurisdiction.

It is insisted that, this being a case of succession, under the act of admission, and not a case of removal, under the removal act, the jurisdictional facts should all appear in the pleadings, and cannot be shown by affidavits filed with, and as a part of, the petition, or request for transfer; and that, if the pleadings do not state such facts, they should be amended before request made. As we have seen also, sufficient jurisdictional facts do, in this case, appear in the pleadings. But upon careful consideration, we are satisfied, that, where they do not appear in the pleadings, they can be set out in the petition, or request, to transfer. When the suits were instituted, it was not necessary to set out, in the pleadings, the facts necessary to give the national courts, as distinguished from the state courts, jurisdiction. Consequently, in many cases, the pleadings filed in the territorial courts would not be likely to state those facts. The cases pass to their successors, as they are, at the time of the admission, or upon the organization of the successors of the territorial courts, immediately after admission. Under the removal acts, it has always, been held, that, when the jurisdictional facts necessary to a removal do not appear in the record, they may be set up in the petition; and, that, the petition constitutes a part of the record to be consulted upon the raising of any jurisdictional question in the court to which the case is removed. Now although this is a case of succession and not removal, under the acts construed, the case is, strictly, analogous; and we can perceive no good reason for making any distinction between the two classes of cases in this respect. The request in this case, like the petition in a removal case, becomes upon the filing and transfer, thereafter, a part of the record for the purpose of determining the question of jurisdiction. We think it sufficient, when the jurisdictional facts appear in the request for a transfer, even though not set up in the pleadings.

We are of the opinion, therefore, that this is a proper case under the admission act to be transferred to the United States circuit court for the district of Idaho; that the record, in the state court both with the request, and without it, presented sufficient facts to give the national courts jurisdiction; that upon the filing of the request in the state court, that court ought to have transmitted the papers to the circuit court of the United States, and that upon the filing of the request the jurisdiction of the state court over the case ceased, and no longer existed.

The next question, is, whether the original papers and files, or a complete certified transcript of the record, should have been transmitted; and if the originals are not transmitted would a complete certified transcript, when filed in the circuit court, constitute such a record, as would authorize the court to assume jurisdiction, and proceed with the case? The language of the statute, is, "All files, records, indictments and proceedings relating to any such cases shall be transferred to such circuit, district and state courts, respectively, and the same shall be proceeded with therein in due course of law." That language seems to be plain, and not open to construction. The originals are, evidently, contemplated. "All the files, records, indictments and proceedings," etc., *not transcripts* of such documents. The court is a successor to the prior court, and the prior court goes out of existence. The successor should succeed as custodian of the existing records. There is no other place indicated for them. What else can be done with them? If the court takes up the case at the point where it finds it, and proceeds "therein in due course of law," it is the appropriate, and only appropriate, custodian; and as we think, was intended to succeed to the possession and control of the original "files, records, indictments and proceedings." This however, as to some parts of the record, would involve a practical difficulty, if not impossibility. The journals, minute books, judgment books, etc., would, doubtless, contain entries, indiscriminately, in both classes of cases—those that go to the state, and those that go to the national courts. Obviously, both courts could not have the custody of these parts of the records. From the necessity of the case, but one could have them. So all cases go to the state courts, *unless a request be made* to transfer them to the national courts, and as a great majority of the cases would go to the state courts, obviously, also the books and records of this kind, should go to the state courts, and transcripts from those books, only, of such recorded proceedings, could be furnished to the national courts in connection with the original separate files of papers, and indictments in any case transferred upon request. As to such portions of the record, we think a certified transcript would afford a legal record upon which the national courts would be authorized to act. But the state court, having possession of the records, files, papers, etc., in this case, refuses to transmit them in pursuance of the request made, and as required by law; and we are asked to make an order requiring the state court, and its clerk to transmit them as the law requires, and as they should do. But the statute gives us no such authority. We are not referred to any law which would justify us making any such or-

der, or authorizing us to enforce an order if made. We have certainly no controlling, or supervising, power over the state courts, or their clerks; and not even any appellate jurisdiction over them. The state and circuit and district courts of the United States, are courts of co-ordinate jurisdiction, only, upon some matters; but having no relations to, or with each other. They are courts of different sovereignties, each acting upon their own views of their powers and duties, and neither subject to interference from the other. We know of no means by which we can compel the state courts to send the records which belong under the law to this court; and such an order would be merely *brutum fulmen*; and a *certiorari*, only goes from a superior to an inferior court. The application for the order asked, must therefore, be denied. We have no doubt, however, that upon a proper request made in a proper case, the jurisdiction of the state court ceases, and if it proceeds with the case, its action will be set aside, as utterly void, by the supreme court of the United States on appeal, as has been done in analogous cases under the removal acts, where the state courts have refused to order a removal, and proceeded with the case. What, then, is to be done, when in a proper case, upon a proper request, the state court refuses to transmit the files, and records in the case, to the national courts? In such a case, we have no doubt, that the jurisdiction of the state court ceases, and that of the national court attaches, upon the filing of the request; but the latter court has no record upon which it can proceed to act. In such case, we think, the national court, would be fully justified in proceeding upon a complete certified transcript of the record from the state court. It could order the transcript to be accepted, and taken as the record in the case, as a substitute for the original papers. Courts have proceeded to act upon a certified transcript of an indictment, even where an indictment was ordered to be transferred for trial from the national court wherein it was found, to another national court. Thus, in *U. S. v. McKee*, 4 Dill. 1, where it was ordered in pursuance of the statute "that the indictment be remitted to the adjourned September term of the circuit court" it was held that the transmission of a certified transcript of the indictment, was a compliance with the order. Numerous authorities are cited upon the point.

We think, therefore, that where the state court in a proper case, and upon a proper request, refuses to transmit the original files to the national court, in which it belongs, the latter court is fully empowered to adopt, and justified in adopting, a complete certified transcript of the record in the case, as its record; and in proceeding thereon with the case. There is nothing in the act of admission prohibiting such a course, and it seems in such case to be the only mode by which the circuit court can take and exercise the jurisdiction conferred on it. We would suggest that the better mode of proceeding in such case, would be to procure a proper complete transcript of the record in the state court, make a showing of the refusal of the state court to transmit the original record, and move the court for leave to file the transcript, and to adopt it as the record, thus far, in the case. This is the only case submitted, and

we have covered all the points argued and submitted, as we understand them. In the brief of plaintiff we are asked to permit a supplemental bill to be filed. We find in the record a motion to file it. But we did not understand, at the hearing, that this motion was submitted. At all events, the proposed bill is not on file, and since we do not know its contents, we cannot determine upon the propriety of allowing it to be filed, as the matter now stands. We do not therefore, pass upon that question but leave it, with leave to renew the motion upon filing as a part of the moving papers the proposed supplemental and amended bill.

Upon these views, the motion of plaintiffs for an order upon the state court, to transmit the record, and of the defendant to strike the transcript from the record, must be denied, and it is so ordered.

UNITED STATES v. AYRES.

(District Court, D. South Dakota. June, 1891.)

GRAND JURY—CONSTITUTIONAL LAW.

A direction by the court in the *venire* for a grand jury, that the jury shall be summoned from a certain part of the district, as allowed by Rev. St. U. S. § 802, is not in conflict with Const. U. S. Amend. 6, which provides that "in all criminal prosecutions the accused shall enjoy the right to a speedy trial by an impartial jury of the state and district wherein the crime shall have been committed."

At Law.

Motion to quash indictment, on the ground that the grand jury finding and returning the same was not a legal grand jury, for the reason that the *venire* issued by the court directed that the requisite number of jurors should be summoned from a named part of the district.

W. B. Sterling, Dist. Atty.

Winsor & Kittridge, for defendant.

Before SHIRAS and EDGERTON, JJ.

SHIRAS, J. The motion to quash the indictment is based upon the claim that it is not within the power of the court to cause a grand jury to be summoned from a certain portion or division of the district, and that, if such limitation is made in the *venire*, a jury summoned in accordance with its provisions would not be a legal grand jury, and therefore indictments returned by such a body would not be valid. In support of the motion, reference is made to the sixth amendment to the constitution of the United States, which provides that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." Even if the construction of this amendment is admissible that would hold it applicable to grand juries, it does not bear the meaning

sought to be given it, for its purpose was to prevent the evil of a person charged with a criminal offense being taken for trial to some distant place. The burden caused to litigants in being compelled to follow the king's progresses throughout England had become so great at an early day that it called for correction in *Magna Charta*, by the provisions of which the court of common pleas was fixed at Westminster, and assizes were required to be held in the different counties. Indeed it became a recognized principle of the common law that one accused of crime was entitled to a trial before a jury of the vicinage. When the constitution of the United States was adopted, the need of extending proper protection in this particular was at once perceived, and the sixth amendment was, with others, submitted to the states by the first congress assembling after its adoption, to-wit, in September, 1789. This same congress, in adopting the judiciary act, approved September 24, 1789, by section 29 thereof enacted:

"That, in cases punishable with death, the trial shall be had in the county where the offense was committed, or, when that cannot be done without great inconvenience, twelve petit jurors, at least, shall be summoned from thence, and jurors in all cases to serve in the courts of the United States shall be designated by lot or otherwise in each state, respectively, according to the mode of forming juries therein now practiced. * * * and shall be returned, as there shall be occasion for them, from such parts of the district, from time to time, as the court shall direct, so as shall be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly to burthen the citizens of any part of the district with such services."

It cannot be for one moment supposed that in framing the act which was to form the foundation for the judicial system of the country congress intentionally incorporated therein provisions which were deemed to be so iniquitous and unjust to the citizens as to call for the adoption of an amendment to the constitution to protect the citizen therefrom in the future. It cannot be possible that in framing the sixth amendment congress intended thereby to secure a constitutional enactment requiring juries to be summoned from an entire state or district, and at the same time, by the provisions of the judiciary act, declared that the courts should have the power to direct the juries to be summoned from parts only of the district. The constitutional provision was intended to fix the maximum limit within which the citizen charged with a criminal offense could be put upon his trial; but it is not to be construed to be a requirement to the effect that the jury must be summoned from the entire district, regardless of its extent, or of the burden and expense that would be thus caused to the government and the jurors alike. This provision of the statute, authorizing the court to direct what parts of the district a given jury, grand or petit, shall be summoned from, has remained a part of the statute law since its adoption in 1789, and now forms section 802 of the Revised Statutes; and I have no doubt that it has been acted upon in all, or nearly all, the districts of the Union. Its constitutionality cannot be successfully impeached at this late day, and, if constitutional, it cannot be questioned that its provisions fully sustain the action of the court in directing that the grand jury summoned for

the term at Sioux Falls, and which found the present indictment, should be drawn from the parts of the district named in the *venire*. The purpose of the court in directing the jury to be summoned from a part only of the district was to save unnecessary expense to the government, and to limit the burden upon the citizens who should be selected for jury duty; and, in so doing, the court simply performed the duty which the statute places upon the court, and which the court is required to perform. This question has been discussed in the cases of *U. S. v. Dixon*, 44 Fed. Rep. 401, and of *U. S. v. Wan Lee*, Id. 707, and the conclusions reached are not in accord. The view taken by Judge HOFFMAN in the former case, adverse to the conclusion we have reached, was doubtless largely affected by the form of the indictment in the case before him, in which it was recited that the indictment was found "by the grand jurors of the United States of America for the northern division of the district of Washington."

In the case now under consideration the indictment properly recites that it was found by the grand jurors for the district of South Dakota. The legal name of the court is the "District Court in and for the District of South Dakota," and a grand jury, when summoned, although from a part only of the district, becomes, when impaneled and sworn, a grand jury of the district court in and for the district of South Dakota. No question therefore arises on the form of the indictment in this case in this particular; the motion to quash being based upon the fact that the *venire* directed the jurors to be summoned from a part only of the district. Upon this question we entertain no doubt that the action of the court was not only strictly legal, but that it was imperatively demanded of the court in fairly carrying out the true meaning of section 802 of the Revised Statutes.

The motion to quash the indictment is therefore overruled.

EDGERTON, J., concurs.

In re KELLY.

(Circuit Court, D. Oregon. November 10, 1890.)

1. DESIGNATION OF CRIME IN COMMITMENT.

It is a sufficient designation in a commitment of the crime of inveigling a person, with the intent to cause him to be sent out of the state against his will, if it states that the party has been held to answer for "the crime of enticing and inveigling Alfred Armstrong and William Kelly to leave the state of Oregon against their will;" for from this statement it must be implied that the inveiglement was "with the intent" that they should so leave the state.

2. INVEIGLEMENT WITH INTENT TO CAUSE ONE TO BE SENT OUT OF THE STATE.

To inveigle another by false and fraudulent representations, or otherwise, with intent that such other should be thereby induced to leave the state of his apparent free will, is equivalent to causing him to be sent out of the state against his will, contrary to section 1746 of the Laws of Oregon, (Compilation 1887.)

3. PLACE OF THE COMMISSION OF CRIME.

The crime defined by section 1746 (Comp. 1887) of the Laws of Oregon is completely committed whenever, by false and fraudulent representations, or other means adequate to that end, the person inveigled is caused or induced to surrender himself to the guidance or control of those whom the party guilty of the inveiglement purposed and expected to take him, or cause him to be taken, out of the state; and a prosecution therefor cannot be maintained in any other county than the one in which such inveiglement took place.

4. DUE PROCESS OF LAW.

A commitment by a justice of the peace for a crime not committed in his county is void for want of jurisdiction, and the party held thereunder is deprived of his liberty without due process of law, contrary to the fourteenth amendment.

(*Syllabus by the Court.*)

On *Habeas Corpus*.

Mr. Franklin P. Mays, Mr. Edward N. Deady, and Mr. Charles E. Lockwood, for petitioner.

Mr. Henry E. McGinn and Mr. Paul R. Deady, for respondent.

DEADY, J. On the petition of Joseph Kelly, filed in this court October 30, 1890, a writ of *habeas corpus* was allowed by me, returnable to this court, directed to H. A. Smith, sheriff of Clatsop county, commanding him to produce the body of said Kelly, alleged by him to be unlawfully detained, together with the cause of detention. On November 3d the sheriff produced the body, and made return that he held the petitioner in custody in pursuance of a commitment issued by A. A. Cleveland, a justice of the peace for the precinct of Astoria, in Clatsop county, Or., dated October 30, 1890. The commitment, after stating the venue, Astoria, Clatsop county, and entitling the cause, continues as follows:

"*In the Name of the State of Oregon, to the Sheriff of the County aforesaid:* An order having been made this day by me that Joseph Kelly, who has been duly held to answer before the grand jury for the crime of enticing and inveigling Alfred Armstrong and William Kelly to leave the state of Oregon against their will, be confined in the county jail to await the action of the grand jury of Clatsop county, Oregon, you are hereby commanded to receive him into your custody, and detain him accordingly, or until he be otherwise legally discharged.

"A. A. CLEVELAND, Justice of the Peace for Astoria Precinct.

"*Dated this 30th day of October, A. D. 1890.*"

In the corner are the words: "Bail fixed in the sum of \$1,000 in each case."

To this return there was a demurrer filed, on the ground that the commitment did not sufficiently designate any crime known to the law. By consent of counsel, evidence was also offered by the petitioner and respondent on the question of whether, as a matter of fact, any crime had been committed by the petitioner, as alleged, in Clatsop county; and if on the argument the court should be of the opinion that the commitment is sufficient, and overrule the demurrer, the matter should then be considered on the question whether any crime had been committed by the petitioner over which the justice issuing the commitment had jurisdiction.

The crime on which it is claimed the petitioner stands committed is defined by the law of this state in section 1746 of the compilation of 1887. It reads:

"Every person who, without lawful authority, forcibly seizes and confines another, or inveigles or kidnaps another, with intent either (1) to cause such other person to be secretly confined or imprisoned in this state against his will; or (2) to cause such other person to be sent out of this state against his will,—shall be punished by imprisonment in the state penitentiary not less than one nor more than ten years."

It is evident that the crime for which this commitment is intended, and for which it is attempted, at least, to commit the petitioner, is the one referred to in the second subdivision of the section: "To cause such other person to be sent out of this state against his will."

Section 1610 of the compilation of 1887 prescribes the form of the commitment by a magistrate, which may be substantially in the following form:

"In the Name of the State of Oregon, to the Sheriff of the County of ———, greeting: An order having been this day made by me that A. B. be held to answer upon a charge, [designating it generally,] you are therefore commanded to receive him in your custody, and detain him until legally discharged." Dated and signed.

To inveigle a person, as it is claimed in this case the petitioner did these parties, Armstrong and Kelly, is to seduce them, to entice them, not by force, but by some art, some device, some representation which is essentially false, and calculated to secure action on the part of the person sought to be inveigled; to secure his acquiescence in the purpose of the mover, so that he may become within the control of some person or persons, with intent that he be sent out of the state; and the device, the art, the seduction, the inveiglement, must be, I suppose, adequate to that end. It is not necessary that force be used. Using force is a distinct case, and, where no force is necessary to be used, the party goes apparently with his will, but on a false impression of where or why he is so going. It stands to reason that the party who acts upon a false representation, upon a device or trick, which misleads him, though apparently acting with his own free will, is, within the meaning of this statute, acting against his will; and if he so goes out of the state, or is sent out of the state in pursuance of that inveiglement, he is sent out of it, within the meaning of this statute.

The crime is to be designated generally, according to the statute, in the commitment. A crime that has a general or generic name is a simple thing to describe,—as murder, arson, burglary, larceny; but a crime that consists of several particulars, and has no generic name, and is described in the statute, must necessarily (although it may be designated generally) be designated with more particularity than a crime like murder, arson, or burglary. This is a crime that consists of two particulars,—the inveigling, and the intent that the party should thereby be sent out of the state. The justice says in the commitment that the petitioner has been held to answer "for the crime of enticing and inveigling Al-

fred Armstrong and William Kelly to leave the state of Oregon against their will." If it had been said in the commitment, "with intent to send them out of the state against their will," it would have followed the language of the statute, and no question as to the sufficiency could be made.

Courts are not required, nor justified, I think, in applying the nice rules of construction to a commitment by a justice of the peace that they may and often do necessarily in the consideration of indictments by grand juries. My own opinion is, although I had an impression to the contrary when I first heard the commitment read, that it is sufficient; that, if the petitioner enticed and inveigled the men to leave the state against their will, he did so with intent that they should so depart. He could not have done so without such intent. The intent must have accompanied the act. It is necessarily implied in the statement that "he enticed and inveigled them to leave the state against their will," and what is necessarily implied in the language used must, I think, be considered as expressed. The commitment is, I think, upon reflection and examination, sufficient.

The section defining this crime is taken from section 272, Pen. Code N. Y. 1864, where it was substantially compiled from 2 Rev. St. p. 664, § 30. In *Hadden v. People*, 25 N. Y. 372, it was held, under the revised statutes, that procuring the intoxication of a sailor, and getting him on shipboard in that condition, with the intent and expectation that the sailor would be thus carried out of the state, is a violation of the statute, even though in fact the ship be not destined to leave the state. If the party charged with the commission of the crime believes that the ship is going out of the state, and inveigles the sailor on board with the expectation and purpose that he shall go out of the state on the ship, he has committed the crime; and, although the ship does not go out of the state, even though it does not intend to go out of the state, it does not excuse him. His crime is committed when the party is inveigled on board the ship with the intent on his part that he should thereby be taken or got out of the state without his free will:

The evidence in this case is somewhat meager. The men, Armstrong and Kelly, were examined, as were also the petitioner, Mr. Byrnes, the harbor master, the expressman who took their baggage to the steam-boat on Saturday, the 25th, when they left here. They were not examined very thoroughly, and the testimony on some points is obscure. The material facts appear to be about these: Kelly, the petitioner, is employed, apparently, in the business of procuring sailors for ships leaving this port. He had been employed to procure a crew for the English ship Noddleburn. It seems that a day or two before the Saturday on which they went below, the petitioner had procured five seamen, and they had been shipped here, as I suppose, by signing articles before the British consul. Able-bodied seamen were to have \$30 a month.

It was probably on Friday, a short time before Saturday, the 25th of October, that the master spoke to the petitioner about the men, and he said two of them were gone; one of them was in jail. The master re-

plied that he must get two more in their places, whereupon he immediately went to the employment office of Mr. Witherill, and asked him to put on his bulletin board a notice that two sailors were wanted. He did so, and very soon one of these men, Kelly, I think, came in and said he wanted a place, and soon after the petitioner was taken to where Armstrong was; at least, he met them both through this notice. Kelly and Armstrong say the petitioner told them they would be shipped in place of two men who did not respond, and that they would get \$30 a month. Kelly is not called upon to testify on that point, does not deny the statement, and I must assume that it is true. Armstrong says he told them that they were going to New York, but a man named Jacobs, who keeps a clothing-store here, says Armstrong came to him Thursday or Friday, and bought some clothing, for the purpose of going to sea, and said he was going to make a trip to Europe. He is not so confident about his saying he was going to Liverpool as he is of buying the clothing, although he thinks he said he was going to Liverpool. Kelly, who I think is a very candid, fair witness, says they had a talk. He had been on boats on the lakes, and was told he would get \$30 a month to a port in Europe, and he engaged to go. He said that was all their conversation; that upon their employment they went to Kelly's boarding-house, and remained all night. Armstrong pretends he did not know whose house it was, but I do not think Armstrong is a very ingenuous witness. However, it was Kelly's house.

On the morning of Saturday they went to the S. G. Reed with the petitioner. An expressman named Marx took their baggage down in a wagon. Two or three others of the crew were more or less intoxicated, but these two, I think, there is no question were duly sober. They walked to the dock where the steam-boat was, which it appears had taken the Noddleburn the night before down below Post-Office bar, in order to cross at high tide, and left her there. Kelly introduced these men to the master of the Noddleburn, who was on board, and they went on board, apparently of their own free will. Nobody urged them or assisted them, and the boat went to the mouth of the Wallamet river, and they were put on board the Noddleburn. When the master received these men on the S. G. Reed he said to the petitioner Kelly: "The articles are on board the ship, and I will have the men sign when we get to Astoria;" and that was the last that passed between them. Kelly remained here, and the ship went to Astoria. Some time before the ship reached there, I should judge, Armstrong went into the forecabin, and saw the articles, where he learned that the men who got \$30 a month were able seamen. He had never been to sea, was a kind of farmer, and knew that he could not get \$30 a month. He also heard the mate, or some other officer of the ship, say he would probably get two-pound-ten, or what he was worth. Evidently he was dissatisfied when this information was obtained, and when the S. G. Reed brought the Noddleburn to Astoria, and she dropped her anchor, and was loosening from the Noddleburn, Armstrong endeavored to get on board; but the ship's officers prevented, and the Reed then cleared the ship. But soon after,

Armstrong jumped overboard, and swam off, when a boat picked him up, and put him ashore, where he found a policeman, to whom he told his story, and by whom he was taken to the sheriff. The sheriff then asked him if there were any more persons on the ship in that condition. He said "Yes," there was another man there who wanted to get off, and the sheriff went aboard the vessel without any warrant, asking permission of the master, however, before he went on board. On board he found the man Kelly, who said he knew where he was going, but was expecting \$30 a month; and added he was not an able-bodied seaman, and could not get \$30 a month, and did not want to go; wanted to go ashore. The sheriff took him to the master, where this statement was repeated. After some altercation, the master said: "To hell with you," and the sheriff took the man ashore.

Immediately afterwards warrants were sworn out before the justice of the peace, A. A. Cleveland, against the petitioner, for having committed the crime defined in this statute which I have read, and the following day, Sunday, he was arrested in Portland. The warrant, I suppose, was indorsed by some justice of the peace here, although it does not appear so, and he was taken to Astoria, and committed to jail for hearing, and on the hearing he was committed to answer before the grand jury.

Now the question is whether this crime was committed when the men were put on the S. G. Reed or transferred to the Noddleburn, or whether it was not completed until she arrived in Clatsop county. The respondent's contention is that the crime was not completed until the Noddleburn arrived at Astoria, and was therefore committed partly in this county and partly in Clatsop county, and is justiceable in either, under section 1214 of the compilation of 1887, which reads:

"When a crime is committed partly in one county and partly in another, or the acts or effects thereof constituting or requisite to the consummation of the crime occur in two or more counties, an action therefor may be commenced and tried in either county."

At common law, a crime was only triable in the county where completely committed. A crime committed partly in one county and partly in another was not triable in either, and therefore could not be punished. But by St. 2 & 3 Edw. VI. c. 24, § 2, it was provided as follows:

"That where any person or persons hereafter shall be feloniously stricken or poisoned in one county, and die of the same stroke or poisoning in another county, that then an indictment thereof, found by jurors of the county where the death shall happen, etc., shall be as good and effectual in the law as if the stroke or poisoning had been committed and done in the same county where the party shall die, or where such indictment shall be so found."

This statute is considered a part of the common law brought over to this country by the colonies, being in and of it. It is the origin of section 1214 of our law, which extends the rule to all crimes.

The crime, if any, in this case was completed when the petitioner induced the men, Armstrong and Kelly, to go on board the S. G. Reed, in charge of the master of the Noddleburn, with the intent and expectation that they would be thus taken or go out of the state. What fol-

lowed after that did not affect him. If he was innocent then, he could not become guilty afterwards, and if he was guilty then, he could not be excused or absolved by what happened afterwards, as that the men left the ship at Astoria, and did not go to sea. Section 11 of the bill of rights of the constitution of the state provides:

"In all criminal prosecutions the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed." In my judgment, the preliminary examination of a person charged with crime is within the purview of this section, as being a part or stage of such "prosecution," and therefore must be had in the county where the crime was committed.

A warrant of arrest for crime must be issued by a magistrate of the county in which the same is committed or triable. Section 1553, Compilation of 1887. The warrant must be executed in the same county, unless indorsed by a magistrate out of the county. Section 1555, Id.

The jurisdiction of the grand jury is also confined to crimes committed or triable in the county. Sections 1230, 1236, 1242, Id. The word "triable" is used in the statute, so that a magistrate may issue a warrant for the offender where the offense is committed or may be tried. That, of course, is to meet the case provided for in the section, which declares that a crime committed partly in one county and partly in another may be triable in either; and that is all it is intended to meet. The Clatsop county justice assumed jurisdiction of a crime not committed or triable in his county, and his commitment is void, not due process of law. Being an officer of the state, his act is so far that of the state, and violates the fourteenth amendment, which prohibits any state from depriving "any person of life, liberty, or property without due process of law." Of course if there was a question of fact in this case as to whether this crime was committed in Clatsop county or not, or of the justice having authority to examine into the matter, his determination could not be questioned in this proceeding in this court. If he erred, the party would have to seek redress in the higher courts of the state. But my conclusion is—and I have considered it carefully, for it is a delicate and important question—that where, as here, it appears beyond a doubt that the crime was committed, not in Clatsop county, but in another, as this one, for instance, and the justice had no jurisdiction to hear or determine the proceeding, where it was usurpation from beginning to end, the commitment cannot be considered "due process of law." Beyond question, if a crime was committed by the petitioner,—of which I say nothing,—it was committed when the men were delivered to the master on the S. G. Reed; certainly when they were delivered on the Noddleburn in this county.

The only pretense of inveiglement on the part of the petitioner arises from the fact that he represented to the men that they would get \$30 per month, when it appears that he ought to have known that they were not able-bodied seamen, and would not receive that rate of wages. But it further appears that the men were to sign the articles at Astoria, when they could see for themselves what wages they were to get, and, if they

were not satisfied with the same, they might refuse to go further, as they did: But it appears probable that the master did not really intend to ship the men formally before the British vice-consul at Astoria, as he should, but was about to take them along as and for the men who had signed the articles and failed to report for duty.

These had signed as able-bodied seamen, and Armstrong and Kelly, not being such, were liable to be disrated by the master on the voyage, and receive only what he saw proper to give them.

In this respect they would have been inveigled out of the state against their will, but by the misconduct of the master, rather than the petitioner, unless he acted with knowledge of the master's ulterior purpose. Against this conclusion is the fact that the master told him on leaving that he would "sign the men at Astoria."

My conclusion, therefore, is that this process, although sufficient on its face, is, upon the facts, unfounded, not "due process of law," and the petitioner must be discharged.

GRIFFITH *et al.* v. MURRAY *et al.*

(Circuit Court, D. New Jersey. May 8, 1891.)

PATENTS FOR INVENTIONS—NOVELTY.

Though the use of circular rings for the packing of piston-rods, cut from sheets built up of alternate layers of India-rubber and cloth, with an oblique slit at one side for the purpose of springing the ring upon the piston-rod, was old, yet a patent covering the product obtained by boiling such rings in oil with plumbago held in suspension, so as to drive the lubricant thoroughly into the fibers of the cloth and the interstices of the India-rubber, softening them both, and rendering them a sort of reservoir for the lubricant, is not invalid for want of novelty.

In Equity. Suit for infringement.

Randolph Parmly, D. H. Driscoll, and Stewart Chaplin, for complainants.

John Griffin, for defendants.

ACHESON, J. The defendants are sued for the infringement of letters patent No. 334,579, granted to Olin J. Garlock January 19, 1886, for an improvement in piston-rod packing. The patent has but one claim, which is as follows:

"What I claim as my invention is: Circular rings of packing for piston-rods, cut from sheets built up of alternate layers in India-rubber and cloth, said rings being cut obliquely across at one side, so as to be opened, as shown, and boiled in oil with plumbago held in suspension, as and for the purpose specified."

While the claim calls for the use of circular packing rings constructed of alternate layers of India-rubber and cloth, with an oblique slit at one side for the purpose of springing the ring upon the piston-rod, the packing

rings themselves are not claimed. The gist of Garlock's invention consists in subjecting the packing rings to the described boiling process, whereby valuable qualities are imparted to them, and the claim is for the improved and finished product. The specification states that during the boiling process the substance of the ring becomes thoroughly impregnated with the oil and plumbago, which together lubricate the packing ring, and permit the piston-rod to slide through the same with the least possible degree of friction; that the thorough boiling of the packing rings in oil with plumbago drives the latter lubricant thoroughly into the fibers of the cloth and interstices of the India-rubber, while it softens both, and renders them peculiarly adapted for packing piston-rods; and that by this treatment the India-rubber, as well as the cloth, becomes a reservoir for the lubricants, holding them, to be gradually drawn upon as the friction of the moving rod requires. Any extended recital or discussion of the proofs in the case would be unprofitable, and I shall do little more than state the conclusions I have reached.

The defendants contest the validity of the patent, first, for want of novelty. Now it may be conceded that packing rings built up of the materials and constructed in the manner and form described in the specification and claim of the patent were old, and it was well known, also, that a composition of oil and plumbago was a useful lubricant. But Garlock was the first to practice the described boiling operation, whereby the character of the packing is changed and improved. I do not find that his process was anticipated by the English patent to Dudgeon. That patent does not describe or disclose any boiling process, or suggest the application of heat to promote the absorption of the lubricating compound.

Again, absence of utility is asserted as a ground of defense. But besides the presumption of usefulness arising from the mere grant of the patent, the proofs, I think, sufficiently show that the process of boiling the packing in oil with plumbago produces highly beneficial results, the product being both new and useful. Even the defendant Murray upon his cross-examination admitted that, "for certain purposes, the boiling process is good." The proofs, it seems to me, are ample to establish utility, and they also justify the conclusion that the production of the Garlock packing involved invention.

Upon the question of infringement, I need only say that there is satisfactory proof that the defendants practiced Garlock's boiling process as set forth in his specification and claim, and thereby produced the patented packing. Let a decree be drawn in favor of the plaintiffs.

MELLOR v. COX.

(Circuit Court, D. South Carolina. June 22, 1891.)

1. ADMIRALTY—TAXATION OF COSTS.

A decree of a circuit court simply affirming a decree of the district court in admiralty "with costs" means that costs are to be paid by the losing party.

2. SAME—PROCTOR'S FEES.

Where, in the discussion before the district court, a person was recognized as proctor for the successful party, he must be allowed his costs, though there was no entry of appearance by him within the time required by rule.

3. SAME—DOCKET FEES.

In admiralty there can be but one docket fee, though the case is appealed from the district to the circuit court.

In Admiralty.

C. B. Northrop, for libellant.

I. N. Nathans, for respondent.

SIMONTON, J. The case comes up on the taxation of costs. The district court dismissed the libel, with costs. 45 Fed Rep. 115. Libellant carried the case to the circuit court, and the decree of the district court was affirmed, with costs. The clerk has taxed a docket fee for Mr. Nathans, proctor of respondent, and to this libellant excepts. He bases his objections on these grounds:

1. That the decree of this court is vague and uncertain in this: that it does not say who shall pay the costs. The decree of the district court is affirmed, simply "with costs." The rule is that the losing party pay the costs. To this rule there are exceptions in equity and admiralty. But when either of these courts desire to modify the rule it says so. When the expression is used, "with costs," it means costs to the losing party, unless other words are used. In this case libellant appealed, and his appeal was dismissed. He must pay the costs.

2. Because there is no entry of appearance by Mr. Nathans for appellee in the circuit court, within the two first days in term succeeding the filing of the appeal and proceedings and affidavit of service of notice thereof on him, as required by rule 9, and that libellant could thus proceed *ex parte*. Mr. Nathans, therefore, cannot get costs. Upon examining the docket of the circuit court the name of Mr. Nathans appears as proctor for respondent. It is admitted that he took part in the discussion before the court, and the order is in his handwriting, signed by the circuit judge on his submission. He thus was recognized as proctor for respondent. No objection seemed to have been made at the hearing. He must be treated as the proctor and allowed his costs.

3. Because but one docket fee can be charged, and that for a final hearing. This docket fee has already been charged in the costs of the district court. I confess that I have some doubt on this point. But Judge TOULMIN, in a well-considered case, (*The Lillie*, 42 Fed. Rep. 179,) holds that there can be but one final hearing in admiralty, and

therefore but one docket fee. It is best that the practice be uniform, and this case is followed. This objection is sustained.

The clerk will correct the taxation of costs by striking out the item of \$20 in the district court costs.

HEALY v. COX.

(Circuit Court, D. South Carolina. June 23, 1891.)

ADMIRALTY—TAXATION OF COSTS.

The district court ordered respondent to pay costs, and then dismissed the libel. Libelant appealed, and the decree was affirmed, with costs. *Held*, that libelant was to pay the costs of the circuit court and respondent those of the district court.

In Admiralty.

C. B. Northrop, for libelant.

I. N. Nathans, for respondent.

SIMONTON, J. This case also comes up on taxation of costs. The district court ordered respondent to pay the costs, and then dismissed the libel. 45 Fed. Rep. 119. Libelant appealed. The circuit court affirmed the decree of this district court, with costs. The clerk taxed \$20 docket fee for Mr. Nathans, and libelant excepted. All of his grounds but one have been passed upon in the *Case of Mellor*, 46 Fed. Rep. 662. The libelant insists that as the circuit court affirms the decree of the district court, and that decree required respondent to pay costs, so he must pay the costs of this court. This is specious. The decree of the circuit court is in two parts. First, it affirms the decree of the district court. It then fixes the costs of that court on the appellant. The respondent will pay the costs of the district court. But, as in the taxation of these costs a docket fee of \$20 is charged, and we have concluded in the *Mellor Case* that this is error, the clerk of this court will eliminate this item, and his allowance of \$20 to respondent's proctor in this court is confirmed.

THE ANJER HEAD.¹

UNITED STATES v. THE ANJER HEAD.

(District Court, D. New Jersey. December 8, 1890.)

ILLEGAL DUMPING—LIABILITY OF VESSEL—ACT OF JUNE 29, 1888.

When an employe on board of a steam-ship threw overboard a single scuttle of ashes in a place prohibited by the statute of June 29, 1888, (25 St. at Large, p. 209,) entitled "An act to prevent obstructive and injurious deposits within the harbor of New York, by dumping or otherwise, and to punish and prevent such offenses," and there was no proof of orders by any one in authority, it was held that the steam-ship was not used or employed in a violation of the law, in the sense of the statute, and was not liable *in rem* to the penalties therein prescribed.

In Admiralty. Suit to recover a penalty.

George S. Duryea, U. S. Atty., and H. W. Hayes, Asst. U. S. Atty., for the United States.

Convers & Kirlin, (Mr. Kirlin, of counsel,) for claimant.

GREEN, J. The first exception taken by the claimants to the libel is well founded, and is sustained. The allegation of the libel is that, while the steam-ship Anjer Head was in New York harbor, some one on board of her did deposit in the tidal waters of the harbor ashes and cinders, contrary to the statute in such case made and provided. The facts, as admitted, are that an employe on board the steam-ship did throw overboard a single scuttle of ashes at the place named. Such employe was undoubtedly technically guilty of violating the statute. But these proceedings are not against him, but are brought against the steam-ship, being based upon the last clause of section 4 of the statute referred to in the libel. That clause reads as follows: "Any boat or vessel used or employed in violating any provisions of this act shall be liable," etc. The emphatic words in this clause are "used" and "employed." Practically, they are synonymous, and they mean "to make use of," "to put to a purpose." The clause in question, then, renders every boat or vessel "put to the purpose" of violating the provisions of this statute liable to the penalties. It is quite evident that the Anjer Head was not so engaged in such violation. To be put to such or to any purpose necessarily requires antecedent determination on the part of her master or owners, or of some one with sufficient authority that she shall perform such purpose. A vessel can only be used or employed by or with the consent of the person who has the legal right to use and employ. There is no pretense that there was any such use or employment in this case.

Libel is dismissed.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

THE BOMBAY.¹

UNITED STATES v. THE BOMBAY.

(District Court, E. D. New York. June 4, 1891.)

ILLEGAL DUMPING—LIABILITY OF VESSEL—ACT OF JUNE 29, 1888.

Under the statute of June 29, 1888, (25 St. at Large, p. 209,) entitled "An act to prevent obstructive and injurious deposits within the harbor and adjacent waters of New York city, by dumping or otherwise, and to punish and prevent such offenses," a steam-ship from which ashes are dumped in an unlawful place, by firemen presumably acting under orders from some superior officer, is liable as having herself violated the law.

In Admiralty. Suit to recover a penalty.

Jesse Johnson, U. S. Dist. Atty.

Convers & Kirlin, (*Mr. Kirlin*, of counsel,) for the Bombay.

BENEDICT, J. This is a proceeding *in rem* to charge the steam-ship Bombay with a fine for dumping ashes in the lower bay of the harbor of New York. It is taken under the statute of the United States passed June 29, 1888, (25 St. at Large, p. 209,) entitled "An act to prevent obstructive and injurious deposits within the harbor and adjacent waters of New York city, by dumping or otherwise, and to punish and prevent such offenses." The libel in the first article charges that on the 8th day of October, 1889, the master of the steamer Bombay, being on board and in command of her, did unlawfully deposit ashes and cinders in the tidal waters of the harbor of New York, in violation of the provisions of the statute above referred to. In the second article the libel charges that the ashes and cinders deposited as aforesaid were brought and carried to said place where they were dumped in and by the steam-ship Bombay, and the said steamer was then and there used and employed in violating the provisions of the statute aforesaid. By the second section of the statute referred to it is made a misdemeanor, punishable by fine and imprisonment, for any person to be engaged in, or aiding or abetting, or otherwise instigating, the deposit or discharge of ashes or cinders in the tidal waters of the harbor of New York; and the last clause of the fourth section of the statute declares that "any boat or vessel used or employed in violating any provision of this act shall be liable to the pecuniary penalties imposed thereby, and may be proceeded against summarily, by way of libel, in any district court of the United States having jurisdiction thereof." The answer raises two issues: *First*, whether the violation of the act set forth in the libel was committed by the master of the steam-ship, or authorized or instigated by him, as charged; *second*, whether the steamer was used or employed in that violation, within the meaning of the statute.

It appears in evidence that while the steamer Bombay was proceeding through the harbor of New York on a voyage from New York to Baltimore, in the pursuit of her calling, which was that of a common carrier

¹Reported by Edward G. Benedict, Esq., of the New York bar.

of merchandise, she was observed by persons on board a United States dredge-boat to be dumping ashes from a shute, which ran from the main deck of the steamer through the bulwarks on the starboard side. The steamer being hailed by those on board the dredge when she arrived opposite the dredge, the flow of ashes at once ceased. The steamer was running at slow speed, and ashes were seen to be running from the shute during a space of some two and a half miles. The explanation of this violation of law given by those in charge of the steamer is that the ashes were put out by two firemen, who acted without authority. In support of this defense testimony is produced to show that in putting out the ashes the firemen acted without orders from the master, the chief mate, or the first or second engineers of the steamer. All of these officers have testified, and each for himself says, that he gave no orders to the firemen to put out the ashes, and had no knowledge that ashes were being put out until the hail from the dredge. The evidence, therefore, fails to sustain the allegations of the first article of the libel, because it is not made to appear that the act of the firemen in dumping ashes was commanded by the master of the ship, as charged. The libel, however, may be amended to conform to the facts by stating "that ashes were transported in the steamer to the place where they were dumped, and that at that place were cast from the steamer into the tidal waters of the harbor of New York by some of the persons composing the crew of the ship." Considering the libel as amended to conform to the facts, the question is raised whether, upon the evidence, the vessel can be subjected to a fine, under the statute. The intention of the statute seems to me to be "that the vessel is to be considered and treated as itself violating the statute," (*The Strathairly*, 124 U. S. 571, 8 Sup. Ct. Rep. 609,) when the vessel is the instrument by means of which the violation of the statute is accomplished. Such legislation is not infrequent. It conforms to that feature of the maritime law which makes the ship liable for collision caused by the act of a seaman done, it may be, in violation of orders; liable to forfeiture for goods smuggled by means of her; liable for negligent navigating by a pilot compulsorily in charge of her. If that be the intent of the statute, I do not see why this case is not within it. The ashes that were dumped into the water of the lower bay were transported to the place of dumping by the Bombay. They were there cast into the water from the Bombay, and the persons who cast them overboard were part of the crew of the steamer engaged at the time in her navigation, and, one of the incidents of the navigation of a steamer being to dump the ashes created by the furnaces, the steamer therefore was used in violating the law. But it is said the use made of the steamer in committing the offense in question was without the knowledge or assent of her owners or her officers, and for that reason cannot subject her to a fine. Assuming, but not deciding, that in a case where ashes were unlawfully dumped by a tort-feasor no liability would attach to the ship, the question still remains whether, in a case like the present, the steamer is not liable. In this case the presumption certainly is that the ashes dumped overboard from this steamer were so dumped by order of some

of the persons in authority on board the ship. Firemen do not volunteer to do labor of this character. The burden is therefore upon the ship to overcome this presumption. Accordingly, the testimony of the master, the chief officer, and the first and second engineers has been produced in behalf of the steamer. The master and the chief officer, each for himself, says that he had no knowledge of the fact that ashes were being dumped from the ship until the hail from the dredge; that he had given no orders to dump ashes; and that it was contrary to the rule of the ship to dump ashes at that place. The first and second engineers, each for himself, says that he gave no orders to dump ashes, and did not hear that ashes had been dumped until the seizure of the vessel on her return to New York. The testimony for the claimant shows, in addition, that the persons who dumped the ashes were firemen; but the names of the firemen are not given. There is nothing in the testimony to indicate that any efforts were made by the officers of the ship to obtain their names, nor does it appear that any effort was made to ascertain, at the time of the transaction, how it came about that these firemen dumped the ashes as they did. The claimants rely upon the simple assertion of the master and chief officers and the first and second engineers that they had nothing whatever to do with the dumping of the ashes, nor any knowledge that the ashes were being dumped, to overcome the strong presumption that the firemen did not undertake the unpleasant duty of dumping ashes without the orders of some one entitled to command them. While it is, of course, possible for firemen to dump ashes without orders, it is highly improbable that firemen would do so. The presumption of orders is so strong that conclusive evidence is required to rebut it, and, in my opinion, it has not been overcome in this case by the testimony that has been produced from the officers of the ship, when that testimony is taken in connection with the acknowledged facts that the names of the offenders were not taken, nor any investigation had as to the circumstances attending the dumping of the ashes, (which, if done without orders, was a serious breach of ship's discipline,) nor any effort made to procure the testimony of the firemen. It is said the firemen left the ship in Baltimore, but that fact does not prove the impossibility of procuring their testimony. It must be also noticed in this connection that neither the third nor fourth engineers are produced as witnesses. The chief engineer indeed testified that the third and fourth engineers had no authority to direct ashes to be dumped; but the third and fourth engineers were officers of the ship superior to the firemen, and their orders to the firemen to dump ashes, although given in excess of authority, would be obeyed by firemen, and dumping ashes by the firemen under orders from the third and fourth engineers, in the absence of notice of want of authority to give such an order, if acted upon by the firemen, would, in my opinion, make the act of the firemen the act of the ship, within the meaning of this statute. Still further, the second mate, who presumably was responsible for doings on the ship's deck at the time the ashes were dumped, is not called as a witness, nor his absence accounted for.

The case, then, I find to be this: that ashes were dumped in an unlawful place from the deck of an ocean steamer by her firemen, presumably acting under orders from some superior officer of the steamer; the steamer at the time being engaged in performing a freighting voyage to sea, and the dumping of the ashes accumulated at her furnaces being a necessary incident to her navigation. In such a case my opinion is that the statute takes effect, and renders the steamer liable as having herself violated the law. This conclusion, as I conceive, is not at variance with the decision rendered by Judge GREEN in the case of *The Anjer Head*, 46 Fed. Rep. 664. That case came before the court upon an admission of fact. The fact admitted was that "an employe on board the steamer did throw overboard a single scuttle of ashes." It did not appear in that case that the employe who emptied the scuttle was one of the crew of the steamer, or that the emptying of the scuttle of ashes was a necessary incident to the navigation of the ship, or that the emptying of the scuttle was directed by some officer of the ship. The presumption of orders scarcely arises in the case of a chamber-maid, who, while lighting a fire, has occasion to empty the scuttle of ashes, or of a passenger on board a steamer who knocks the ashes out of his pipe into the tidal waters of New York harbor. Such cases differ from the present, in this: that here the ashes were dumped by firemen, part of the crew of the ship, whose duty it was to clear away ashes created by the furnaces, and who in dumping the ashes presumably acted under the orders of an officer of the ship, given in furtherance of the navigation of the ship. In such a case, it seems to me that the ship, so used to dump ashes in an unlawful place by persons authorized to dump her ashes, is used and employed in violating the law, within the meaning of the statute.

It was contended in argument that in the case of *The Anjer Head* the decision was that under this statute it must appear that the ship was devoted by her owners to the business of dumping ashes before the ship could be held liable; in other words, that the act applied to dumping scows only, and not to steamers engaged in transporting freight and passengers through the harbor of New York. But I do not understand the decision in that case to go to that length. Such a decision would render the statute inoperative to remedy one of the serious evils intended to be reached,—namely, the dumping of ashes from steamers in the lower bay. The steamer *Bombay*, having thus been found to have been used in violating the provisions contained in the first section of the statute above referred to, is by that statute made liable to the pecuniary penalty provided by that section, which is a fine of not less than \$250 nor more than \$2,500. It will be sufficient, I conceive, to fix the amount of her liability at the lowest figure permitted by the statute, and it is accordingly fixed at the sum of \$250.

Let a decree be entered, condemning the steamer in the sum of \$250 and costs, and ordering that a decree be entered against the stipulators for such, in accordance with the practice of the court.

THE GEORGIA.¹HOWARD *et al.* v. THE GEORGIA.

(District Court, E. D. New York. June 10, 1891.)

SEAMAN'S WAGES—PURCHASE OF CLAIM BY OWNER—DISCHARGE OF LIEN.

A purchase of a seaman's claim for wages against a vessel by the owner of the vessel is, in legal effect, a payment of the seaman's claim, and discharges the vessel of the lien for wages.

In Admiralty. Suit for seaman's wages.

Goodrich, Deady & Goodrich, for libelants.

R. D. Benedict, for bottomry holder.

BENEDICT, J. This is an action to recover seaman's wages. The defense is payment. The evidence is that the vessel was owned by a man in Matanzas named Torrontagui; that subsequent to the commencement of the action the libelant's proctor received from one Monjo, the agent of the owner of the vessel, money to pay off the crew, and accordingly the men were paid by the proctor, and receipts for those wages taken from the men. Monjo testifies that he had no interest whatever in the vessel; that the money he gave the proctor to pay the wages was an advance made by him for account of the owner of the vessel. The proctor says that the transaction between him and the crew was a purchase, by direction of Monjo, of the seamen's claims against the vessel. But this does not alter the legal effect of the act done. A purchase of a seaman's claim against a vessel by the owner of the vessel is, in legal effect, a payment of the claim, and it discharges the vessel of the lien. A man cannot pay his own debt, and be subrogated to any right of the creditor. That the wages were paid subsequent to the commencement of the action makes no difference. The wages are now paid, and no decree will be rendered against the vessel for wages already paid.

There is also a claim for master's wages. The vessel, as it now appears, was owned in Matanzas by Torrontagui, and not by the man whose name appears in the vessel's papers. She was in fact a Spanish vessel, and not a British vessel. In the absence of any evidence as to the Spanish law, the law of the forum governs the case, and, by our law, a master has no lien for wages.

The libel is therefore dismissed, but without costs.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

THE DALE.*

MUMPTON v. THE DALE.

(District Court, E. D. New York. June 11, 1891.)

WEIGHT OF EVIDENCE—DISPUTE OF FACT—NUMBER OF WITNESSES.

In a dispute of fact, when all the witnesses are equally positive and equally credible, and one story is as plausible as the other, the party presenting two witnesses must prevail over the party presenting but one.

In Admiralty.

Hyland & Zabriskie, for libelant.

Edwin G. Davis, for claimant.

BENEDICT, J. The question in this case is whether the canal-boat *James Nelson*, while navigating the Erie canal, lost her rudder-blade by striking it on the berme bank through her own negligence, or whether the rudder-blade was knocked out by the steam canal-boat *Dale*, while passing the *James Nelson*. Upon this question of fact the testimony stands two witnesses in favor of the libelant's story to one witness for the claimant in opposition. All the witnesses are equally positive and equally credible, and one story is as probable as the other. If there be any difference in probability, it is in favor of the libelant. In such a case the party presenting two witnesses must prevail over the party presenting but one. Let a decree be entered in favor of libelant, with an order of reference to ascertain the damage.

CUFF v. NINETY-FIVE TONS OF COAL.

(District Court, E. D. New York. June 10, 1891.)

1. SHIPPING—LIEN FOR FREIGHT—WAIVER OF LIEN—WHAT CONSTITUTES—INTENT.

A delivery of cargo subject to a lien for freight, made to a person liable to pay the freight, will not be held to be a waiver of the lien for freight unless facts appear from which it can be found that the act of delivering the cargo was accompanied with an intention to waive the lien for freight. *Costello v. Laths*, 44 Fed. Rep. 105.

2. SAME—EVIDENCE OF INTENT.

When a master began to deliver cargo, but demanded his freight before the unloading of the cargo was completed, and when the freight was not paid stopped the delivery, and then, continuing, made special delivery of the remainder subject to the lien for freight, held, that this was not sufficient to show an intent to abandon the lien.

*Reported by Edward G. Benedict, Esq., of the New York bar.

In Admiralty. Suit to enforce a lien.
Goodrich, Deady & Goodrich, for libellant.
Wing, Shoudy & Putnam, for claimant.

BENEDICT, J. This is an action to enforce a lien for freight and demurrage. The defense as to the freight is that the lien for freight was waived. The defense as to the demurrage is that no detention was caused by the consignee of the cargo. In the case of *Costello v. Laths*, 44 Fed. Rep. 105, the decision of this court was that a delivery of cargo subject to a lien for freight, made to the person liable to pay the freight, will not be held to be a waiver of the lien for freight unless facts appear from which it can be found that the act of delivery of the cargo was accompanied with an intention to waive the lien for freight. Following the reasoning of that case, the question here is whether it appears that the act of delivering this coal was accompanied with an intention on the part of the master of the vessel to waive the lien for freight. In my opinion it does not so appear. The fact is proved that the master demanded his freight before the unloading of the cargo was completed, and when the freight was not paid he stopped the delivery; then, going on, he made special delivery of the remainder subject to the lien for freight. This is sufficient, in my opinion, to show that the master at no time intended to abandon his lien. There must therefore be a decree entered for the libellant for the amount of the freight, with interest and costs. As to demurrage, I do not think a case of liability for detention of the vessel is made out.

THE GLOAMING.¹

BRAKER *et al.* v. THE GLOAMING.

(District Court, E. D. New York. June 11, 1891.)

CARRIERS—DAMAGE TO CARGO—OIL AND PLUMBAGO—LEAKAGE—PRECAUTION.

Casks of plumbago and cocoanut oil were stowed together in the ship *G.*, and on her arrival from Ceylon the plumbago was discharged damaged by the oil. It is customary to stow the two articles in the same ship, and leakage from casks of such oil on voyages from Ceylon to New York is to be expected. Some of the oil was stowed in the wings of the ship, between decks, and the plumbago stowed between the wings, where the oil was, was laid on the deck. No precaution was taken to prevent the leakage of the oil from reaching the plumbago. Held that, even if the leakage was occasioned by perils of the sea, yet, as the damage to the plumbago might have been avoided by the reasonable exercise of skill and diligence, the omission to take any precaution against such damage constituted negligence for which the carrier was liable.

In Admiralty. Suit to recover for damage to cargo.
R. Burnham Moffatt, for libellants.
Wing, Shoudy & Putnam, for claimant.

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

BENEDICT, J. This is an action to recover damages for the failure on the part of the ship *Gloaming* to deliver in like good order as shipped certain barrels of plumbago brought to the port of New York from Colombo, Ceylon. The entire consignment of plumbago amounted to 1,909 barrels. On the arrival at New York some 200 barrels were found to have been rendered unmerchantable by contact with cocoanut oil. The cargo of the ship consisted of plumbago and cocoanut oil, the latter in pipes, puncheons, and barrels. Of the packages of cocoanut oil, 12 emptied themselves of their contents during the voyage either wholly or partially, and the damage to the libelants' plumbago arose from this fact. The evidence shows that it is customary to stow cocoanut oil and plumbago in the same ship, and that leakage from casks of cocoanut oil on such a voyage is to be expected, owing to the fact that the heat of the sun upon a ship during the voyage from Ceylon to New York will cause the casks to shrink and the oil to leak. Leakage of cocoanut oil to a greater or less amount was therefore to be expected on the voyage in question. It appears by the testimony of Charles Gertschaw, who was the stevedore who discharged the *Gloaming* in New York, that the plumbago belonging to the libelants which was damaged came from the between-decks of the ship. The following was the stowage in the between-decks: She had oil right from the fore peak to the fore part of the aft-hatch solid, and then she had two tiers of oil in each wing of the ship. In the middle of that, and on top, was plumbago, and some coir yarn right aft. This plumbago, stowed between the wings, where cocoanut oil was stowed, was, according to the stevedore, laid on the decks, so that the bottom of the casks got soaked with the oil leaking onto the between-decks from the oil casks in the wings. It is manifest that with such stowage cocoanut oil would be present upon the between-decks of the ship, and that it would damage plumbago stowed on the between-decks, unless some precaution was taken to prevent the oil from reaching the plumbago. The testimony of the stevedore shows that no such precaution was taken. In my opinion, to stow plumbago in such a place upon the decks, without protection from oil that might flow on the decks, in view of the fact that oil might be expected to leak upon the deck from the casks of oil stowed in the wings, was negligence; for assuming, but not deciding, that the leakage of the oil is shown to have been caused by peril of the sea, yet, inasmuch as evidently damage to the cargo from the leakage might have been avoided by a reasonable exercise of skill and diligence, the omission to take any precaution against such damage constitutes negligence, and for negligence the carrier is liable.

BACK v. SIERRA NEVADA CONSOLIDATED MIN. CO.

(Circuit Court, D. Idaho. June 30, 1891.)

1. FEDERAL COURTS—TRANSFER OF CAUSES FROM TERRITORIAL COURTS.

Transfer of causes to national courts, under the admission act of Idaho, may be made by certified copies of the files and records, and such courts have no power to compel a state court to transmit its files and papers.

2. SAME—SUFFICIENCY OF RECORD.

The record must show that the facts at the commencement of the action were such as would give the United States court jurisdiction had it then existed; and an affidavit showing the value of the matter in dispute when it was made, instead of when the action was commenced, is insufficient.

(Syllabus by the Court.)

On Motion to Dismiss the Record.

W. B. Heyburn, for plaintiff.

Albert Hagan, for defendant.

BEATTY, J. The record in this cause shows that the plaintiff claims to be the owner of the Pilgrim tunnel site, located in pursuance of the provisions of section 2323, Rev. St. U. S., and defendant claims to be the owner of the Sierra Nevada mining claim; that, to defendant's application for a patent for such mining claim, the plaintiff interposed in the land-office his protest, and, in support thereof, brought this action in the district court of Idaho territory; that on the 9th day of July, 1890, after the admission of Idaho as a state on the 3d day of said month, the plaintiff filed in said territorial court his request for a transfer of the cause to this court, and at the same time, with his request, filed his affidavit, stating therein "that the said action is one brought under the laws of the United States, and that the adjudication of the issues therein made involves the construction of the acts of the congress of the United States," and "that the sum and value involved in said action exceeds the sum of two thousand dollars, exclusive of costs." On the 17th day of October, 1890, the plaintiff filed in this court a transcript of the record of said cause. The defendant, on the 7th day of April, 1891, filed in this court a motion to strike from the files and dismiss said transcript, and on the next day the plaintiff filed his motion for an order of this court directing the court and clerk having the custody of the original papers to transmit the same to this court.

The questions involved in this hearing are the motion to dismiss the transcript, the motion for an order on the state court and clerk to transmit to this court the original files in the cause, the value of the matter in dispute, and whether the construction of a congressional act is involved in determining the issues in the cause. In accordance with the decision of this court, the learned circuit judge presiding, rendered June 18, 1891, in the case of *Burke v. Concentrating Co.*, 46 Fed. Rep. 644, it is concluded that duly-authenticated copies of the original files and record in the territorial court may be used here, and that this court has no power to compel the state court, now the custodian of such files and

v.46F.no.12—43

records, to transmit them. Does the record now before the court show that the matter in dispute exceeded in value, at the time this action was commenced, the sum of two thousand dollars? This must have been so to give this court jurisdiction, for it must be conceded that the transfer from the territorial to the national courts of any "cause, proceeding, or matter," pending in the former at the date of Idaho's admission as a state, must be governed by the provisions of the enabling act; and any general statutes for the removal of causes from state courts in conflict with such act do not apply. Section 18 of such enabling act provides for the transfer only of actions then pending, which might have been commenced in this court had it existed "at the time of the commencement of such cases." Under the general removal acts, the entire record may be examined for a disclosure of the jurisdictional facts. As there is no limitation to this rule in the enabling act, it follows that the entire record, including the request for transfer, with all pertinent affidavits and papers connected therewith, may be considered. The affidavit referred to, filed with the request, alleges that the sum and value involved in said action "exceeds the sum of two thousand dollars, exclusive of costs." It is objected that this is a statement of the value only at the date the affidavit was made, and not on the 29th day of August, 1887, when the action was commenced; while the plaintiff insists that the phraseology of this affidavit differs from that of some others, which have recently been judicially construed, and that this may fairly be construed as sufficient to show the value at the time the action was commenced. It is true the affidavit does differ from others, and does not follow the language of the statute, which is "the matter in dispute," not the sum or value involved; but it cannot be perceived how this difference inures to plaintiff's advantage. The statement of "the sum or value involved," if it can be construed as a compliance with the statute, must be held as equivalent to the phrase, "the matter in dispute;" and the affidavit says: "This sum or value—this matter in dispute—exceeds" now—July 9, 1890; not on August 29, 1887—the sum of \$2,000. The only construction that can be placed upon this clause is that it was an allegation of value at the date the affidavit was made. That the affidavit is insufficient to show the value at the time the action was commenced is supported, I think, by the weight of authority, and certainly by the following: *Insurance Co. v. Pechner*, 95 U. S. 183; *Beede v. Cheeney*, 5 Fed. Rep. 388; *Strasburger v. Beecher*, 44 Fed. Rep. 209. It is noted that the affidavit does not allege the amount to be exclusive of interest. Whether this statement is necessary, depends upon the nature of the matter in dispute.

Can the value of the matter in dispute at the time the action was commenced be learned from any part of the record? In this connection it is pertinent first to inquire what the matter in dispute is. The complaint sets forth the circumstances of the location of said tunnel site and the Sierra Nevada mining claim; that plaintiff owns the tunnel site, on the line of which, or across which, the mining claim is located; that he is running his tunnel "in the direction of said lode or ledge, so discovered and called the 'Sierra Nevada,' as aforesaid, for the purpose of in-

tersecting and cutting the same, and that he intends, when the same shall have been so intersected and cut, to locate the same according to the provisions of said section 2323, * * * and claim the same, or so much thereof as he is entitled to claim under said statute;" that the defendant has made application for patent for said mining claim, against which plaintiff has made his protest and brought this action, and asks that it be decreed that the location of said mining claim be held void, and that defendant have no title thereto. The plaintiff does not now claim any portion of said mining claim, or of its ledge, nor ask any judgment therefor, or anything for himself, except as it may be included in the prayer for general relief; but says that if a certain event shall happen, he will claim said ledge, or some portion thereof, but nothing in the complaint or record shows where such tunnel will, if at all, intersect the ledge, or what particular portion of the mining claim plaintiff will claim, if he finally shall claim but a portion. Must not the matter in dispute be some particular property, thing, or right, which both parties claim adversely to each other, and for which the judgment of the court is asked? It may be said the entire mining claim is in controversy in this action, because the effect of the judgment which defendant asks would be to finally give it a patent for such claim, and this is the very thing which plaintiff by this action resists and desires to prevent; but the question occurs whether the plaintiff can insist that defendant's proceedings shall be stayed, when he sets up no present claim or title to the mining claim. This purports to be an action brought under the provisions of section 2326, but in such action both parties claim the right to the possession to some particular tract of ground. Such is not this case, for the plaintiff does not claim now any right of possession to the mining claim. These suggestions are not designed to indicate that this action cannot be maintained, but they point to the conclusion that neither the mining claim, nor any portion thereof, is now the matter in dispute between these parties. In *Elgin v. Marshall*, 106 U. S. 578, 1 Sup. Ct. Rep. 484, it is held that the matter in dispute is that which is claimed by both parties. It says that sections 691, 692, Rev. St., "have reference to the matter which is directly in dispute in the particular cause;" and it is not permitted, "for the purpose of determining the sum or value, to estimate the collateral effect in a subsequent suit between the same or other parties. * * * The rule, it is true, is an arbitrary one; but, as it draws the boundary line of jurisdiction, it is to be construed with strictness and rigor. * * * It [jurisdiction] ought not to be extended by doubtful construction." Whether, however, in this case, "the matter in dispute" is the mining claim or the tunnel site, or a portion of either, there is no direct allegation in the complaint, either showing what it is, or its value. The only allegation or statement in the entire record, aside from that in the affidavit already noticed, tending to show the value, is that in defendant's answer, that the defendant, "during the years 1887 and 1888, has expended in work, labor, and improvements thereon [the vein, lode, or ledge in said mining claim] not less than fifty thousand dollars." It does not appear whether this was expended on

that portion of the property which the plaintiff may claim, or on some portion he may never claim; or, conceding that he may claim all said mining claim, and that it is the matter in dispute, does such allegation show the value of the property exceeded \$2,000, or that it was of any value whatever? It certainly justifies a very strong presumption—even a belief—that the mining claim was worth such sum; but a presumption is not sufficient. Every jurisdictional fact must appear distinctly, clearly, and positively, and not be left a subject of speculation or question. For aught that appears here, the \$50,000 may have been so improvidently expended as not to have benefited the property, nor does the allegation show that any of the expenditure was made prior to the commencement of the action.

Having reached the conclusion that the value of the matter in dispute is not such as to give this court jurisdiction of the cause, whether in the determination of the issues a construction of congressional laws is involved will not be considered; neither will be noticed defendant's affidavit, stating the subsequent proceedings and trial of the cause in the territorial court after the request for transfer was refused, further than to add that, after refusal by such court to transfer the cause, the plaintiff was fully justified in appearing in the action, and protecting his interests in all subsequent proceedings in that court, and such action on his part cannot be questioned here. The defendant's motion in this cause is "to strike from the files of this court, and dismiss therefrom, the alleged transcript of said cause," chiefly because it is a transcript, and not the original papers; but upon the argument all the questions above referred to were fully considered. While there is no motion to remand, nor any original papers, records, or files to be returned to any other court, it is the duty of this court, whenever it discovers a cause is improperly upon its calendar, even without motion of the parties thereto, to remand or dismiss it.

It is therefore ordered that all papers, files, and transcripts in this cause on the files of this court be stricken out, and the cause be dismissed.

WILDER *et al.* v. VIRGINIA, T. & C. STEEL & IRON Co. *et al.*

(Circuit Court, W. D. Virginia. June 5, 1891.)

1. REMOVAL OF CAUSES—SEPARABLE CONTROVERSY.

Some of the stockholders and creditors of a New Jersey corporation, part of whom were citizens of Virginia, brought an action in a Virginia state court against the corporation and its promoters, who owned the majority of its stock, alleging that the latter had defrauded the corporation in the payment of their subscriptions, and that they had wasted the funds of the New Jersey corporation in acquiring the stock of various Virginia corporations, contrary to complainants' rights. The Virginia corporations were also joined as defendants, and the theory of the bill was that complainants had the right to have the entire assets of the New Jersey corporation brought into court, and, to that end, that the various Virginia corporations, which had secured its funds, should also be wound up. *Held*, that inci-

dental averments of indebtedness of the New Jersey corporation to the creditors who had joined as complainants in the bill did not constitute a separate controversy between them and the New Jersey corporation, so as to entitle the latter to remove the cause into a federal court on the ground that such complainants were citizens of a state different from that of the corporation.

2. SAME.

Allegations in the bill that one of the Virginia corporations was organized by the promoters of the New Jersey corporation, with intent to defraud the stockholders and creditors of the latter, and that the New Jersey corporation had fraudulently conveyed land to the Virginia corporation without any valuable consideration, and at a great loss, do not constitute a separate controversy between complainants and the New Jersey corporation, so as to entitle the latter to remove the cause into a federal court, since the Virginia corporation and the promoters of the New Jersey corporation, some of whom are citizens of the same state with complainants, are indispensable parties defendant.

3. SAME.

The facts that some of the complaining stockholders hold full-paid stock, while others own assessable stock, that each of them may have purchased at different times, and under different circumstances from the others, and that the claim of each complaining creditor may be distinguishable from that of the others, do not operate to split the cause of action on which complainants are proceeding; nor is a separate controversy presented because complainants might have severally prosecuted the suit which they have properly brought jointly.

4. SAME—LOCAL PREJUDICE.

While a single defendant, being a citizen of a state other than that in which the suit is brought, who is jointly sued with other defendants, citizens of the same state as complainants, may remove the suit to the federal court on the ground of local prejudice, yet such removal cannot be made when complainants are not all citizens of the state in which suit is brought, and all are concerned adversely to the non-resident defendant who seeks to remove the cause.

In Equity. Motion to remand.

Goode & Goode, for complainants.

John F. Dillon, Wager Swayne, R. S. Ayers, and John N. Staples, for defendants.

FULLER, Chief Justice. This bill was filed August 4, 1890, in the circuit court of Washington county, Va., being the sixteenth judicial circuit, by Bailey and Wellington, citizens of New York, Jonas Wilder and Hawkins, citizens of Virginia, A. B. Wilder, of Vermont, and Sheen, of Tennessee, against the Virginia, Tennessee & Carolina Steel & Iron Company, a corporation of New Jersey, the Southern Atlantic & Ohio Railroad Company, the Bailey Construction Company, and the Bristol Land Company, corporations of Virginia, and certain citizens of New York, Massachusetts, Kentucky, Tennessee, Virginia, and South Carolina. Of the complainants, Bailey, the Wilders, and Wellington were stockholders; Bailey holding paid-up and assessable, Jonas Wilder paid-up stock, and A. B. Wilder and Wellington assessable stock, and Sheen, Hawkins, and Bailey were simple contract creditors of the New Jersey corporation, and joined in the bill as such.

The bill alleged that some of the defendants, on or about April 18, 1887, associated themselves by written articles, with intent to form a corporation under the laws of the state of New Jersey, to be known as the "Virginia, Tennessee & Carolina Steel & Iron Company," which articles were acknowledged and filed; that prior to the attempted formation of the corporation, three of the defendants, claiming to own and control large tracts of land in Virginia, Tennessee, and South Carolina,

entered into an agreement with certain other of the defendants to form and float a corporation, to which the land should be sold at \$720,000, \$150,000 to be paid to said three of the defendants, and \$570,000 to the other defendants named, styled on the bill "promoters;" and that, after the agreement with the promoters, the articles of association as a corporation were entered into, and complainants charge that this was not done in conformity with the laws of New Jersey. Defendants pretend, however, that they had formed a legal corporation, and elected themselves as directors; that it was understood at the time of the agreement between the promoters that when the corporation was organized the lands should be sold to the company, and be paid for out of subscriptions for its stock; and, while a pretended sale was made, the lands were never purchased by the promoters of the company, who received \$100,000 out of the subscriptions to the stock, and that \$570,000 was taken out of said subscriptions, and divided between the promoters, whereby innocent subscribers to the stock of the company, and the stockholders therein, were made to pay in full for the land, and to pay the bonus which the promoters, by their control of the company, were enabled to draw from the subscriptions to the stock; that the individual defendants have continued to control the company, owning a majority of the stock and holding the excess thereof, and have conducted its affairs for their own benefit, and with intent to defraud the subscribers and stockholders of the company; that the promoters and directors of the company represented to the complainants who are stockholders, and to the public, that the company was duly organized, and invited subscriptions, and issued and published a circular, which is annexed, and induced by false and fraudulent representations certain of the complainants to subscribe for shares of the stock, and others to make large subscriptions, while the promoters were conspiring together to take wrongfully, from the moneys realized from subscriptions, the sums of \$150,000 and \$570,000; that the defendants have abused their trust as promoters and directors, and grossly mismanaged the property of the company; that they have loaned large sums of money of the company to the Bailey Construction Company; that they have unlawfully purchased with the moneys of the Virginia, Tennessee & Carolina Company more than \$1,000,000 of the capital stock of the Southern Atlantic & Ohio Railroad Company, excepting a small amount issued by that railroad, and the Bailey Construction Company has been purchased with funds belonging to the Virginia, Tennessee & Carolina Company, and the latter company is, without right, assuming to own, operate, and enjoy the franchises of the railroad company and the construction company; that the credit of the Virginia, Tennessee & Carolina Company has been pledged for large amounts for the Bailey Construction Company, and the property and assets of the company mortgaged, without right, to the Bailey Construction Company; that the defendants, assuming to be directors of the Virginia, Tennessee & Carolina Company, have misappropriated and squandered many shares of the capital stock of the Virginia, Tennessee & Carolina Company, and the company has received no adequate consideration therefor, contrary to the laws of New

Jersey and the laws of the state of Virginia, and in fraud of complainants and the stockholders and creditors of the Virginia, Tennessee & Carolina Company; that the Bristol Land Company was organized for the benefit of the promoters, and with intent to defraud the Virginia, Tennessee & Carolina Company, and the stockholders and creditors thereof; that all the lands of the Virginia, Tennessee & Carolina Company, adjoining the city of Bristol, in Virginia, being of the value of \$200,000, have been conveyed to the Bristol Land Company, without any consideration to the Virginia, Tennessee & Carolina Company, and such conveyance, which was grossly fraudulent, has resulted in a loss to the Virginia, Tennessee & Carolina Company of one-half of the value of the lands conveyed; that there is due to the Virginia, Tennessee & Carolina Company \$780,000, on account of subscriptions to the capital stock, a large portion of which is due from the promoters and directors of the company; that the directors have refused and neglected to levy an assessment of stock to insure the payment thereof, and propose to release and discharge said indebtedness in fraud of the stockholders and creditors, and have issued full-paid stock for the amount heretofore paid on subscriptions.

Complainants bring the bill in behalf of themselves and all other creditors and all the stockholders of the Virginia, Tennessee & Carolina Company not named as defendants, and all stockholders of the Southern Atlantic & Ohio Railroad Company who are not named as defendants, and all creditors of the Bailey Construction Company and the Bristol Land Company, and say that, upon information and belief, each of the said Virginia corporations made defendants herein, and the said Virginia, Tennessee & Carolina Company, are indebted to divers persons in different amounts, which are now due, and which they neglect and are unable to pay; that the Virginia, Tennessee & Carolina Company owns all the stock of the railroad company excepting a limited number of shares, and controls said railroad, and it owns all the stock of the Bailey Construction Company, and operates and controls the same; that the promoters and directors of the Virginia, Tennessee & Carolina Company have interfered with the business of the railroad company and the construction company, and have intermingled their assets, and have altered and amended contracts existing between the two corporations, for the purpose of defrauding the stockholders of each, that they may more readily appropriate the assets to their own benefit; that the principal office of these corporations is in the city of Bristol, in the county of Washington, state of Virginia; and that the Virginia, Tennessee & Carolina Company, through the several local companies, has converted the greater portion of the land and valuable properties of the said several companies into bonds and mortgage securities, and all the assets have been taken out of the state, and made way with, by the Virginia, Tennessee & Carolina Company. The complainants charge that a receiver ought to be appointed *instantly*, and that due notice is impracticable; that the defendants have been, and are now, converting the assets of the company, and have been guilty of maladministration and misappropriation. The bill

prays for an account of the moneys due the complainants, and all other moneys due from the four corporations defendant; that certain conveyances by the Virginia, Tennessee & Carolina Company to the land company be declared void, and a reconveyance ordered, and, when sold to innocent purchasers, that an account be taken; that the land company be dissolved, and its assets, after the payment of the debts, be divided among the stockholders; that the construction company be dissolved, and its assets divided; that the railroad company be dissolved, and its assets divided; that an account be had of the money wrongfully taken by certain of the defendants while acting as managers and directors; that an account be taken of all the stock of the Virginia, Tennessee & Carolina Company issued without lawful consideration, for the benefit of certain of the defendants; that the issue be declared null and void, and these defendants be ordered to deliver up the same for cancellation, or pay the face value into court; that an account be had of all the stock of the Virginia, Tennessee & Carolina Company subscribed to by the defendants, and they be directed to pay the balance unpaid thereon; that the property and assets of the Virginia, Tennessee & Carolina Company be applied to the payment of claims asserted against it, and all other just debts, and the balance be distributed among those equitably entitled thereto; that a commissioner be appointed to take and state an account, showing the amounts due to each of the complainants, the entire indebtedness of the companies, with their priorities, and the amount of stock held by each and every stockholder of each and every one of said companies; that an injunction be issued, and a receiver appointed, etc.

Upon this bill and accompanying affidavits an injunction was issued, and a receiver appointed; the proceeding being *ex parte*, and without notice. This order was entered by the judge of the circuit court for the fifteenth judicial circuit, acting for the judge of the sixteenth judicial circuit, but its operation was subsequently suspended by order of the latter. On the 15th of August, 1890, the Virginia, Tennessee & Carolina Company, the New Jersey corporation, filed a petition and bond for the removal of the cause into the circuit court of the United States for the western district of Virginia. The state court was not in session, and the petition and bond were not presented to it or any judge thereof. The record was thereupon filed in the United States court, and certain orders entered thereon. On the 16th of August application was made under the Code of Virginia, upon refusal of an injunction by the judge of the sixteenth judicial circuit, to a judge of the court of appeals of Virginia, upon the original bill and certain supplemental matter added thereto, who entered an order of injunction and for the appointment of a receiver in substantially the same terms as the original order granted by the judge of the fifteenth judicial circuit. This application was *ex parte*, and without notice. On the 2d of September the Virginia, Tennessee & Carolina Company applied to the circuit court of the United States for the western district of Virginia, by petition and affidavit, for the removal of the supplemental proceedings into that court, upon the ground of local prejudice, and an order was thereupon entered by it, removing said

cause. A motion is now made to remand the case under the original proceedings for removal, and to set aside the order of removal entered upon the second application.

As to the alleged removal of the cause of August 15th, the statute contemplates that the petition and bond should be presented to the state court, which was not done, and it is insisted that the removal was therefore not effected; but it is not necessary to dispose of the serious question involved in that contention. That the petition and bond should have been brought to the attention of the court below is obvious.

The question, then, for determination is whether there was a separable controversy, which entitled the New Jersey corporation to remove the cause. The petition for removal stated that "there is a controversy which is wholly between citizens of different states, and which can be fully determined between them, to-wit, a controversy between your said petitioner, which avers that it was at the commencement of this suit, and still is, a citizen of the state of New Jersey," and the complainants, giving the names of each of them, and showing that two of them were and are citizens of Virginia, two of them were and are citizens of New York, one of them was and is a citizen of Vermont, and one of them was and is a citizen of the state of Tennessee; and concluding: "And that the said Jonas Wilder, Thomas S. Hawkins, John M. Bailey, John L. Wellington, A. B. Wilder, and William G. Sheen, and your petitioner, are actually interested in said controversy." This does not assert on the part of the petitioner that there was a separate controversy between it and each of the three simple contract creditors as such, namely Sheen, Bailey, and Hawkins. In this the petitioner was correct, though it is now contended on its behalf that there is a separable controversy between each of these complainants and it, because each of these complainants has an individual claim, as alleged, for so much money against the New Jersey company; but these averments of indebtedness are incidental to the real controversy raised by the bill, and cannot be treated as separate controversies, constituting the basis of removing the entire case, under the statute. *Graves v. Corbin*, 132 U. S. 571, 10 Sup. Ct. Rep. 196; *Safe-Deposit Co. v. Huntington*, 117 U. S. 280, 6 Sup. Ct. Rep. 733.

It is said there is a separable controversy between the complainants and the New Jersey company, upon the allegations that the Bristol Land Company was organized for the benefit of some of the individual defendants, and with intent to defraud the New Jersey company and its stockholders and creditors, and that the New Jersey company had conveyed lands to the Bristol Land Company without any valuable consideration, and in fraud and at great loss; but as to that controversy the Bristol Land Company and the individual defendants in question are indispensable parties, and, besides, the combination charged makes the New Jersey company rightly and necessarily a party co-defendant with the Bristol company. The theory of the bill is the right of complainants to have the entire assets of the New Jersey company brought into court for the purpose of distribution, and that, under its averments, involves the winding up of the various other corporations. If the New Jersey corpo-

ration could be considered as complainant, and the Virginia companies defendants, there would be a separable controversy between them; but they cannot be so arranged under the circumstances. For the purpose of determining whether a controversy is separable, the allegations in the bill must be taken as true, and the combination charged between these defendants, viewed in that light, does not present a separable controversy. *Railroad Co. v. Grayson*, 119 U. S. 240, 7 Sup. Ct. Rep. 190; *Railroad Co. v. Mills*, 113 U. S. 249, 5 Sup. Ct. Rep. 456. And so in respect to the distinction between the holders of full-paid and of assessable stock as regards the right to attack the validity of the incorporation of the Virginia company, and the fact that each of the complaining stockholders may have purchased at different times, and under different circumstances, from the others, and that the claim of each creditor may be distinguishable from that of the others, these matters do not operate to split the cause of action upon which complainants are proceeding, and separate defenses do not create separate controversies, within the meaning of the removal act. Nor is a separate controversy presented because complainants might have severally prosecuted a suit, which they have properly jointly brought, nor can a defendant say that an action shall be several which a plaintiff elects to make joint. *Little v. Giles*, 118 U. S. 596, 7 Sup. Ct. Rep. 32; *Graves v. Corbin*, *supra*, and cases cited.

As to the second order of removal, the supplemental proceedings must be taken as a part of the entire case, which stands upon the original and supplemental and amended bills. As this court has already held the presentation of facts in relation to local prejudice to be *prima facie* sufficient, that may be assumed. Of course, this does not involve passing upon the complainants' right to contest that showing as a matter of fact. But the difficulty of this order of removal is that there is not a controversy, within the intent and meaning of the act, between citizens of the state in which the suit is brought and a citizen of another state. Any defendant, being such citizen of another state, may remove; but it is essential that a controversy should exist between such citizen of another state and citizens of the state in which suit is brought. Assuming that a single defendant, being a citizen of a state other than that in which the suit is brought, who is jointly sued with other defendants, citizens of the same state as the plaintiff, may remove the suit to the circuit court, upon making it appear to the court that, on account of local prejudice or local influence, he cannot obtain justice in the state court or courts, still the question remains whether this can be done when the plaintiffs are not all citizens of the state in which suit is brought, being all concerned adversely to the non-resident defendant, who seeks to remove the case. The language of the act of 1887 is that, "when a suit is now pending, or may be hereafter brought, in any state court in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant being such citizen of another state may remove," etc. The language of the act of 1867, in describing the suit, is the same; and, as to the act of 1867, it has been uniformly held that all the persons on one side must be citizens of the

state in which the suit is brought, and all those on the other citizens of some other state. *Young v. Parker's Adm'r*, 132 U. S. 267, 10 Sup. Ct. Rep. 75, and cases cited.

Granted that the area of removability was enlarged by the act of 1887, inasmuch as any of the defendants may remove, still the rule under the act of 1867 applies, that, when the citizenship on the plaintiff's side of the suit is such as to prevent the removal under that act, it is equally effective to defeat the right under the act of 1887. The suit was brought in Virginia, and the complainants are only in part citizens of that state. The petition admits this. It states—

"That in the said suit there is a controversy between citizens of the state in which the said suit is brought and the citizens of another state, to-wit, a controversy between your said petitioner, who avers that he was at the time of the bringing of the said suit, and still is, a citizen of the state of New Jersey, and that the complainants Jonas Wilder and Thomas S. Hawkins were at the time of the bringing of said suit, and still are, citizens of the state of Virginia; that William G. Sheen was at the time of the bringing of this suit, and still is, a citizen of the state of Tennessee; that A. B. Wilder was at the time of the bringing of this suit, and still is, a citizen of the state of Vermont; and that John L. Wellington and John M. Bailey were at the time of the bringing of this suit, and still are, citizens of the state of New York; and that both your petitioner and the complainants in the bill are actually interested in said controversy."

Upon the face of this bill there is no controversy otherwise than as stated, and this is fatal to the application. We are not to be understood as expressing any opinion as to whether the bill can be sustained as at present framed.

For the reasons given, the entire case must be remanded, and it is so ordered.

UNITED STATES v. SOUTHERN PAC. R. Co. *et al.*, (two cases.)

(Circuit Court, S. D. California. June 22, 1891.)

1. RAILROAD COMPANIES—AMALGAMATION—CONGRESSIONAL GRANTS.

The act of congress of March 3, 1871, authorized the Southern Pacific Railroad Company of California, subject to the laws of California, to construct a certain line of railroad, and granted it certain lands. The Southern Pacific Railroad Company, as it then existed, accepted said grant, and filed its plat of definite location in the proper office August 12, 1873. Said Southern Pacific Railroad Company, as authorized by the laws of California in force at the time of the passage of the act of congress, consolidated with other companies under the name of the Southern Pacific Railroad Company, a part of its object, as stated in the articles of amalgamation, being to construct the railroad mentioned in said act. Thereafter said consolidated company completely built said road, as required by said act, and the road so built was accepted by the president, and has performed, to the satisfaction of the government, all the services required of it under said act. *Held*, that said consolidated company if not, technically, is, substantially, the same company to which said act referred. *Affirming Railroad Co. v. Poole*, 12 Sawy. 544, 32 Fed. Rep. 451; *U. S. v. Railroad Co.*, and *U. S. v. Colton, etc., Co.*, 45 Fed. Rep. 596.

2. AMALGAMATION—RECOGNIZED BY CONGRESS.

Pursuant to state authority, recognized by and made a part of the congressional grant of March 3, 1871, the S. P. R. Co., April 15, 1871, filed amended articles of

incorporation; and August 12, 1873, filed, together with the S. P. Branch R. R. Co., articles of amalgamation and consolidation, under the name of the S. P. R. R. Co. *Held*, that while in one sense a new corporation was formed, each was substantially and practically the same S. P. R. R. Co. mentioned in the acts of congress, and was so recognized by congress, and that the articles of amendment, amalgamation and consolidation were authorized by congressional as well as by state legislation.

3. SAME.

Commissioners having from time to time been appointed to report in regard to the construction of the Southern Pacific Railroad, the road having been accepted by the president, and having been used by the government in the transportation of mail, military stores, etc. *Held*, that these acts were acts recognizing the defendant company as the S. P. R. R. Co. to which the act of March 3, 1871, applies, and that the defendant company, being subject to burdens imposed by the act, is entitled to the benefits conferred by it as a consideration for those burdens.

4. RAILROAD COMPANIES—SUCCESSORS AND ASSIGNS.

Act Cong. July 27, 1866, having expressly granted lands to the S. P. R. R. Co., *its successors and assigns*, it is *held*, that if the consolidated company, with the amended articles of incorporation, is not technically the same corporation, referred to in act March 3, 1871, it is within the express provisions of the grant, being the successor or assign of said company.

5. SAME.

Inchoate grants were not contemplated by congress when it provided for deductions, but lands that had been effectively granted, and to which the title has passed, or shall effectively pass, and finally become effectively vested in the grantees upon the performance of the prescribed conditions.

6. SAME—PROVISO IN GRANTS.

The section of Act Cong. March 3, 1871, granting lands to the Southern Pacific Railroad Company, provided that said section should in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Company. *Held*, that this language did not constitute an exception from the grant, nor a reservation in favor of the United States, but that it made the grant to the Southern Pacific Railroad Company subject and subordinate to any rights the Atlantic & Pacific Company, a prior grantee, may then have secured, or might thereafter acquire under the law.

7. SAME.

The present and prospective rights of the Atlantic & Pacific Company were to secure the odd sections of land provided for along the line of the road they should build by actually building the road and earning the lands by performing the acts required. Their rights were to earn the lands, and not to obtain them without earning them.

8. SAME—FORFEITURE.

As the Atlantic & Pacific Company never did comply with the condition of the grant to it, and as all of its rights thereunder became forfeited in 1886, by act of congress, because of such non-compliance, its rights have never ripened into an effective grant, and now they never can so ripen. The only condition imposed upon the grant to the Southern Pacific Railroad Company has thus become inoperative.

9. SAME—FAILURE OF PRIOR GRANT.

The Southern Pacific Railroad Company, having performed all the conditions required of it by the act of 1871, thereby acquired a right to the odd sections for the prescribed distance on each side of the road, subject only to be defeated by the Atlantic & Pacific Company having an older grant, and filing its map of definite location, and performing the other conditions necessary to earn the lands; but the Atlantic & Pacific Company never having performed said conditions, and its grant having been declared forfeited by congress, the lands never were granted to it, within the meaning of the act of congress, and the grant to the Southern Pacific Railroad Company therefore became effective and perfect without in any way affecting or impairing any rights of the Atlantic & Pacific Company.

10. SAME—ACT OF 1886—EFFECT OF ON GRANT.

No claim in the act of July 27, 1866, granting lands to the Atlantic & Pacific Company under the facts before stated defeats the grant to the Southern Pacific Railroad Company to the odd sections lying within the primary limits of the grant.

(Syllabus by the Court.)

In Equity.

W. H. H. Miller, Atty. Gen., Willoughby Cole, U. S. Atty., and Joseph H. Call, Sp. Asst. U. S. Atty.

Joseph D. Redding and Chapman & Hendrick, for defendants.

Before SAWYER, Circuit Judge, and Ross, District Judge.

SAWYER, J. These are suits brought against the Southern Pacific Railroad Company, and parties who have purchased the land described, and derived title thereto from the Southern Pacific Railroad Company, to determine the adverse claim of title to said lands and to restrain defendants from cutting timber thereon, or from hereafter setting up any claim of title to said lands. The lands involved in suit No. 177 are sections 1, 11, and 13 of township 3, and section 35 of township 4 N., of range 15 W., San Bernardino meridian; and those in suit No. 178, section 23, township 4 N., range 15 W., same meridian. These lands are claimed by defendants under the act of congress of March 3, 1871, "to incorporate the Texas Pacific Railroad Co., and to aid in the construction of its road, and for other purposes." 16 St. 573. Section 23 of said act is as follows:

"That for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (*subject to the laws of California*) to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado river, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions as were granted to said Southern Pacific Railroad Company of California, by the act of July twenty-seven, eighteen hundred and sixty-six." 16 St. 579.

Section 18 of the act conferring rights upon the Atlantic & Pacific Railroad, referred to in the section quoted and conferring the rights under which defendants claim, is in the following language:

"That the Southern Pacific Railroad, a company incorporated under the laws of the state of California, is hereby authorized to connect with the said Atlantic & Pacific Railroad, formed under this act, at such point, near the boundary line of the state of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic & Pacific Railroad herein provided for."

And the provision of the same act, made applicable to the Southern Pacific Railroad Company, and granting it lands putting it upon the same footing in all particulars with the Atlantic & Pacific Railroad Company incorporated by the same act, is as follows:

"And be it further enacted, that there be and hereby is granted to the Atlantic & Pacific Railroad Company, [substitute Southern Pacific Railroad Company,] its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated,

and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the commissioner of the general land-office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers: provided, that if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been *heretofore granted* by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted, shall be deducted from the amount granted by this act." 14 St. 294, § 3.

Substitute in this section the words, "the Southern Pacific Railroad Company" for the words, "the Atlantic & Pacific Railroad Company," and we shall have the grant to the Southern Pacific Railroad Company both by the act of 1866, and the act of 1871. Soon after the passage of the said act of March 3, 1871, to-wit: on April 3, 1871, the Southern Pacific Railroad Company as it then existed, designated the line of its road from Tehachapa Pass by way of Los Angeles, to Fort Yuma, on the Colorado river, which it on that day filed in the office of the commissioner of the general land-office, and thereby the grant under said act of congress attached to all the odd sections of land, to which it could attach under the provisions of said act of congress. Afterwards, on the 12th day of August, 1873, the said Southern Pacific Railroad Company, in all respects as authorized by the laws of the state of California, existing and in force before and at the time of the passage of said act of congress of March 3, 1871, incorporating the Texas Pacific Railroad Company, amalgamated and consolidated with several smaller companies as shown by Exhibits A, B, annexed to the bill of complaint in these cases; the said consolidated company being called by the name of "The Southern Pacific Railroad Company," a part of the object stated in said articles of amalgamation being to construct "a line of railroad from a point at or near Tehachapa Pass by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado river, a distance of three hundred and twenty-four miles as near as may be," in pursuance of said provisions granting the right so to build a railroad to the Southern Pacific Railroad Company as provided in said section 23, in said act, incorporating said Texas Pacific Railroad Company, hereinbefore cited, said company having been amalgamated and consolidated under the same name and style as the principal company so incorporated and amalgamated, viz.: "The Southern Pacific Railroad Company." The said amalgamated and consolidated company afterwards built the said railroad along the line so hereinbefore designated from Tehachapa Pass by the way of Los Angeles to the Colorado river, and fully completed the same within the time, and in all respects, as required by said act of congress; and the said several sections were examined from time to time, and reported upon to the president by commissioners appointed for the purpose, and the whole line accepted by the president. Ever since its completion and acceptance,

the said road has performed to the satisfaction of the United States government, all the services, such as carrying the mails, transporting troops, supplies, etc., in all respects as required by the provisions of said act of congress incorporating the Texas Pacific Railroad Company; and said services have been accepted by the United States.

The Atlantic & Pacific Railroad Company, on March 12, 1872, long subsequent to the definite location of the line of the Southern Pacific line, and after it commenced building its road, filed in the office of the secretary of the interior—not in the office of the commissioner of the general land-office—two maps of portions of a line of road in the state of California. These were the first maps of any part of the contemplated road in California ever filed. These maps are designated "Master's Exhibits Nos. 122 and 127." Some time subsequently, the said company filed in the same office, two other maps designated "Master's Exhibits Nos. 130 and 131." These are the only maps filed relating to the location of the California portion of the Atlantic & Pacific road. The Atlantic & Pacific Railroad Company never constructed any portion of the road authorized to be constructed by it, in the state of California; and for failure to construct said road or any part of it, congress, on July 6, 1886, passed an act declaring a forfeiture of all lands within the state of California, before granted to it, to aid in the construction of the road. 24 St. 123. The line of the Atlantic & Pacific Railroad, as shown upon said maps filed in the office of the secretary of the interior, crosses the line of the Southern Pacific Railroad as located by its said maps and as constructed from Tehachapa Pass by the way of Los Angeles to the Colorado river, but said lines are not located along the same general route. The lands in controversy lie within 20 miles of both of said lines as so located and shown, where they cross each other. The said lands have been conveyed by the said Southern Pacific Railroad Company, respondent, which constructed its road as aforesaid, to the other respondents to this suit, and the title so conveyed, is now vested in them.

The first point made by complainants is, that the present Southern Pacific Railroad Company, which built the road after the amalgamation and consolidation with sundry smaller roads mentioned, under the same name as the old company, and professedly for the same purpose, made in pursuance of the statutes of the state of California, authorizing such consolidation and amalgamation, which statutes were in force at the date of the congressional grant in question, and prior to which consolidation the grant by congress was made, and which road was to be built in accordance with the laws of the state of California, is not the identical Southern Pacific Railroad Company, to which the act referred, and the grant was made, and therefore, that the defendant took nothing under the act of congress. This point is not new in this court, as it was fully considered and overruled in *Railroad Co. v. Poole*, 12 Sawy. 544, 545, 32 Fed. Rep. 451. Again, the point was made and earnestly urged in the southern district of California, in *U. S. v. Railroad Co.* and *U. S. v. Colton, etc., Co.*, and the district judge in an able opinion, concurred in, on this point, by the circuit judge, thoroughly examined the point, and overruled it, cit-

ing with approval also, the case of *Railroad Co. v. Poole*, referred to, and affirming it. (14 Sawy. 623, 45 Fed. Rep. 596 *et seq.*) See, also, *Railroad Co. v. Orton*, 6 Sawy. 160, 32 Fed. Rep. 457. We shall adhere to the ruling made in these cases till the point is otherwise determined by the supreme court.

It is earnestly urged on the part of the respondents, that the filing in the office of the *secretary of the interior*, of the fragmentary maps of the location of the line of the contemplated Atlantic & Pacific road, and to points not authorized by the law, does not constitute a location of the line in such sense, or legal form, as to give any right whatever under the act, to the Atlantic & Pacific Company; and, that, it in no way affects the action or rights of the Southern Pacific Company. For the purposes of this case, however, without deciding, or discussing the matter, I shall assume that the filing of these maps in the office of the secretary of the interior, instead of the commissioner of the general land-office, to have been so far regular, and in accordance with the law granting the rights contemplated to the company, since, upon the view I take upon the rights of the parties, and of the effect of the act forfeiting the grant to the Atlantic & Pacific Company, it will not be necessary to decide the point raised.

The only remaining question is, whether, in view of all the facts of the case, the clause in the provision of section 23 in the act of 1871, "that this section shall in no way affect or impair the rights, present, or prospective, of the Atlantic & Pacific Railroad Company, or any other railroad company," or any clause in the act of 1866, under the facts of the case, defeats the grant to the Southern Pacific Railroad Company to these lands, which lie within the primary limits of the grant? This question did not arise in *U. S. v. Railroad Co.* and *U. S. v. Colton, etc., Co.*, 14 Sawy. 620, 45 Fed. Rep. 596. It is now directly presented however, and we address ourselves to its consideration and solution. In my judgment, neither the proviso to section 23 of the act of 1871, nor any provision of the act of 1866, defeats the title to the lands in question, in view of all the facts in the case. That proviso is as follows: "Provided however, that this section shall in no way affect or impair the *rights present or prospective* of the Atlantic & Pacific Railroad Company, or any other company." Now what is the fair import of this language? What was the intent of congress, in view of the important objects sought, in making the grant to respondents, in adopting this peculiar language? It is not the language of exception from the grant, of any lands that the Atlantic & Pacific Company might lay claim to without earning them under the statute. It is not the language of exception at all. On the contrary, it merely made the grant to defendant, subordinate, and subject to any rights, that the Atlantic & Pacific Company may then have secured, or might thereafter, acquire under the law, authorizing it to acquire lands, by the performance of the acts prescribed. Congress intended that the respondent should not interfere with any lands which that other company should lawfully earn. It simply intended to protect any rights, that it should acquire, by performing the required acts.

What were "the rights, present and prospective of the Atlantic & Pacific Railroad Company?" Their rights were to secure the odd sections of land provided for along the line of *the road they should build, by actually building the road, and earning the lands by performing the acts required. Their rights were to earn the lands, and not to obtain them without earning them.* Congress has nowhere provided, or contemplated, that this company should file a plat of a route for a railroad, and then play the role of the dog in the manger, and neither build the road itself, and thereby earn the lands, nor allow the respondents to build one, and earn the lands under another grant. The Atlantic & Pacific Company never did anything to earn these lands, except to file, what it was pleased to term a "map of the location of its route," six years after the date of the grant, and one year after the respondent had located its road under the grant, made five years subsequently, and after it had commenced building the road; and for failure to comply with the terms of the grant, by the Atlantic & Pacific Company, congress, in 1886, (24 St. 123, 124,) passed an act forfeiting its right to earn these lands altogether. Thus its rights "present" and "prospective," have never ripened into an effective grant, and now they never can so ripen. They now have, and can have no further rights in these lands, whether the respondents get them or not. The building of its road, by the respondents, and earning these lands, which the other party has itself failed to earn, and now never can earn, can in no possible way "affect or impair" any rights the other company now has, or ever did have. And had that company built the road, and earned the lands, the respondent would not have got them, for that would have been to affect or impair its rights.

The *present* right of the Atlantic & Pacific Company was to earn the lands by the performance of the required conditions, and the *prospective* rights, the right to have the lands when so earned. This is all there is of it, and it did neither. Now the grant to the Southern Pacific, being subject, and subordinate, to those rights, could not in any way, or in any degree, have affected, or impaired them, because the Atlantic & Pacific Railroad Company, had it performed the conditions would have taken the said land under the act. It utterly failed to perform the conditions, and all its rights have been forfeited, and now the patenting of the lands to the Southern Pacific cannot in any way possible affect any of these rights which do not now exist. Thus the rights of the Atlantic & Pacific Company present or prospective, never could have been affected by the acts of the Southern Pacific, which only took the lands in case the other company did not. It seems to me, that any other view, is utterly untenable. The respondent was in the position, that it was compelled to take its grant subordinate, and subject to the prior grant. It only took what would not be required to satisfy the prior valid claim, had the work been performed. The prior claimant failed to acquire any real right to the lands, by earning them, and they were forfeited and left to the respondent to earn under its grant, and it has faithfully earned them without in the slightest degree "affecting or impairing any prior rights" "present or prospective," and it now cannot impair them. It

seems to me, that the respondent is justly entitled to these lands under its grant. An exception, from a grant, is an entirely different matter from taking a grant subject to other claims or rights, as is, manifestly, the case here. When the other claims are satisfied, or lost, the grantee, subject to those rights, takes what is left. The proviso in section 23 of the act of 1871, *seems to me, clearly to prescribe all the limitations intended by congress in that act to be put upon the grant to respondent.* It is specific and clear on this point, and, only intended to be subject to any rights that should be actually acquired and perfected under any prior act. The reference to the act of 1866, does not modify the provision in this particular section. It puts no restriction upon respondent, not expressly put upon the Southern Pacific Company by the act of 1866, and that act, in the precise language used, taken literally, or substantially, does not affect this point. In that act, the Southern Pacific Company was put upon the precise footing with the Atlantic & Pacific Company. Both took under the same act, upon equal terms. In the act of 1871, the Southern Pacific Company was put upon the same footing as the Southern Pacific Company was put by the act of 1866. The proviso in section 3 of the latter act is—

“That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, *as far as the routes are upon the same general line*, the amount of land *heretofore* granted shall be deducted from the amount granted by this act.”

The language is “*have been heretofore granted;*” that is to say, granted *before the passage of the act of 1866, not the act of 1871.* The rights of the Southern Pacific, granted by section 18 were not affected by any act that should be thereafter passed, and the rights of the Southern Pacific Company under the act of 1871, are the same as those of the Southern Pacific Company under the act of 1866, and under this proviso are only affected by grants made *prior to the passage of the act of 1866.* To hold otherwise, would be, to change the language of the acts. But the line of the Southern Pacific road is not on the line of the “Atlantic and Pacific” route as designated on what is claimed to be its map of location. The two roads are not “upon the same general line.” They simply cross each other. But again: The fair construction of this proviso, and as it was intended by congress, in view of the object sought, is, that “lands that have *heretofore* been granted,” and “the amount of land” to be dedicated, means lands that have been *effectively granted*, and to which the title has passed, or shall *effectively pass out of the United States, and finally become effectively vested in the grantees upon the performance of the prescribed conditions.* It does not mean inchoate grants, that are not finally perfected—grants that become forfeited by failure to earn them by performing the prescribed conditions or any of them. These do not, ultimately, become grants at all, within the meaning of the act, and intent of congress. Congress was anxious to procure the construction of these great works, for military, mail-carrying, and other uses, and thereby also develop the resources of the country, and make a market for the public

lands. It contributed *nothing*, because it received double price for the even sections. In these provisions, it was, only solicitous to protect the vested rights of prior grantees in lands fairly earned in constructing works of a similar kind in pursuance of a similar policy. It did not seek, by forfeitures, to evade its obligations to subsequent roads, and thereby increase its own property, at the expense of those who, actually carry out the objects of the law, and fairly earn the lands intended for them. We cannot attribute any such unworthy purpose, or motive to congress. It manifestly, intended, that the subsequent grantees should take the odd sections subject only to prior rights, and when the prior grants failed, and finally, became no grants, by reasons of a failure to perform the conditions necessary to perfect the grant, and when no rights can possibly be further affected by the grant to the subsequent grantee, that the latter, upon complying with the terms of its grant should have the lands, not ultimately, or effectively granted under the prior acts of congress. Effective, completed grants only, are contemplated in this proviso.

Now, in my judgment, the case is clearly this, and nothing more. The act of 1866 gave the Atlantic & Pacific Company the right to build a railroad with the right of location within the provisions of the acts; to receive the odd sections of land along the general line of its route, upon building the road as required, but upon no other conditions. The grantee did not, for six years, do anything to locate its road in the state of California, or earn the grant. The act of 1871 was passed, making a similar grant to respondent, subject however to any prior rights of the other company. *Within a month* it filed its map of location, and immediately, went to work and continued till it performed all the required conditions, had its road completed, and accepted by the president, and earned its lands. By filing its map of definite location, it acquired a right to the odd sections for the prescribed distance on each side of the road, subject *only* to be defeated by the Atlantic & Pacific Company, having an older grant, by filing its map of definite location, *and then performing the other conditions necessary to earn the lands.* At the time of locating the Southern Pacific line, there was nothing to indicate that the Atlantic & Pacific would ever move in the matter. A year afterwards, and six years after the date of its grant, the Atlantic & Pacific Company filed what is claimed to be its definite location; and by that act, if properly done, and not already *too late*, under the law, it acquired what? Not a perfect, or complete title, to the land but at most a temporary provisional title, with a right to build the road, earn the lands, along its line, perfect its title, and defeat the right of the respondents to acquire the land. But it did nothing more, and, after waiting 20 years for it, without anything more being done, congress passed the act referred to, forfeiting its grant, and the lands never were fully granted—never became granted, within the reasonable meaning of the act of congress providing for deducting therefrom subsequent grants, and thereby the grant to respondents became effective and perfect, without in the slightest degree, or “in any way,” “affecting” or “impairing any right,” “present or prospective” of the

Atlantic & Pacific Company, or any other prior grantee. If this be not the true view of the case, then no lands could have been acquired by the respondents under its grants, and the act, purporting to be a grant, as to it, was a dead letter—a mere illusion; for, if the acts mentioned, performed by the Atlantic & Pacific Company, at that date could utterly defeat the grant of these lands as to the respondents, any location respondents could have made, could have been defeated by similar action, and the thereafter, non-action of the Atlantic & Pacific Company; for it could subsequently locate upon the same line, in the same sense, as that upon which respondents did locate, and in the same manner, defeat the latter grant.

I am, therefore, of the opinion, that the earning and acquiring of these lands by the respondents, under the conditions shown by the record, in no way affected, or impaired, the "rights present or prospective," of the Atlantic & Pacific Railroad Company, or any other, within the meaning of the act of congress; and that, these lands are not lands heretofore, or at any time, granted by the act of congress in such sense as to require them to be deducted along the general line of the road, or otherwise, within the meaning of the acts of congress of 1866, and 1871, or of either of them.

Under the views expressed, the amended bills must be dismissed, and it is so ordered, without costs.

Ross, J. These cases have been argued and submitted together. The suits are brought to quiet the complainants' alleged title to certain lands and to enjoin defendant from asserting or claiming any title thereto. The lands are claimed by the defendant by virtue of the act of congress of March 3, 1871, entitled "An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes." 16 St. U. S. 573. By the 23d section of that act it was provided as follows:

"That for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado river, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions as were granted to said Southern Pacific Railroad Company of California by the act of July 27, 1866: provided, however, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company, or any other railroad company."

The evidence in the case shows that the defendant company accepted this grant and on the 3d of April, 1871, filed in the office of the commissioner of the general land-office, a plat showing the definite location of the road it was thereby authorized to build, and proceeded to build it and completed its construction, to the satisfaction of the government, in January, 1878. It thereby earned the lands embraced by the grant to it. The point that the present Southern Pacific Railroad Company is not the same Southern Pacific Railroad Company to which the act of

March 3, 1871, applied, was decided against the government in the recent cases of *U. S. v. Railroad Co.* and *U. S. v. Colton, etc., Co.*, 45 Fed. Rep. 596, (March 6, 1891.) The reasons for so holding were given at length in the opinions then rendered, and need not now be repeated.

It is admitted that the lands in controversy in the present suits are situate within 20 miles of the line of road so located and built by the Southern Pacific Company, but as they are also within 20 miles of the line that the Atlantic & Pacific Railroad Company, under the act of congress of July 27, 1866, designated for its road, it is earnestly contended on behalf of the government that they are excluded from the grant to the Southern Pacific Company. When the cases of *U. S. v. Railroad Co.* and *U. S. v. Colton, etc., Co.*, 39 Fed. Rep. 132, were before the court on demurrers to the bills—the lands then involved being within the *indemnity* limits of the Atlantic & Pacific grant and within the primary limits of that to the Southern Pacific Company—it was said:

“Had they been situated within 20 miles of the designated route of the Atlantic & Pacific Company they would clearly have fallen within the grant to that company and consequently have been excluded from the subsequent grant to the Southern Pacific Company; for, if the construction above put upon the act of July 27, 1866, be the correct one, every alternate section of public land, designated by odd numbers, within 20 miles of the line of the road, as definitely fixed, would have passed to the Atlantic & Pacific Company as of the date of its grant.”

That, though *obiter*, would undoubtedly have been so had the Atlantic & Pacific Company earned the lands by building the road for which the grant was made. But is it true where it appears that the road was not built and where the grant to the Atlantic & Pacific Company for that reason has been subsequently declared forfeited by congress? is the question now involved and to be decided. The grant to the Atlantic & Pacific Company was the prior grant—it having been made by the act of July 27, 1866, entitled “An act granting lands to aid in the construction of a railroad and telegraph line in the states of Missouri and Arkansas to the Pacific coast.” 14 St. U. S. 293. By that act the Atlantic & Pacific Company was authorized to construct a railroad—

“Beginning at or near the town of Springfield, in the state of Missouri, thence to the western boundary of said state, and thence, by the most eligible railroad route as shall be determined by the said company, to a point on the Canadian river; thence to the town of Albuquerque on the river Del Norte, and thence by way of the Agua Frio or other suitable pass to the headwaters of the Colorado Chiquito, and thence along the 35th parallel of latitude, as near as may be found most suitable for a railroad route, to the Colorado river at such point as may be selected by said company for crossing; thence by the most practicable and eligible route to the Pacific.”

To aid in the construction of the road there was granted to the Atlantic & Pacific Company, by the third section of the act, every alternate section of public land, not mineral, designated by odd numbers, to the amount of 10 sections on each side of the road whenever it passes through a state—

“And whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption

or other claims or rights, at the time the line of said road is designated by a plat thereof filed in the office of the commissioner of the general land-office, and whenever," etc.

The Atlantic & Pacific Company did nothing towards locating its line of road in California until March 12, 1872, and never did do anything towards building it; in consequence of which congress, in 1886, passed an act declaring its land grant forfeited. In the mean time, that is to say, March 3, 1871, the grant under which the defendant company claims the lands in controversy was made. Those lands were at that date public lands of the United States, for it is not pretended that the Atlantic & Pacific Company designated the route of its road prior to March, 1872, and its grant, as has been seen, was only for such public lands, designated by odd numbers and non-mineral in character, as should fall within the designated limits and be, *at the time the line of its road should be designated by a plat thereof filed in the office of the commissioner of the general land-office*, not reserved, sold, granted, or otherwise appropriated and free from pre-emption or other claims or rights. No valid reason, therefore, existed why congress could not include the lands in controversy in the grant it made to the Southern Pacific Railroad Company. Did it do so? The act of March 3, 1871, refers to that of July 27, 1866, for the terms of the grant thereby made to the Southern Pacific Company to aid it in building a road from a point at or near Tehachapi Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado river, for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco. The grant was for 10 odd-numbered sections of public land, not mineral, on each side of the road. As has already been said, the lands in controversy here were at that time public lands of the United States. They are within 20 miles of the line of road the Southern Pacific Company was by the act of March 3, 1871, authorized to locate and build and which it did locate and build and which the government accepted as having been built in compliance with the terms of that act and which it has since used for its own purposes. The lands in controversy are therefore within the primary limits of that grant and justly belong to the Southern Pacific Company unless there be something in the act of March 3, 1871, excluding them from the grant thereby made to it. It is urged that such exclusion is effected by the concluding clause of the section making the grant, which is in these words: "Provided, however, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company, or any other railroad company."

It is plain that this clause is not in the form of an exception from the grant. Congress was, of course, aware of its previous grant to the Atlantic & Pacific Company of date July 27, 1866, and being desirous of making that to the Southern Pacific Company subordinate and subject to its previous grants, inserted the proviso that the grant to the Southern Pacific Company should "in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Company, or any other railroad company." This is by no means saying, nor is it the equivalent of say-

ing, that any public lands of the United States that would otherwise be embraced by the grant to the Southern Pacific Company should be excluded from that grant. It was not to reserve anything to the United States, but to protect the "present and prospective" rights of the Atlantic & Pacific Company and any other railroad company to which congress may have made grants of lands that the proviso was inserted. Had the line of road the Atlantic & Pacific Company was authorized to build by the act of July 27, 1866, been definitely located at the time of the grant to the Southern Pacific Company of March 3, 1871, and had the Atlantic & Pacific Company thereafter built its road and thereby earned the lands covered by its grant, the lands in controversy would have gone to it without regard to the proviso in question; for its grant which would have attached to such lands at the time of the definite location of the route of its road would have been perfected by the building of the road and the title thus perfected have related back to the date of the grant, July 27, 1866, and of course have excluded any subsequent grant covering the same lands. But the Atlantic & Pacific Company had not designated the route of its road at the time of the grant to the Southern Pacific Company of March 3, 1871. It might do so, however, thereafter and might build the road it was authorized to build and thereby earn the lands embraced by the grant to it of July 27, 1866. It had a "present and prospective" right to do so. If it did both of those things, it would be entitled to the lands granted to it by that act. If it did not do both of those things, it would not be so entitled and the lands would remain as they then were, public lands of the United States. Congress, therefore, in making its grant to the Southern Pacific Company of March 3, 1871, made it subject to those "present and prospective" rights. Had they been perfected by a compliance on the part of the Atlantic & Pacific Company with the conditions on which they were based, the title to the lands in controversy would have become vested in the Atlantic & Pacific Company as of date July 27, 1866. But as that company never did comply with the conditions of the grant and as all of its rights thereunder became forfeited in 1886 by act of congress because of such non-compliance, there remain no rights of that company to be, or that ever can be, affected or impaired by the grant to the Southern Pacific Company of March 3, 1871. The proviso to the twenty-third section of that act, in my opinion, was only intended to protect, and its scope went only to the protection of, the rights of the Atlantic & Pacific Company and any other railroad company to which congress had previously made a grant. It was not intended to reserve to the United States any land that would otherwise be included in the granting clause of the act. The lands in controversy were public lands of the United States at the time of that grant; the terms of the granting clause include them, provided, *only*, that the grant be without prejudice to the present or prospective rights of the Atlantic & Pacific Railroad Company, or any other railroad company. The Atlantic & Pacific Company having forfeited its right to earn the lands in question by failing to build the road it was required to build as a consideration for the grant, it never acquired any title thereto

and thenceforward there remained no right, "present or prospective," to be affected or impaired. When its rights became forfeited (there being no pretense that the case is affected by the rights of any other railroad company than those herein spoken of) there came to an end the only condition imposed by congress upon the grant to the Southern Pacific Company of March 3, 1871.

These views render it unnecessary to determine the question elaborately and ably argued by counsel as to whether there ever was a valid designation of the route of the proposed road of the Atlantic & Pacific Company.

I concur in the dismissal of the amended bill in each case, without costs, and wish to add that I would not have written this brief opinion had I known the circuit judge was engaged in the preparation of an opinion; but as each of us reached the same conclusion in a separate examination of the cases, at his suggestion both opinions are filed.

INVESTMENT CO. OF PHILADELPHIA *v.* OHIO & N. W. R. Co. *et al.*

(Circuit Court, S. D. Ohio, W. D. June 1, 1891.)

RAILROAD MORTGAGE—FORECLOSURE—ALLOWANCE TO COUNSEL.

Where in the foreclosure of a railroad mortgage the complainant is the holder of a majority of the bonds secured, and the trustee, by agreement with the complainant, has declined to act in the foreclosure proceedings, and is made a co-defendant, and full allowance has been made to the counsel of complainant and to the receiver for his services, all for duties which by the mortgage were assigned to the trustee, it was not error to refuse an allowance also to the trustee's counsel.

In Equity.

Alexander & Green, for trustee.

Howard C. Hollister, contra.

SAGE, J. This cause is before the court upon an application by the trustee under the mortgage for compensation and for counsel fees, to be paid out of the proceeds of sale of the defendant company's road under decree of foreclosure. The mortgage was made by the defendant the Ohio & North-Western Railroad Company to the defendant the Mercantile Trust Company, to secure bonds issued by the first-named defendant company. It is in the usual form. It provides that, upon the default of the mortgagor to pay its interest coupons within six calendar months after their maturity and after demand, the bonds themselves shall become due and payable, and after demand of payment the trustee shall, upon the written request of the holders of a majority, enter upon and take possession of the railroad, its equipments, and all the property included in the mortgage, and operate the road for the benefit of the bondholders; and that said trustee shall, at the written request of the holders of a majority of the bonds, proceed to foreclose. The com-

plainant company is the holder of a majority of the bonds secured by the mortgage, and of other claims which are prior liens upon the mortgaged property. The foreclosure proceedings were, with the consent of the Mercantile Trust Company, conducted by the complainant. The trust company filed an answer to the bill, and to each of seven cross-bills, which set up liens claimed to be prior to the mortgage. These answers are merely formal, and in terms leave the conduct of the cause to the complainant. Upon the complainant's motion, and with the consent of the trust company, a receiver was appointed shortly after the filing of the bill, and the road was transferred to his possession, and operated by him, under the direction of the court, until the confirmation of the sale.

The statement of services rendered by counsel, which was filed with the application, shows numerous consultations with the officers and counsel of the complainant company with reference to the proceedings in the cause, and frequent correspondence. It is urged in support of the application that, while there is no reported case in its favor, such allowances have been repeatedly made; citing *Central Trust Co. v. St. Louis, A. & T. Ry. Co.*, where allowances were made to counsel for services rendered by them on behalf of the defendant companies; but, as it appears from the statement of counsel, those allowances were granted substantially on the consent of all parties to the litigation. That cause was pending in the eighth and fifth circuits, but the principal cause proceeded in the eighth. The same course was pursued in reference to an allowance to counsel representing some of the defendants in the suit of the *Mercantile Trust Co. v. Missouri, K. & T. Ry. Co.*, which was also in the eighth circuit. In that cause, too, the allowance was agreed upon by the parties, and the matter did not come before the court. In the case of *Central Trust Co. v. Wabash, St. L. & Pac. Ry. Co.*, in the seventh circuit, an allowance was made by the court to the Mercantile Trust Company, cross-complainant. That case was like this, in that the proceeding was originally in the nature of an application for the appointment of a receiver; the ostensible purpose of the bill being to preserve the property for the benefit of all its creditors. The case is not reported. As stated by counsel, it was originally begun "by rather an anonymous proceeding on behalf of the defendant railway company." The Central Trust Company, as the mortgagee of the principal mortgage, was made a party defendant, but it had commenced an independent suit in the state court of Indiana. Shortly after the original bill was filed, that suit was removed to the federal court, and the causes were consolidated, and thereafter proceeded as a consolidated cause. There were really no proceedings under the Wabash bill, excepting the appointment of a receiver. About the time that the Central Trust Company, complainant in the consolidated cause, was ready to take a decree of foreclosure, it was thought for the best interests of all concerned that a subsequent collateral trust mortgage executed to the Mercantile Trust Company should be foreclosed, and that company thereupon answered and filed its cross-bill, (which was very short,) and the defendant company and the Cen-

tral Trust Company immediately answered, and a decree was thereupon had. The actual proceedings of the Mercantile Trust Company, as cross-complainant, were very simple. The matter of compensation and allowances of that company, and for its counsel, was referred to a special master. In his printed report of the proceedings in the cause he finds that counsel had rendered exceptional services to the Wabash Company from the very inception of the litigation, for which they had been allowed and paid the sum of \$3,000. The master reported that the services of counsel had greatly aided in rendering possible a speedy ending of the litigation, and the saving of a considerable amount of money to the holders of the bonds secured by the mortgages to the Central Trust Company and the Mercantile Trust Company. He recommended an allowance for the services rendered by counsel for both companies, and in the two different capacities in which they acted. The matter was carefully considered by the court upon exceptions to the master's report, on behalf of some of those who were largely interested in the property. The report was confirmed, with possibly some slight reductions in the amounts. According to the statements of counsel, which I have no doubt are correct, allowances were granted in the same cause to counsel for the Wabash Company.

It is urged in support of the application now made that the Mercantile Trust Company declined to proceed in this cause at the express solicitation of the investment company, with the understanding that the trust company should become a cross-complainant. That course, it is stated, was not pursued because of the request of counsel for the complainant, on the ground that it would lead to a postponement of the ultimate result sought, namely, the foreclosure of the mortgage, and the sale of the property; the bill having been filed before the expiration of six months after default of payment of interest upon the bonds; and that the interests of all concerned would be furthered by the trust company merely continuing to be a party defendant, and joining in its answer in the prayer of the complainant's supplemental bill, which was filed after the expiration of six months' default upon the bonds. The statement of counsel is frank and full, and as to its facts is admitted to be true. It is proper, also, that it should be stated that the complainant company does not oppose the application, neither does it formally consent. It is neutral, and submits the matter to the decision of the court.

In the case of *Central Trust Co. v. Wabash, St. L. & Pac. Ry. Co.*, last above referred to, the finding was that counsel for the Mercantile Trust Company by their services not only aided in rendering possible a speedy ending of the litigation, but also saved a considerable sum of money to the holders of the mortgage bonds; and the allowance seems to have been made for that reason. The case is altogether distinguishable from the case now before the court. The Mercantile Trust Company was not merely a defendant, but was a cross-complainant, representing the mortgage made to it as trustee. But that is not this case. Here the only aid was by declining to act, and by consenting that the proceedings should be conducted by the investment company. The remarks of Chief

Justice REDFIELD in *Sturges v. Knapp*, 31 Vt. 54, are directly applicable. Speaking of trustees under a railroad mortgage to secure the payment of bonds, he said:

"We think it could scarcely escape the notice of any one who had seriously and patiently attempted to master this question that until the actual foreclosure of the mortgage the trusts involved in the contract, and imposed upon the trustees named, are entirely fiduciary and executory. At first, and so long as prompt payment is made, it is understood, in practice, indeed, that the office of such trustees is rather silent, and the duties of the trustees, by means of the negotiability of the bonds and of the coupons attached, are ordinarily performed, or expected to be performed, by the corporation officers."

In this cause at the outset a receiver was appointed, and the property passed into his possession, and came under his management. The trustee never has had possession of the property. It has been repeatedly held in this circuit, but not in any reported case, that the court will not allow compensation to the trustee under the mortgage to be paid out of the proceeds of sale. Upon an application very like the present one, in the unreported case of *James R. Jesup et al. v. Wabash, St. L. & Pac. Ry. Co. et al.*, in the United States circuit court at Toledo, for the northern district of Ohio, counsel for the minority bondholders, claiming to represent the trust, and who were defendants in the suit, were denied allowance or compensation out of the proceeds of sale of the mortgage property. Judge JACKSON made the ruling in that case. He concurs with me that in this case counsel for the Mercantile Trust Company are not entitled to any allowance or compensation out of the proceeds of the mortgage property. When the trustee under the mortgage has declined to act or to proceed to foreclose, neither it nor its attorney can thereafter properly claim allowances upon foreclosure out of the proceeds. It does not matter for what reason the trustee declined to act. The suit was conducted by the investment company, as complainant, on behalf, also, of all the other bondholders. Full allowance has been made and paid out of the proceeds of sale to its counsel, and full payment has been made to the receiver for his services in caring for the property, and operating the road. All the allowances, therefore, which could have been expected had the trustee, in accordance with the stipulations of the mortgage, taken possession of and operated the road, and by its counsel conducted the proceedings in foreclosure, have been made to those who upon the trust company's declination rendered services which were by the mortgage assigned to the trustee. The services rendered by counsel for the Mercantile Trust Company in preparing and filing answers, in keeping an eye upon the proceedings, and in consulting from time to time with counsel for the complainants, were all doubtless well enough; but it cannot be said that they so contributed to the progress of the cause as to entitle them to be paid out of the proceeds of sale. Besides, they are not services provided for in the deed of trust. In *Tracy v. Gravios Railroad Co.*, 13 Mo. App. 295, it was held that a trustee can receive pay out of the trust fund for such services and expenditures only as are within the line of duties imposed upon him by the instrument

creating the trust. The court said that the true test was "whether the services and expenses for which he demands compensation and reimbursement were either directed by the terms of the deed of trust, or were necessary to a performance of the duties imposed upon him by that instrument." The opinion of the court will be found to be instructive. The ruling was affirmed in 84 Mo. 210, the supreme court there adopting the reasoning and approving the conclusion reached by the court below.

The application will be denied.

ARNOLD *et al.* v. CHESEBROUGH *et al.*¹

(Circuit Court, E. D. New York. June 30, 1891.)

1. HUSBAND AND WIFE—MARRIAGE—EVIDENCE—BURDEN OF PROOF.

One who asserts a marriage as the basis of a claim at law or in equity must satisfy the court, upon the whole case, by a fair preponderance of proof, not necessarily when and where such contract was made, but that at some time and place it was made.

2. SAME—MARRIAGE—HOW PROVED—INFERENCES.

Marriage may be proved by circumstantial evidence, by proof of the acts and declarations of the parties, of their cohabitation as husband and wife, holding themselves out to the world as such. Such course of life or declarations do not make a marriage, but are legitimate ground for inferring that there has been at some time a valid marriage contract.

3. SAME—EVIDENCE—REPUTE.

On a disputed question as to the existence of a marriage, evidence of repute in the families of the contracting parties is admission.

4. SAME.

On the evidence in this case, *held* that the marriage asserted by complainant was not proved.

In Equity.

Henry Rawcliffe, (John H. V. Arnold, of counsel,) for complainant.
Bliss & Schley, (W. S. Logan, of counsel,) for defendant.

LACOMBE, Circuit Judge. This is an action brought by Leonora A. Arnold, who claims to be a legitimate daughter of Blasius More Chesebrough, against the executors and trustees under the will of his mother, Margaret Chesebrough, deceased, such will directing that, upon the death of Blasius, (an event which happened in 1866,) one equal half part of her residuary estate should be paid to his lawful issue, if any. It is not disputed, upon the proofs, that the complainant's mother is Josephine, a daughter of Mrs. Rachel Cregier, nor that her father was Blasius M. Chesebrough. It appears that she was born (October 9, 1857) in the house of her grandmother, (Mrs. Cregier,) in this city, and that for several years prior thereto her father and mother lived together, as man and wife, in hotels, in boarding-houses, in apartments, and also at her grand-

¹Reported by Edward G. Benedict, Esq., of the New York bar

mother's. It is essential to the complainant's case, however, that the fact of a marriage between her father and mother should be shown by competent evidence, to the satisfaction of the court. The question to be determined is a question of fact, to be settled upon a consideration of all the competent and relevant evidence in the case. It is a fact which, at the close of the case, the complainant must show to be established by a fair preponderance of proof. As the evidence is being put in, the weight in either scale may vary, and such preponderance may shift from side to side, but the burden of proof which the complainant assumed when she filed her bill she must show herself able to sustain when the case is closed, or she has failed. There is no presumption of law in such a case. *Blackburn v. Crawford*, 3 Wall. 186. Such presumptions of fact, or rather such unproved inferences from proved circumstances, as human experience will warrant the trier of the facts in drawing, may constantly vary, may be of greater or of less force, controlling of the final decision, or of no effect thereon, just as there may be change in the number and character of those proved facts from which it is sought to draw the inferences; and the final conclusion must be drawn with a due regard to the entire body of competent and material proof. Marriage may be proved by circumstantial evidence, by proof of the acts and declarations of the parties, of their cohabitation as husband and wife, holding themselves out to the world as sustaining that honorable relation to each other. But neither such a course of life nor such declarations make a marriage, nor do they even directly or affirmatively establish it. They may, if satisfactorily proved and sufficiently strong, be legitimate ground for inferring that there has been a valid marriage,—a contract, that is, (with or without any ceremony,) whereby, at some time and place, the parties agree together, *per verba de presenti*, to be husband and wife, following that agreement by cohabitation as such. Whoever asserts a marriage as the basis of a claim at law or equity must satisfy the court, upon the whole case, by a fair preponderance of proof, not necessarily where and when such contract was made, but that at some time and place it was made. If it is sought to prove that fact by circumstantial evidence, the triers of the fact must first determine what circumstances are fairly proved, and then decide whether all those circumstances, taken together, constrain the mind to accept the inference that such contract was made.

Blasius M. Chesebrough, who claimed to have purchased a title of nobility in Austria, and liked to be known as "Count," is described, truthfully enough, by counsel, as a very eccentric man, bombastic, pompous, and extravagant; but this by no means completes his picture. He was under no restraint, self-imposed or otherwise; absolutely selfish; seeking pleasure in the constant gratification of his sensual appetites; reckless, roystering, dissipated; rarely completely sober; a frequenter of bawdy-houses; a bad son; a mere brute when inflamed with drink; and yet contemplating himself and his position in the community with a self-complacent conceit, which esteemed "Count" Chesebrough as something superior to mere common clay. In 1854, when he first encountered Josephine Cregier, (though some testimony would make the date 1853,) he was

about 35 years of age and she was 16. They met at Sirocco's dancing-rooms in Bond street, (Blasius having apartments in the same building,) and that same night she shared his bed. Shortly thereafter she left her mother's home, and lived with him in Bond street and elsewhere, and the testimony is uncontradicted that for weeks certainly, probably for months, they maintained a meretricious connection. It is contended by the complainant that subsequently, in 1854, they were married in the city of Baltimore, whither they made a trip for that express purpose; and Josephine herself, testifying for the complainant, gave direct evidence to that effect. Subsequently, when called by the defendants, she retracted her former statement, and testified that she was never married to Blasius M. Chesebrough in Baltimore or elsewhere. If her later testimony were to be accepted, there need be no further inquiry. Certainly, in view of her admitted perjury, the complainant cannot insist that her testimony affords direct proof of a marriage. If her evidence both ways on that point be disregarded, such proof can only be found, if at all, as a necessary and natural inference from all such circumstances as are established by the testimony of credible witnesses.

To discuss at length this testimony, extremely voluminous, and a large part of it taken under exception, is wholly unnecessary. The point to be decided is purely a question of fact. The conclusion reached, after consideration of a multitude of circumstances, peculiar to the case, would be of no value as a precedent in other cases, where the circumstances were not identical. It will be enough, therefore, to indicate, with great brevity, some of the reasons which lead to the conclusion that Blasius M. Chesebrough and Josephine Cregier were not husband and wife. The intercourse was originally meretricious, and there was no reason why Blasius should change it. Marriage was not needed as the price to be paid for the gratification of some passion. The girl had already yielded, apparently without much objection, to his solicitation, and was living with him as his mistress. That marriage was a reparation, which he ought to make her for having gratified his passion at the sacrifice of her virtue, was an idea which there is certainly no reason to suppose would ever have entered the head of Blasius Chesebrough, nor been entertained there long had it been suggested by another. Until the time when they separated, in 1858, they lived together as husband and wife, to the extent at least of sharing the same rooms, and indicating to hotel-keepers, dressmakers, servants, and others, with whom they necessarily had occasion to come in contact, that their relationship was a proper one. Standing alone, such testimony would be very strong evidence in support of an asserted marriage; but it is also the way in which man and mistress frequently live, in which it may be said they must live if they frequent respectable hotels; and, when it appears that their living thus together began illicitly, something more than mere continuance, coupled with such declarations as would make that continuance pleasant for them, is needed to support an inference that they were married. There seems to be nothing to distinguish the cohabitation which immediately succeeded the first meeting at Sirocco's from the co-

habitation which followed the month of October, 1854, when it is claimed they were married in Baltimore. There is nothing to exclude the natural inference that the former relation continued, nor to satisfactorily prove that it had been changed into that of an actual marriage by mutual consent.

The declarations of Blasius, made subsequently to their separation, may be disregarded. As to the statements that they were married, made, during such intercourse, to hotel-keepers, and to other persons, at a time when a respect for appearances called for such statements as essential to comfortable living in decent quarters, and to the contrary statements made to boon-companions or loose women, whose questions he might resent as referring to what was none of their business, it may be said that they are entitled to little weight; probably a lie one way or the other was of little matter to Blasius. Of general public recognition by acquaintances beyond those casually encountered in the vicinity of his residence, of introduction to his family, of declarations to his relations, or at least to those with whom he was on good terms, which would naturally be expected from a husband, there is no satisfactory proof. Practically the only evidence as to such declarations is that of Christian Storms.

Inasmuch as they lived together for several years, it is quite natural that the question what relation they bore to each other suggested itself to other members of his family. In such cases evidence of repute in the family is admissible. Without discussing at length the evidence of the various members of the Storms family, (other than Christian) whose source of information seems to have been their father (a gentleman who in his life-time put himself on record, under oath, as believing Blasius to be unmarried,) it is sufficient to say that the repute in the Cheesebrough family was divided, and the same may be said of repute among his associates and friends. But a divided reputation is not sufficient to warrant the inference of marriage. *Clayton v. Wardell*, 4 N. Y. 230; *Brinkley v. Brinkley*, 50 N. Y. 184.

As to reputation in the Cregier family, it is to be noted that the evidence of the cousins Mrs. Irving and Mrs. Franklin, and of the sister-in-law Mrs. George W. Cregier, is principally, if not wholly, based upon what they heard from Mrs. Rachel Cregier. The same ought, perhaps, to be said of the evidence of Josephine's sister, Almira, (Mrs. Sisson,) who was but 9 years old when the intercourse began, and 12 years old when it terminated.

Rachel Cregier is deceased, but it appears that in 1859 she brought a suit in the superior court for the seduction of Josephine against Blasius, alleging that the connection between them continued between April 1, 1853, and November 16, 1857, and that complainant was born October 9, 1857, as the result of such unlawful connection; and, further, that about October 1, 1855, he enticed Josephine away from her mother's house, and kept her away two months. The case was tried on inquest, before Judge WOODRUFF and a jury. Mrs. Cregier and the sister Almira were examined as witnesses, and there was a verdict for the plaintiff

therein of \$2,500, which was subsequently paid. In view of this piece of record evidence, it is difficult to see how it can be contended that there was a reputation of marriage in the Cregier family. Certainly no declarations of Rachel to that effect, nor any testimony as to the belief of others, whose information was derived from her, are entitled to much weight. She might have sought to save her daughter's reputation among other members of the family by saying she was married, but it must be assumed that she stated what she believed to be the truth when she brought the suit and testified on the trial. The complainant objected to the admission of the record and judgment roll in this seduction suit. It is well settled that, in cases of pedigree, family conduct is admissible evidence from which the opinion and belief of the family may be inferred. The judgment roll may fairly be considered competent evidence of family conduct; but if it be not, and if all evidence of the declarations of Rachel Cregier were excluded from the case as hearsay, then there would be left practically no evidence of repute in the Cregier family, except that given by Almira Sisson, which, as she was of such tender age at the time, is certainly of but little weight. Finally, though Blasius was liberally supplied with money, and after his mother's death in 1860 was a man of abundant means, Josephine never made any claim upon him during the 8 years of his life subsequent to the separation, nor for 14 years after his death did she assert any claim to the large estate which he left. Considered together, the testimony is not sufficiently strong to constrain the mind to accept it as a natural inference that the arrogant, selfish, dissolute man of 35 ever married the young girl of 16, whose feeble virtue yielded so promptly to his solicitations, who began life with him as his mistress, and who left him without any effort to obtain from him, or his estate, the support which the law secured to her if she were his wedded wife.

HERSHBERGER *et al.* v. BLEWETT *et ux.*

(Circuit Court, D. Washington, N. D. June 27, 1891.)

I. QUIETING TITLE—PLEADING—COMMUNITY PROPERTY.

Plaintiff's bill alleged that a patent of certain land was in 1872 issued to the heirs at law of one S., the heirs being his mother and several brothers and sisters, and the children of deceased brothers and sisters; that plaintiff was married in 1870 to R., a son of a deceased sister; that R. died intestate, without issue, in 1871; that in 1870, after said marriage, the mother of S. conveyed her interest in the land to R.; that by virtue of the deed, and the statutes of Washington relating to the rights of married people, the share of R. and of the mother of S., deeded to him, became the common property of R. and plaintiff, and on R.'s death plaintiff became the owner in fee-simple of an undivided one-half; that defendants claimed the whole of the land under a conveyance made pursuant to a sale under a decree of the court, to which plaintiff was not a party. The bill sought to establish plaintiff's title to the shares claimed by her. *Held*, that the bill was demurrable in not stating when and where S. died, or any facts by which the court could ascertain under what act of congress the patent was issued to his heirs, and what laws as to the property rights of married people were in force, or the residence of R. and his wife, (plaintiff,) or the date of the suit under which the sale and conveyance was made to defendants, or of any reasons for plaintiff's delay in suing.

2. HUSBAND AND WIFE—COMMUNITY PROPERTY.

Under Laws Wash. 1869, p. 319, declaring that all property acquired by a husband after marriage, by gift, devise, or descent, shall be his separate property, and that all property acquired after marriage by either husband or wife, except such as may be acquired by gift, bequest, devise, or descent, shall be common property, makes property acquired by a husband by descent his separate property, and not the community property of himself and wife.

3. SAME—NON-RESIDENTS.

Laws Wash. 1869, p. 319, § 11, providing that in every marriage thereafter contracted in the territory the rights of husband and wife should be governed by this act, unless there was a marriage contract containing stipulations contrary thereto, and section 12, providing that the rights of husband and wife, married out of the territory prior to the passage of the act, but who should reside and acquire property therein, should also be determined by the provisions of the act, *held*, that the act did not confer any rights on a wife where she and her husband resided without the territory.

In Equity.

Fogg & Murray, for plaintiffs

T. R. Shepard, for defendants.

HANFORD, J. The material averments of the complainants' bill necessary to be considered in deciding the questions raised by the defendants' demurrer are as follows: On the 15th day of December, 1872, the United States by a patent conveyed a certain tract of land in this state to the heirs at law of one William A. Strickler, deceased; the said Strickler's heirs being his mother, several brothers and sisters, and the children of deceased brothers and sisters. One William L. Rider, son of Rebecca Rider, a deceased sister of said Strickler, was, on the 6th day of December, 1870, married to the plaintiff, who is now Sarah Hershberger, and said marriage relation continued until October 26, 1871, when said William L. Rider died, intestate, and without issue. In the month of December, 1870, after said marriage, the mother of said Strickler, for a valuable consideration, executed and delivered to said William L. Rider a deed of her undivided interest in said land. Said deed was recorded in the deed records of the county in which the land is situated in the month of June, 1890. Sarah Hershberger is now the wife of her co-plaintiff, John B. Hershberger, and resides with him in the state of Ohio. In the bill plaintiffs assert that the mother's share of said land was an undivided one-seventh thereof, and that said interest, by virtue of the deed above mentioned and the statutes of the territory of Washington relating to the rights of married people, became the common property of said William L. Rider and his wife, now Sarah Hershberger; also, that, as one of the heirs of said Strickler, said William L. Rider took an undivided thirty-sixth part of said land, which share also became the common property of said Rider and his then wife, under the statutes of the territory, and that upon the death of said Rider, his widow, now Sarah Hershberger, became the owner in fee-simple of an undivided one-half of all such common property,—that is to say, an undivided one-half of both of said shares; and she claims now to be the owner of the undivided one-half of said shares, and brings this suit to establish her title thereto against the defendants, and for an injunction to prevent the sale or disposition of said land, and for an accounting as to

the proceeds as to any and all portions thereof which may have been sold or disposed of by the defendants before the suit was commenced. The defendants are husband and wife, and claim title to the whole of said land, deraigned through and under a conveyance thereof made pursuant to a sale under a decree by the district court of the third judicial district of the territory of Washington, in a suit wherein several of the heirs of said Strickler, but not the plaintiffs, were made parties.

The bill fails to state many of the facts which should appear in order to make good the claim of title asserted by plaintiffs. It fails to state the date and place of Strickler's death. It fails to state any facts by which it can be ascertained under what act of congress the patent referred to was issued, or whether Strickler or his heirs could have acquired any interest in the land at any time prior to the date of the patent. It does not state whether the plaintiff Sarah Hersherberger, and her former husband, William L. Rider, or either of them, lived in the territory of Washington, nor where they did live, during all or any part of the time between their marriage and the death of said Rider, nor the place where Rider died. It does not show the date of any of the proceedings in the suit mentioned, or of the sale made under the decree in said suit; and it does not allege the existence of any reasons or excuses for the delay on the part of plaintiffs in commencing this suit, nor that the plaintiffs had asserted any claim to the property at any time prior thereto. The bill in my opinion is defective, and the demurrer should be sustained for lack of allegations as to these important matters. Presumably only the heirs of Strickler living at the date of the patent were entitled to share as beneficiaries by that grant, and they would take by purchase, as grantees of the government, and not by inheritance, as the heirs of Strickler. Therefore it is necessary for the plaintiffs, in order to sustain their claims to the contrary, to show under what law and under what state of facts the patent was issued, and when Strickler or his heirs acquired ownership of the land. Otherwise, as William L. Rider died prior to the issuance of the patent, the court will be unable to discover that either he or his wife ever became in any way interested in the land, or that the mother of said Strickler ever acquired any interest in said land which she could have conveyed to any one in her life-time, as she also died before the date of the patent. Unless the heirs of Strickler took the land by inheritance, and not as grantees of the government, the court cannot determine who are the lawful heirs of Strickler, or what share or interest either would take without being informed as to the place of Strickler's death, and the laws in force in the country where he died, at the time of his death, and all the facts as to his family and relatives. Since the year 1869 several changes have occurred in the laws of the territory of Washington in relation to the property rights of married people, and it is necessary, therefore, in a suit such as this, to show the time of the inception of any claim to real estate depending upon the community property laws of the territory.

For the purpose of obtaining the opinion of the court as a guide to the parties in the future conduct of the case, and especially in preparing an

amended bill, if the plaintiffs shall elect to amend, counsel have argued the questions which may fairly arise in the case, assuming a state of facts not disclosed by the bill; and I am urged at this time to render an opinion upon these questions. The facts thus assumed are that Strickler became entitled to the land as a settler under the act of congress of September 27, 1850, (9 St. U. S. 496,) known as the "Oregon Donation Law," and the several acts amendatory thereof; that he died prior to the date of the deed alleged to have been given, in 1870, by his mother to William L. Rider; and that said William L. Rider and his wife, now the plaintiff Sarah Hershberger, during all the time of their marriage lived in the state of Ohio.

In view of all the facts thus assumed, together with what appears in the allegations of the bill, it is my opinion that the complainants cannot prevail in this suit, and that they have no interest whatever in the land referred to. Prior to December 2, 1869, the rights of all married people to real property situated in the territory of Washington, whether residents of the territory or elsewhere, were governed by the rules of the common law. On the date last mentioned the first statute enacted by the territory, changing the law as to the property rights of married people, was approved and went into effect. In November, 1871, which was after the death of Rider, another act relating to this subject was passed, supplanting the act of 1869. In 1873 the act of 1871 was repealed, and at the same session of the legislature the act of 1869 was reenacted. It is therefore by virtue of this statute, passed in 1869, that the plaintiffs claim that Mrs. Hershberger, during the time she was the wife of Rider, acquired an interest in the land. In making this claim it is assumed that Strickler in his life-time owned the land, and that upon his death it descended to his heirs, and that the issuing of the patent subsequently was a mere formality, in confirmation of the title which before existed. I do not wish to be understood as expressing any opinion as to whether this assumption is or is not warranted.

The claim to an undivided one-half of an undivided thirty-sixth of the land alleged to have been inherited by William L. Rider can be disposed of in a few words. The statute relied upon by plaintiffs gives no support to this part of their contention. If Mr. Rider acquired any property in this state by descent, either before or after his marriage, it would not be community property. The first section of the act of 1869 in express terms declares that all property acquired by a husband after marriage, by gift, devise, or *descent*, and all property owned by him before marriage, shall be his separate property. Laws Wash. 1869, p. 318. This provision is entirely free from ambiguity and it is not an innovation upon the common law. It leaves a husband's estate and title in and to property so acquired or owned as it would be in the absence of any legislation on the subject. The second section of the act provides that "all property acquired after the marriage, by either husband or wife, except such as may be acquired by gift, bequest, devise, or descent, shall be common property;" and, as the deed from Strickler's mother to Rider was made after the marriage, we may assume that if it became operative

to convey any interest in the land in question, such interest would be the common property of Rider and his then wife, if their rights were at all affected by this statute. As to this part of plaintiffs' claim, therefore, the question is raised whether said statute governs the rights of non-resident married people as to real property situated in the territory of Washington. I think that an easy and satisfactory answer to the question is found in the statute itself. Section 11 provides that, "in every marriage hereafter contracted in this territory, the rights of husband and wife shall be governed by this act, unless there is a marriage contract containing stipulations contrary thereto." And section 12 of the act reads as follows:

"The rights of husband and wife, married in this territory prior to the passage of this act, or married out of this territory, but who shall reside and acquire property herein, shall also be determined by the provisions of this act, with respect to such property as shall be hereafter acquired, unless so far as such provision may be in conflict with the stipulation of any marriage contract."

These two sections of the statute plainly indicate the intention of the legislature to limit the application of all the provisions of the act, and to furnish a rule for its interpretation which should amount to a disclaimer of any intention to change the property rights of people not inhabitants of the territory, and whose marriage contracts were not made in subjection to the laws of the territory. Section 2 of the act is an innovation upon the common law, and for that reason, by a familiar rule of interpretation, it is not to be given a more extended application than is necessary to give effect to all its provisions, and all parts of the act are to be considered together, so that sections 11 and 12 must be regarded as modifying and limiting section 2. This statute, from the time of its enactment until now, has always been understood by the legal profession and the people of the territory as being limited in its application, so that the rights of non-residents were not affected by it. The district and probate courts of the territory have acted in many instances according to such understanding of the law, and their adjudications have been acquiesced in, so that no case has ever been taken to the supreme court; hence, no decision covering the point has found a place in any published volume of reports. The fact that no precedent can be cited is a circumstance which shows that heretofore there has been no question as to the true interpretation of the act, or difficulty in understanding what is meant by sections 11 and 12 thereof. Another circumstance confirmatory of this is to be found in the fact that in 1879 the legislature again revised the law, and, in doing so, omitted entirely the provisions of sections 11 and 12. The important change made by the omission of these two sections must be regarded as significant, and it has been understood as making the community property law general, and applicable to all real estate within the territory, the title to which has passed by conveyances to married persons since the date of its enactment.

It has been argued with much earnestness and ability by counsel in support of the demurrer that the plaintiffs are not entitled to maintain

this suit in equity, for the reason that, having delayed for so many years to assert their claim, an action at law founded upon it would be barred by the statute of limitations, and in equity it should be regarded as stale, and therefore barred. Without more information as to the facts than I have yet obtained, I cannot coincide with defendants' counsel in this view. I do not consider that the plaintiffs should be precluded from maintaining this suit by reason of delay during the time the property was unoccupied, and before they had knowledge that other parties claimed exclusive ownership adversely to them. There has not been sufficient time since there has been visible adverse possession or an asserted ownership of the property adversely to the plaintiffs for any just claim which the plaintiffs may have to become stale, and it is my opinion that the suit is not barred by the statute of limitations of this state in force at the time the suit was commenced, nor by the principles of equity. An order will be entered sustaining the demurrer, and the plaintiffs may have leave to file an amended bill, if they elect to do so.

DOYLE v. SAN DIEGO LAND & TOWN CO.

(Circuit Court, S. D. California. July 6, 1891.)

1. WATER-RIGHTS—DIVERSION OF WATER.

A deed by the owners of a stream to a corporation organized for the purpose of diverting water from the stream for the purposes of irrigation, the furnishing water for mining and manufacturing purposes, and for supplying water to cities, conveying the right to the grantee, its successors and assigns, "to divert and appropriate all the waters flowing in" said stream, is a grant of the right to divert the water thereafter flowing in the stream, as against a subsequent purchaser from the grantor of land bordering on the stream.

2. CONVEYANCE BY DE FACTO CORPORATION.

A conveyance to or by a *de facto* corporation cannot be avoided on the ground of any defect in its organization.

In Equity.

Deakin & Story, for complainant.

J. Wade McDonald and Luce, McDonald & Torrance, for defendant.

Ross, J. This suit is brought to enjoin the defendant from the erection of a dam on the Sweetwater river in San Diego county, and from thereby diverting the waters of that river from their natural channel; complainant being, as alleged, a lower riparian proprietor, having acquired his tract of land, called the "Old Copeland Place," from one George D. Copeland, and he having acquired it by purchase from Frank A. Kimball, Warren C. Kimball, and Levi W. Kimball, on the 1st day of April, 1873. The answer to the bill, as amended, among other things, alleges that—

"On the 9th day of June, 1869, Frank A. Kimball and Warren C. Kimball were, and for a long time prior thereto had been, the owners in fee of all and singular the bed of said Sweetwater river, and of all the land on each side

thereof, riparian and contiguous thereto, from the point on said Sweetwater river where is now located the dam and reservoir of this defendant, downward, along and upon said Sweetwater river, to the place where said river empties into the bay of San Diego."

The answer also alleges that on the said 9th day of June, 1869, the Kimball Brothers Water Company was a corporation duly organized and existing under and pursuant to the laws of the state of California for the purpose "of diverting by means of dams, flumes, canals, and aqueducts the waters of the Sweetwater river and its tributaries, and other streams in the county of San Diego, from their natural channel, at some suitable point or points, for the purposes of irrigation, the furnishing water for mining and manufacturing purposes, and for supplying the towns of National City, San Diego, and other towns and places in said county, and the inhabitants thereof, with pure, fresh water;" that "on the said 9th day of June, 1869, in furtherance of its aforesaid purposes and intentions, and as appurtenant to its said proposed system of water-works, said corporation, the Kimball Brothers Water Company, purchased from the said Frank A. Kimball and Warren C. Kimball, and the said Frank A. Kimball and Warren C. Kimball duly granted and conveyed unto said corporation, its successors and assigns, forever, the right to divert and appropriate all the waters flowing in said Sweetwater river at any point or points thereon, and to conduct the same over, along, and across any of the lands then owned by said Frank A. Kimball and Warren C. Kimball, together with the right to ingress, egress, and regress in, over, and upon all such of the aforesaid lands of said Frank A. Kimball and Warren C. Kimball, and to dig and take all such stone and earth from the aforesaid lands of said Frank A. Kimball and Warren C. Kimball as might or should be necessary or convenient to said corporation in and about the diversion of the waters of said river and the construction and maintenance of its said contemplated system of water-works," which said deed, it is alleged, was duly recorded in the office of the recorder of the county where the property is situate on the day of its execution. The answer further sets up that the rights thus conveyed to the Kimball Brothers Water Company subsequently passed, by various mesne conveyances, duly executed and recorded, to the defendant company, under and by virtue of which defendant erected the dam, and made the diversion of water complained of. The disposition of the exceptions filed by the complainant to the answer, now to be made, depends upon the construction to be given to the deed of June 9, 1869, from Frank A. and Warren C. Kimball to the Kimball Brothers Water Company, and upon the effect to be given to the fact appearing in the answer that the articles of incorporation of that company were signed and acknowledged by Frank A. Kimball, Warren C. Kimball, and Levi W. Kimball, by W. C. Kimball, his attorney in fact. The state statute in force at the time the articles were filed provided that such articles should be signed and acknowledged by at least three persons, and the point is made that the signing and acknowledgment of such articles by an attorney in fact of another is of no validity. Whether or not this is so I think unnecessary to de-

cide in this case, for the reason that the answer shows that the Kimball Brothers Water Company was a *de facto* corporation, and the rule is that a conveyance to or by a corporation existing *de facto* cannot be avoided upon the ground of any defect in its organization. Such transfer will be held valid and binding as against all parties but the state. *People v. La Rue*, 67 Cal. 526, 8 Pac. Rep. 84; *Mor. Priv. Corp.* § 753, and authorities there cited. The Kimball Brothers Water Company was formed, as has been said, for the purpose, among other purposes, of supplying the town of National City and the city of San Diego, and the inhabitants thereof, with pure, fresh water. It is provided by the statute under which the company was formed that any company incorporated for such a purpose "shall have the right to purchase or appropriate, and take possession of, and use and hold, all such lands and waters as may be required for the purposes of the company upon making compensation therefor." *Hitt. Laws*, § 963. By section 1001 of the Civil Code of California it is provided that "any person may, without further legislative action, acquire private property for any use specified in section 1238 of the Code of Civil Procedure, [among which uses is the supplying of towns and cities with pure, fresh water, and the supplying of water for agricultural, mining, and manufacturing purposes,] either by consent of the owner, or by proceedings had" for the condemnation of property. The supreme court of the state in the case of *Water Co. v. Forbes*, 62 Cal. 182, held that by virtue of these and other provisions of the state statute the waters of running streams may be condemned for the purpose of supplying the inhabitants of a town with water. It has also been many times decided by the supreme court of California, as well as by the supreme court of the United States, that the waters of non-navigable running streams in California may be acquired by appropriation for any or all of the purposes already mentioned. *Irwin v. Phillips*, 5 Cal. 140; *Ortman v. Dixon*, 13 Cal. 38; *McDonald v. Water & Min. Co.*, Id. 232; *McKinney v. Smith*, 21 Cal. 381; *Canal Co. v. Kidd*, 37 Cal. 314; *Atchison v. Peterson*, 20 Wall. 511; *Basey v. Gallagher*, Id. 682. If such waters can be acquired by appropriation and by condemnation proceedings, *a fortiori*, they may be acquired by express grant of the owner of the land over which they run. *Cross v. Kitts*, 69 Cal. 222, 10 Pac. Rep. 409.

The answer, to which exceptions are taken, alleges as has been seen, that at the time of the execution of the deed of June 9, 1869, the grantors, Frank A. and Warren C. Kimball, were the owners in fee of the bed of the Sweetwater river, and of all the land on each side thereof, from the point thereon where the dam and reservoir of the defendant is located to the place where the river empties into the bay of San Diego, including the land subsequently conveyed by the Kimballs to Copeland, and now owned by the complainant. Being the owners in fee of the land as well as the water, it was competent for them to grant all or any portion of either. "A grantor of land through which a stream of water flows may reserve the water privilege, or he may convey the use of the water in whole or in part, leaving the fee of the land vested in the grantor." *Gould, Waters*, § 299. "A grant of a water-course in law," says

JESSEL, M. R., 'especially where coupled with other words, may mean any one of three things. It may mean the easement or the right to the running of water, it may mean the channel-pipe or drain which contains the water, and it may mean the land over which the water flows. What it does mean must be shown by the context; and if there is no context I apprehend that it would not mean anything but the easement,—a right to the flow of the water. A grant of a 'pool' or 'gulf' or of a 'pond' passes the land which is covered with water. So a grant of a 'well' or 'spring' or 'wharf' is effectual to pass the soil as well as the water." *Id.* § 304a. By the deed of June 9, 1869, the owners in fee of all the land and water here in question granted to the Kimball Brothers Water Company, its successors and assigns, "all the water flowing in the stream called 'Sweetwater River,' * * * in said county of San Diego, with the right to divert the same from its natural channel at any point or points, and to conduct the same over, along, and across any of the lands of the parties of the first part [the grantors] in said county, by means of flumes, canals, and aqueducts, together with free ingress, egress, and regress to and for the said party of the second part, [the Kimball Brothers Water Company,] its successors and assigns, and its and their servants and workmen, with horses, carts, and carriages, at all convenient times and seasons, in, along, and upon said flumes, canals, and aqueducts, for the amending, cleaning, and repairing of the same, with liberty and privilege for the purpose to dig and to take stone and earth from the adjacent lands of the party of the first part, when and as often as need or occasion requires. To have and to hold, all and singular, the premises and privileges hereby mentioned and granted, or intended so to be, with the appurtenances, unto the said party of the second part, its successors and assigns." I do not think there is any room for mistake in respect to the true meaning of this language. It is impossible to limit its scope to the water flowing in the river at the instant of the execution of the deed. Such a construction would be absurd. It is true, as said by complainant's counsel, that the deed does not use the words all waters "hereafter to flow" in the Sweetwater river; but the language employed cannot reasonably be construed any other way than as embracing the waters then flowing and thereafter to flow in that river. The grantee, its successors and assigns, were granted the right to divert the waters granted from their natural channel at any point or points. Such diversion necessarily must occur subsequent to the grant, which must therefore necessarily include the waters thereafter flowing in the stream. The purpose had in view by all of the parties, as well as the language used, clearly shows that the grant was continuous and perpetual in its nature, and included not only the water at the time flowing, but thereafter to flow, in the stream in question, and inured not only to the benefit of the grantee, but in express terms to its successors and assigns as well. No legal reason exists why it could not. The water in question was a part and parcel of the land over which it flowed, and when its owners granted the water they necessarily granted an interest in the land, which interest was assignable, descendible, and devisable. The grant

to Copeland, under which complainant holds, being subsequent to that under which defendant claims, is of course subject to it. From the view taken of the principal exceptions the others become unimportant. Exceptions overruled.

McKINNON v. McKINNON *et al.*

(Circuit Court, W. D. Missouri, St. Joseph Division. July 20, 1891.)

1. WILLS—TESTAMENTARY CONTRACT—VALIDITY.

An uncle and nephew entered into partnership in the practice of medicine. The written articles of copartnership provided that, should the uncle die, "all his property, personal and otherwise, which he held in partnership at the time of his death should go to" the nephew. The articles were not executed in the manner required for wills. *Held*, that land which had been bought by the uncle in his own name did not on his death pass to the nephew, since the instrument was clearly testamentary.

2. SAME—STATUTE OF FRAUDS.

Before the execution of the written articles of copartnership the parties had made an oral agreement of a similar character. *Held*, that under the statute of frauds the agreement was ineffective to pass title to the uncle's land.

3. EQUITY PRACTICE—PLEADING AND PROOF.

Upon a bill brought by the nephew after the uncle's death for a specific performance of a contract, the nephew was allowed by the defendants to testify in his own behalf. The evidence tended to show that part of the land had been paid for with partnership funds. *Held*, that court should not retain the case for an accounting and the enforcement of a resulting trust, since the nephew's testimony had been admitted on the theory that the only issue was as to his right to a specific performance.

In Equity.

This is a bill for specific performance. The bill in substance recites that on the 1st day of January, 1882, one Malcolm McKinnon, (who was the uncle of complainant, John A. McKinnon, and then engaged in the practice of medicine at Maysville, Mo.,) formed a copartnership with the complainant at said place in the practice of medicine; that at said time Malcolm owned in fee a certain parcel of land as residence property, of the value of \$1,000; that it was agreed at the time of the formation of the partnership that this real estate should be the property of the partnership, and that the profits arising from the business and practice of the firm should be from time to time invested in real estate, to be used for the purposes of the partnership; that in 1882 they purchased a farm known as the "Watts Farm," which was paid for out of the earnings of the partnership business, although the deed of conveyance thereto was taken in the name of the uncle. It is further alleged that, both parties being unmarried, it was agreed between them, "for certain valuable considerations in said agreement expressed, that, should the said Malcolm die during the continuance of said partnership without leaving a family of his own, then all the property of the partnership, of every kind, should go to and become the property of the complainant." That on January 1, 1884, the parties concluded to put their agreement in writing, which was accordingly done. The important parts of this agreement are as

follows: *First.* It recites that this agreement is made on "this the 1st day of January, 1884." They agree "to enter into partnership, for the purpose of practicing the arts of medicine and surgery, in the town of Maysville and vicinity, from the 1st day of January, 1884, until the 1st day of January, 1890, inclusive." *Second.* They were to share equally the profits, as also the expenses and losses. At the end of the partnership, at the request of either, they were to take account of stock and all profits in money, or any other property of which they were in possession, "and, after deducting therefrom all expenses of the firm, and allowing for the differences in stock furnished at the commencement of the partnership, equally divide all profits, which we will consider due to ourselves, our heirs, or executors." *Third.* The junior member, at the end of the partnership, agreed to relinquish the right to practice at Maysville without the consent of the senior member. *Fourth.* "And it is further agreed upon that, should the senior member die, or become incapable of practicing his profession, the right to continue the business should devolve upon the junior member; and, in the event of the death of the senior member, all his property, personal and otherwise, which he held in partnership at the time of his death, should go to the junior partner, provided the senior member leaves no family of his own to which it might recur." *Fifth.* Makes provision concerning the matter of administering the property in case of the death of the junior member. This partnership continued until the death of the uncle, which occurred on the 14th day of May, 1886. He was 44 years old at the time of his decease. On March 23, 1885, another piece of real estate was acquired, as is alleged, with the partnership funds, known as the "Meyers Lots." The deed to this property was also taken in the name of the uncle. The uncle died unmarried, leaving the respondents, and others, not parties to this action, his heirs at law. The respondents having brought action of ejectment against the complainant for the recovery of their interest in the property, — the real estate, — the complainant filed this bill in equity in the nature of a cross-bill to enjoin the prosecution of the action at law, claiming that by the terms of the agreements aforesaid he was the absolute owner in equity of the entire property, and praying for the specific performance of the contracts, and the divestiture of the legal title of the heirs of Malcolm McKinnon in and to the said real estate, and the vesting of the same in him, etc. The evidence showed that the uncle had long been established in the practice of his profession at Maysville, Mo., prior to 1881. At that time the complainant was a young man, just graduated in medicine, and had been practicing in the state of Massachusetts about one year. He had no property, save his medical instruments, and perhaps a few books. At that time the uncle wrote him respecting his practice in Missouri, which was promising, suggesting to the nephew the advisability of his coming to Missouri and engaging with him. He concluded to do so, and arrived at the uncle's home in the fall of 1881. At that time the uncle had in bank about \$1,200 in money, a large amount of outstanding accounts, and an equipment of horses, buggies, and other vehicles, in addition to the residence property above

named. Their card for the practice of medicine appeared in the newspaper about the 1st of January, 1882. What the terms of their co-operation were we are left alone to ascertain from the statement of the nephew made on this trial. His claim is that all the uncle had of real estate, money, and other property went into the partnership business as a common fund, and that all the property acquired after that time took the same direction and character, with the agreement that on the death of the uncle during the continuance of the partnership the entire property should go to the nephew by survivorship. The personal estate amounted to about \$3,500, which was administered upon and appropriated by the complainant. Other evidence will appear from the opinion.

Steven S. Brown, for complainant.

Lancaster, Hall & Pike, for respondents.

PHILIPS, J., (*after stating the facts as above.*) This is what may not inaptly be termed a many-sided case. There are, however, a few controlling principles of law which so far determine the case as to render, in my opinion, an extended review of the evidence unnecessary. There are involved three pieces of real estate. One is known as the "Residence Property," acquired and owned by the uncle, Dr. McKinnon, Sr., long prior to the complainant's coming to Missouri; the farm known as the "Watts Farm," acquired in 1882, after the formation of the partnership by parol; and the Meyers lots, acquired on the 23d day of March, 1885, after the formation of the partnership, under written articles of agreement of January, 1884. As to the lot known as the "Residence Property," it may as well be said here as elsewhere that there is no foundation for the suggestion that the claim made to that by complainant can be supported upon the consideration that the complainant left his home in the east and moved to Missouri on the faith of the assurance that he was to have this property. The bill itself makes no such claim. The only negotiation between the parties was by letters, as claimed by complainant; and, accepting his own version of their contents, (the letters not being produced,) there was no reference made to this real estate. The only thing named was the extent and character of the professional practice of the uncle. It was on the faith of that alone he came to Missouri. He made up his mind to come solely on account of the proffered interest in the practice of medicine. He did not, so far as his testimony discloses, even know of the existence of this property until after his arrival here. The bill is framed for and on the theory of a specific performance. He must, therefore, show a parol contract, clear, explicit, and indubitable in its terms, based upon a valuable consideration, fully performed or paid by him. Without objection to his competency, the complainant was introduced as a witness in his own behalf. Justice to the dead demands not only that the complainant be held rigidly to his own version of the terms of the verbal agreement, but, as he is attempting to affect the title to real estate by the uncertainty of parol proof and his rehearsal in his own behalf of the words and conduct of a dead man,

every reasonable intendment of fact, in the forum of conscience, should be indulged against him. The very utmost that can be predicated of his testimony respecting the home property is that it was understood it was to go into the partnership arrangement. On what basis of valuation, as between partners, it was to be estimated, is not apparent, from the vague and general terms testified to by the complainant. As already suggested, the bill is framed on the theory of specific performance, as if the complainant were entitled in equity to the entire property, whereas the complainant's testimony only tends to show that this property constituted a partnership asset. On the theory of partnership, no matter in whose name the legal title stood, in equity the realty would be treated as a partnership fund, "disposable and distributable accordingly." And in case of the death of one of the partners there is no right of survivorship; but, after payment of debts, his share would go, according to a strong line of authorities, to his legal representative, or, according to the better rule, to his heirs at law. The right of the heirs and distributees would be postponed to that of the partnership creditors, and where there are no partnership debts such property would be held in equity for the adjustment of balances on an accounting between the partners. The residuum would go to the administrator or the heirs at law. 1 Story, Partn. §§ 92, 93; 1 Woerner, Adm'n § 126; *Buchan v. Summer*, 2 Barb. Ch. 167. The administration of the partnership estate having been concluded, the surviving partner is not entitled to hold this property even in trust. To maintain this bill, therefore, the complainant is necessarily driven to the contention that the partnership agreement provided for an absolute survivorship in him as to this property. When he first undertook in his deposition to detail the verbal agreement he went no further than to state, in substance, that the uncle proposed to put into the partnership whatever he owned of personalty and realty, without any limitation as to either the term of the partnership or final disposition of the joint estate. His learned counsel, recognizing the legal predicament in which this would leave his cause under the bill, plied the complainant with an exhausting pump. After several questions as to what transpired between the parties in their personal interviews after the complainant reached Missouri, his counsel asked: "What did he tell you he would do?" The complainant answered, seemingly, in full, stating the terms of the contract, without intimation that the uncle said he would make him his heir. Thereupon this question was put: "Was anything said about the final disposition of this property in any contingency?" To this the answer came: "He said, in one of our first conversations we had in talking about home affairs, and one thing and another, that if I would stay with him there, we would work together,—we would accumulate together; 'I will consider you in the light of my heir, and what we make will be considered as yours. I want it to go that way.'" Aside from the fact that it thus appears that the witness himself did not at first deem this suggestion as to the final disposition of the property a part of or one of the terms of the contract of copartnership, it is quite inferable from the cross-examination that this conversation in point of time

was after the partnership was consented to by the complainant. This conclusion is justified by the following questions and answers:

"*Question.* You regarded then, did you not, your uncle's offer to make you his heir as a free offering on his part? *Answer.* No, not altogether. It was free in the sense of his giving it, but was not free in the sense of not receiving an equivalent. *Q.* Explain what you mean by that. *A.* In this way: Of course it was his to withhold, but, while that was the case, it was to his interest both financially, and, I suppose, socially, that I remain, because he was unable to do the real hard work of the practice. *Q.* You were perfectly willing, however, to remain at the time he made the offer, were you not? *A.* Yes, sir."

It cannot, therefore, be fairly maintained that this was a promise based upon the consideration of the formation of the partnership. On the contrary, the context, as well as the time and the occasion of the utterances, enforce the conclusion that it was of the nature of a gratuitous promise, as distinguished from a promise based upon a valuable consideration. "The question in such a case is always: Were the representations made by the decedent terms in a contract, or were they merely voluntary, revocable promises, which were not carried out? Did the complainant drive a bargain with him, or did he trust to his generosity, relying upon his word?" 5 Amer. & Eng. Enc. Law, 313. The context shows that this conversation came about casually. They were "talking about home affairs, and one thing and another. I will consider you in the light of my heir, and what we make will be considered as yours. I want it to go that way." This is no more than a mere testamentary intention. "I want it to go that way" expressed no agreement, and bound the uncle to nothing. It was simply the declaration of a wish, with none of the earmarks of a contract. The complainant having already come to Missouri upon the prospect of a profitable partnership, to an inexperienced and impecunious young doctor, and having already consented to the partnership, he was really to perform no additional act, nor give any additional consideration, for this promise. In *Neal's Ex'rs v. Gilmore*, 79 Pa. St. 421, the decedent, having no children, took two boys of tender years to live with him. A short time afterwards one House, a half-brother of the complainants, met the decedent, and he testified that the decedent had taken a great liking to the children, and that he would like to keep them; and, if their father would stay and work the place, and behave himself, he would give him a certain share of the crop; and, if the children would stay until they were of age, he would take them, and raise them as his own; that he would give them a good common education, and at his death would give them what he had. It was held that this was a mere declaration of intention of the decedent towards the children; that it had none of the marks of a contract. It was a contract all on one side; and in determining whether it was a contract or not it is a controlling circumstance that all the important benefits were on the side of the promisee.

In addition to all which it is not clear to my mind that the alleged verbal contract respecting the home place is not within the prohibition of the statute of frauds. "No action shall be brought upon any con-

tract made for the sale of lands, * * * or an interest in or concerning them, * * * or upon any agreement that is not to be performed within one year from the making thereof, unless the agreement upon which the action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith." Section 5186, Rev. St. Mo. "All declarations or creations of trust or confidence of any lands, etc., shall be manifested and proved by some writing signed by the party, * * * or by his last will in writing, or else they shall be void." Section 5184, Id. In *McCormick's Appeal*, 57 Pa. St. 54, it is expressly held that a parol agreement made in anticipation of the formation of a partnership to put land into the firm, or to consider it as firm property, passes no title, either in law or equity. The court say that—

"A taking possession does not withdraw a parol contract from the statute of frauds. The possession taken under such a contract must not only be notorious and distinct, but it must be exclusive of the vendor. Receiving a parol vendee into joint possession with his vendor is not equivalent with the ancient feudal investiture, for which the statute of frauds intended to declare a writing should be the only substitute. The notoriety and significance of an entry into common possession is much less than when an owner leaves and another person takes the sole and exclusive enjoyment. Hence it has been held that a tenant in common in possession cannot pass his title to his cotenant in possession by parol, because there cannot be, in such a case, that distinct transfer of possession which equity regards equivalent to a written contract. To constitute a valid parol sale under the statute of frauds, the possession must be exclusive of the donor. * * * The mischief against which the statute was designed as a guard is greater in cases of parol transfers to partnerships than in any other case. * * * When partners intend to bring real estate into partnership, their intention must be manifested by deed or writing placed on record, that purchasers and creditors may not be deceived. * * * Undoubtedly a partnership may hold real estate, and they may have a resulting trust, where the partnership funds have paid for land. *Erwin's Appeal*, 39 Pa. St. 535. So there may be a constructive trust in favor of a firm, as was held in *Lacy v. Hall*, 37 Pa. St. 360; but these come within the exceptions to the statute of frauds. In both these cases the lands were acquired after the partnerships had been formed, and while the joint business was in progress. But here there is no resulting or constructive trust. The agreement, if there was any, to put the land into the joint stock, was made before the firm had any being; and the partnership funds did not pay for it. A parol agreement to put land into a firm, or to consider it as firm property, made before the firm exists, is wholly ineffectual to pass any title, either in law or in equity."

The rule invoked by counsel for complainant, that a complete performance of the contract on the one side may take the case out of the operation of the statute, in my opinion, has no application to a case like this. The courts have gone quite far enough in this direction, practically wiping out the wise and protective provisions of this statute by equitable construction. The rules laid down by the supreme court in *Purcell v. Miner*, 4 Wall. 513, may well be applied to this case: The party relying upon such parol contract must make full, satisfactory, and indubitable proof of the contract,—a proof which must show a contract leav-

ing no *jus deliberandi*, or *locus pœnitentiæ*, and which cannot be made out by mere hearsay, or by evidence of the declarations of a party to mere strangers to the transaction, in chance conversation, that the consideration has been paid. And even this will not of itself be sufficient for the interference of a court of equity, if the party have a sufficient remedy at law to recover back the money, or after there has been such part performance of the contract that its rescission would be a fraud on the other party which could not be compensated by damages; and, finally, that delivery of possession has been made in pursuance of the contract acquiesced in by the other party.

In respect to the property known as the "Watts Farm," acquired by the uncle in 1882, the complainant's evidence shows that at least \$1,000 or \$1,200 of the purchase money was paid out of the moneys of the uncle on hand when the complainant came to Missouri; and the uncle gave his notes for the unpaid balance, which the complainant testifies was paid out of the earnings of the joint practice. The negotiation for the purchase of this farm was conducted wholly by the uncle, and the deed taken in his name. This fact was known to the complainant, without protest or inquiry on his part. In view of the attempt to impress the title to this land with a trust by calling strangers as witnesses, to give rather their impressions than the words of the conversations had with the deceased, to the effect that he spoke of this land as if held for the use of the firm, the letter written by the uncle to his brother in 1883 constitutes more than countervailing evidence. It was written in the abandon of confidence between two brothers. It was written at a time when the writer could have had no conceivable object to either pretend or dissemble. In his letter he said:

"I bought a farm lately, and it keeps me cramped to make the payments on it, and I want to be as saving as I can. I thought it best to have such a provision made, as I might get crippled, and unable to attend to my profession. You know a doctor runs a good many risks, riding at all times."

This language is hardly consistent with the testimony of the expectant "heir" that this purchase was made as a mere investment of the surplus earnings of their practice. "I thought it best to have such a provision made, as I might get crippled," etc., coupled with other evidence that the uncle spoke of this farm as a place of repose, and the attention he was giving to stocking it, furnish little support to the contention of the nephew that it was bought as a joint investment, to be held as a mere partnership asset. On the contrary, the inference is strong that the uncle made this purchase with the pleasing expectation that with advancing age he would in the near future leave to his *protege* the legacy of the practice he had built up, with its good-will, and retire to the more peaceful pursuit and quietude of agricultural life. Especially would this be a happy provision in the event of the happening of the apprehended physical misfortune. It would be a liberal concession to the complainant to say that a part of the purchase money of this farm came from the earnings of the professional practice of the firm. What, then, would be the rights and interests of the complainant in this farm? In the absence of

debts to be paid out of the partnership assets there would be a resulting trust, not in favor of the complainant, but in favor of the partnership, creating a charge upon the land *pro tanto*. *Botsford v. Burr*, 2 Johns. Ch. 410. And this resulting interest would be subject to an accounting between the partners; and, even if the case were to fall within the view that the entire balance of the purchase money was paid by the complainant, it would be subject to a further serious legal impediment. Where A. asserts a resulting trust in his favor to land deeded to B. on the ground that he paid part of the purchase money, such money must be advanced at the time of the original transaction, and not after the purchase is consummated. In *Botsford v. Burr*, *supra*, the chancellor, speaking of the note assigned by the complainant in payment of a part of the purchase money, said:

"The note affords no ground for a resulting trust springing out of the purchase of either farm by the defendant, because such a trust arises only from the payment, originally, of the purchase money, (or at least a part of it,) by the party setting up the trust. * * * The trust must have been coeval with the deeds, or it cannot exist at all. After a party has made a purchase with his own moneys or credit, a subsequent tender, or even reimbursement, may be evidence of some other contract, or the ground for some other relief, but it cannot, by any retrospective effect, produce the trust of which we are speaking. There never was an instance of such a trust so created, and there never ought to be, for it would destroy all the certainty and security of real estate. The resulting trust, not within the statute of frauds, and which may be shown without writing, is when the purchase is made with the proper moneys of the *cestui que trust*, and the deed not taken in his name. The trust results from the original transaction, at the time it takes place, and at no other time; and it is founded on the actual payment of money, and on no other ground. It cannot be mingled or confounded with any subsequent dealings whatever." *Vide Duce v. Ford*, 138 U. S. 587, 11 Sup. Ct. Rep. 417.

So the only possible pretext upon which the complainant could assert a resulting trust in his favor is upon the assumption that the \$1,000 paid by the uncle on the original purchase belonged to the partnership assets. This pretension rests alone upon the unsupported testimony of the complainant, which, under all the circumstances concerning the relations between these parties and the purchase of this farm, I cannot accept as sufficient to impress the legal title to this property. His own testimony respecting this purchase is that when the uncle made it and paid the \$1,000 he stated to the nephew, "We must now collect up to raise the balance." This was nothing more nor less than an agreement at the time of the purchase and conveyance that part of the purchase price might be paid after the original act, and as such it is within the statute of frauds; or, if paid out of the partnership funds, at the very utmost it would only create a charge upon the land *pro tanto* in favor of the partnership.

In respect to the Meyers lot, acquired after the execution of the articles of agreement of partnership of January 1, 1884, if it is to be treated as partnership property, it is clearly subject to the terms of the written instrument. The contention of the complainant is that the entire purchase money came from the partnership funds. If this purchase was made pursuant to and in furtherance of the copartnership, there would be a

resulting trust in favor of the partnership, subject to the equitable interests hereinbefore stated. After the administration of the partnership assets and payment of partnership debts it would be subject to an equitable accounting as to the balance between the partners; and, probably, under the Missouri statute doing away with joint tenancies, the surviving partner and the heirs at law of the deceased partner would be tenants in common in the real estate. *Buchan v. Sumner*, 2 Barb. Ch. 198; *Carlisle v. Mulhern*, 19 Mo. 57; *Willet v. Brown*, 65 Mo. 138. In the absence of any question as to the rights of creditors of the concern, in construing the rights and interests of the partners *inter se* respecting this purchase, their intention in making the purchase would have to be looked into. The articles of agreement provided only for a partnership "for the purpose of practicing the arts of medicine and surgery." As this purchase of the Meyers lot, unless used in connection with the business of the concern, for an office, or something of that character, does not come within the purview of the written instrument, it would be regarded as a mere commercial transaction, the investment of surplus funds; and the parties might in such a case be mere tenants in common. The better rule seems to be that which makes the intention of the parties, as between themselves, at the time the conveyance was taken, the proper test. If they intended to make a division of that portion of the assets they would be tenants in common. If they intended to keep it in the firm, employing it as an asset, it would be a partnership asset. See note to *Page v. Thomas*, 54 Amer. Rep. 793. The ultimate reliance of the complainant for the retention of the whole of the real estate and for the divestiture of the legal title is based upon the following declaration in the written articles of agreement:

"And it is further agreed upon that, should the senior member of the firm die or become incapable of practicing his profession, that the right to continue business should devolve on the junior member, [J. A. McKinnon;] and in the event of the death of the senior member of the firm, that all his property, personal and otherwise, which he held in partnership at the time of his death, should go to the junior partner, [J. A. McKinnon,] providing the senior member leaves no family of his own to which it might recur."

It is to be observed that the property thus designated to go to the complainant on the death of the uncle is expressly restricted to that "which he held in partnership at the time of his death." As every species of property held by the uncle, according to the testimony of the complainant, was either held in copartnership or in trust for the benefit of the partnership, why did the parties to this agreement employ the term "held in partnership?" If it was the understanding of the parties and the intention of the uncle to leave it to the "junior member," the most natural, as the most apt, term possible would have been, "all his property, personal or otherwise, which he held at the time of his death." The limitation, on the contrary, not only indicates that the senior member held other property than partnership, but that it was his mind to give none other than his interest in the partnership property. To give any other construction to the written instrument is to add to its expressed

language, and to substitute the wish and hope of one of the parties for the expressed will of the other. Superadded to all this, the provision of the agreement was not only to take effect after the death of the uncle, but was to apply alone to the property held by him in partnership at the time of his death. The well-settled rule of law is that an instrument purporting to be a deed or contract transferring property after death is but a testamentary paper. In determining whether it be a conveyance or a will the court will not consider so much what the maker believed it to be, but what in point of law it is. *Hester v. Young*, 2 Ga. 31; *University v. Barrett*, 22 Iowa, 73, 74; *Watkins v. Dean*, 10 Yerg. 320. The essence of the definition of a will is that it is a disposition to take effect after death; and, whatever the form of the instrument, if it passes no present interest, but only directs what is to be done after the death of the maker, it is testamentary. *Turner v. Scott*, 51 Pa. St. 126. If the instrument passes a present interest, although the right to its possession and enjoyment may not accrue until some future time, it is a deed or contract; but, if the instrument does not pass the interest till after the death of the maker, it is merely testamentary. *University v. Barrett*, *supra*.

In *Roth v. Michalis*, 125 Ill. 325, 17 N. E. Rep. 809, the court say:

"The instrument, it will be observed, does not, as counsel assume, purport to convey an undivided half of the property which he then owned; but, on the contrary, only that which he might leave at the time of his death, after the payment of all his just debts. What portion of the effects he then owned, if, indeed, any at all would be on hand at the time of his death, and thus brought within the terms of the grant, was at that time, as is manifest, a matter of pure conjecture. This being so, it is clear that no present estate or interest in the property thus owned by him could have passed by this deed, and it therefore follows as a legal sequence that the instrument in question, considered as a conveyance, was and is void. This conclusion rests upon the fundamental principle that a deed takes effect upon its delivery, if at all."

The court then proceeds to consider the question as to whether such a provision can be given effect to as a declaration of trust:

"It is unquestionably true that, where one for a valuable consideration attempts to make a conveyance of property to another, and by some casualty or inadvertence the instrument is defective and inoperative as a conveyance, a court of equity will, in a proper case, treat the instrument as a declaration of trust, or as a contract for a conveyance, as the circumstances may require. But this doctrine has no application to a case like the present, where an essential element of the trust is wanting. An existing property right in or to some distinct subject-matter is essential to the existence of every trust; and any instrument, however perfect otherwise, which fails to disclose this, cannot properly be established as a declaration of trust."

See, also, following authorities: *Miller v. Holt*, 68 Mo. 584; *Grattan v. Appleton*, 3 Story, 755; *Sperber v. Balster*, 66 Ga. 317; *Turner v. Scott*, 51 Pa. St. 126; *In re Diez*, 50 N. Y. 88; *Cover v. Stem*, 67 Md. 449, 10 Atl. Rep. 231; *Reed v. Hazleton*, 37 Kan. 321, 15 Pac. Rep. 177; 1 Redf. Wills, 170.

We do not controvert the doctrine that a contract, based on a valuable consideration, duly performed by the beneficiary, to make a will,

may be specifically enforced or compensated in damages after the death of the promisor. But, as we have already shown in respect of the alleged verbal language, "I will make you my heir; I want it to go that way," this promise was a mere gratuity. This view the complainant should be held to, for the reason that in his cross-examination he stated in the most direct terms that the parol agreement of 1881 was but, in effect, transferred to and expressed in the written instrument of 1884; that it, according to his understanding, differed in no material respect from the written agreement. So the conclusion forces itself that this provision of the written instrument was a mere gratuity,—a provisional arrangement as to the final disposition of his partnership interest in the event of death during the continuance of the partnership. It was certainly revocable by the act of the uncle during life. Had he, by will or other instrument, disposed otherwise of this interest, what remedy would the survivor have had to prevent it? This provision of the agreement could not have been specifically enforced, as the property would not have been in the uncle's possession at the time of his death. There could have been no action in *assumpsit* predicated of the breach of contract, for by its explicit terms the junior member was to take only in the event the uncle held the property at the time of his death. He was not required to hold it until that event. On the contrary, the second article of the agreement provided for a disposition of the partnership property by division on dissolution of the partnership prior to death. There was no restraint of the power of disposition prior to death; therefore the alleged contract passed no interest *in præsentia*, nor created any *indebitatus assumpsit*. The promise, then, was essentially testamentary. As such it must fail, for the reason that the instrument does not conform to the requirements of the Missouri statute prescribing the necessary formality in the execution of wills. Section 8870, Rev. St. Mo.

Of the testimony of witnesses called by complainant to depose concerning statements made by decedent in promiscuous conversations, to the effect that he and his nephew owned the property in common, and the like, it may be observed—*First*, that such desultory talk cannot be accorded more weight than the complainant's own version of the understanding between him and the deceased; and, *second*, that such vague and indefinite statements are too meager to be the basis of judicial ascertainment of the exact state of accounts, or terms of compact, between the parties. Such evidence is often easy of coinage against the dead, or, when honest, owing to the weakness of human nature to favor the "living king," it enlarges by excessive coloring. As aptly said by Sir WILLIAM GRANT, (*Lench v. Lench*, 10 Ves. 517:)

"The witness swears to no fact or circumstance capable of being investigated or contradicted, but simply the naked declaration of the purchaser admitting that the purchase was made with the trust money. That is, in all cases, most unsatisfactory evidence, on account of the facility with which it may be fabricated, and the impossibility of contradicting it. Besides, the slightest mistake or failure of recollection may totally alter the effect of the declaration."

The only written declarations through which the uncle, "though dead, yet speaketh," are the deeds, his letter to his brother, the articles of co-partnership of 1884, and his notes for the unpaid purchase money for the lands. Against these the only claim which this evidence presents of a disputable character, to my mind, is whether or not there is a resulting trust in favor of the partnership against the Watts farm to the extent of the money, if any, taken from the partnership funds to complete the payments, and the extent and nature of the claim in favor of the partnership, and the residuary interest of the complainant in the Meyers lots. Should the court retain the bill for the purpose of making this ascertainment? It is true, a court of equity, as a rule, may grant any relief under the general prayer consistent with the allegations of the bill. But the bill in this case is not framed with a view to either treating this property as a partnership asset, nor as chargeable with a resulting trust, nor as an equitable tenancy in common. The evidence was not taken with a view to the settlement of partnership accounts, the ascertainment of balances, nor the exact amount of the trust funds which are claimed went into the purchase of the respective pieces of property. And what is more persuasive still that under this bill and the depositions published thereunder the court should not undertake to vary the theory of the complaint is that the respondents have consented, under the issues presented, to admit the deposition of the complainant himself. What their action would be, under their unquestionable right, in admitting this testimony on another theory, the court cannot anticipate. So long as the object of pleading is to define the issues between the parties, to advise them to what matters witnesses are to be called, the relief asked for by the pleader ought to have controlling influence. The complainant is not entitled, in my opinion, to a decree for specific performance. It is therefore ordered that the bill be dismissed, and the injunction dissolved, at complainant's costs.

MARTINEZ v. MOLL.

(Circuit Court, E. D. Louisiana. June 16, 1891.)

1. EQUITY—RESCISSION OF CONTRACT.

A man 28 years old bought, after examination, a plantation which was only worth two-thirds of the price he paid for it. There was no evidence of fraud or undue influence. The vendor offered to release him from the bargain before it was consummated, but he refused to be released. *Held*, that the sale could not be set aside in equity.

2. SAME—INSANITY—EVIDENCE.

Under Civil Code La. art. 1788, which provides that, where there has been no interdiction, a contract will not be void on the ground of insanity unless the party is notoriously insane, the evidence of five witnesses that a man is of feeble intellect, when contradicted by that of seven witnesses, there being no evidence that the purchaser knew of the vendor's incapacity, is not sufficient evidence of notorious insanity to avoid a contract.

In Equity.

Henry C. Miller, for plaintiff.

R. H. Browne, for defendant.

BILLINGS, J. This is a suit in equity submitted upon the pleadings, which are the bill, answer, and replications, and upon the proofs for a final decree. It is a suit for the rescission of a conveyance made by the complainant to the defendant of two lots of ground, with the buildings thereon, known as "No. 52 Canal Street," in the city of New Orleans, for a reconveyance of the same, and for the rents and profits thereof. The grounds for the decree asked by the bill of complaint are fraud and undue influence and mental incapacity. The transactions between the parties were as follows: In September, 1888, the complainant exchanged the store above described (52 Canal street) for a sugar plantation in the parish of St. John the Baptist, the store being estimated, over and above a mortgage existing upon it for \$13,000, at about \$14,000, and the plantation, together with a store upon it, which was valued at about \$2,000, at \$27,000; that is, the plantation, by itself, was estimated at \$25,000. For the difference (about \$14,000) notes bearing a mortgage upon the plantation were given by the complainant. At the time of the exchange an apparently promising crop was growing and nearly made upon the plantation, which was taken off by the complainant, netting \$3,859, instead of a much larger sum, viz., about \$10,000, which had been expected. This diminution is by the defendant attributed to the storm in August. In September, 1889, just about six months after the exchange, the complainant abandoned the whole purpose of conducting the plantation, and reconveyed it to the defendant for the amount due by him to the defendant, in the neighborhood of \$14,000. Minor facts are brought before the court in the testimony, but those above recited constitute the important ones, and give in outline the transaction. From these it is evident that in the purchase of the plantation, with all the uncertainties attending the cultivation of sugar, giving in exchange for it the productive and well-located city property, and, too, the purchaser, the complainant, being inexperienced in the production of sugar, the complainant made an unwise purchase. This is beyond all question. But that, in and of itself, cannot authorize the court to rescind the sale.

Was the complainant insane? and was he induced to make the exchange or purchase by the fraud and undue influence of the defendant?

First. Was he insane? As to his insanity, five witnesses—Mrs. Hubert, complainant's mother-in-law, Louis Hubert, complainant's brother-in-law, Robert Upton, William Pepperman, James April—testify as to his being, in their opinion, feeble—hardly average—in intellect. To these should be added the brother of the complainant, whose statement comes through the notary, (Upton.) As to his being of average intellect, seven witnesses—H. L. Bidstrup, J. J. Wetta, J. B. Ash, John Webber, sheriff, John G. Moll, Jr., Paul Turner, and L. De Poorter—testify:

"He has never been interdicted. He was at the time of this transaction 28 years of age, and had been left by his father, who had been but a short time dead, as his portion of the estate, the property which is the subject of this suit. He had quarreled with his father on account of his marriage. At the time of the purchase or exchange he was driver of a street-car, and at the time he gave his testimony in this cause he was store-keeper for an auction-house in San Antonio, Tex."

The statutory provisions as to what constitutes insanity, which, according to the jurisprudence of the state, include feebleness of intellect, are found in Civil Code, art. 1788. The party to be declared insane, when there has been no interdiction, must be notoriously insane; *i. e.*, the insanity must be such that it could not but be known to the party dealing with him. "Notoriously" means "well and generally understood." That clearly is not this case, which closely resembles, as to the want of notoriety, the case of *Kenney v. Dow*, 10 Mart. (La.) 603, where the court, rejecting the plea of insanity, say: "It must be notorious and clearly proved." In *Bank v. Dubreuil*, 5 Mart. (La.) 426, the court say:

"But the law has provided that 'no act anterior to the petition for interdiction shall be annulled, except where it shall be proved that the cause of such interdiction notoriously existed at the time when the deed, the validity of which being contested, was made, and that the party who contracted with the insane person or lunatic could not have been deceived as to the state of his mind.' Civil Code, p. 80, art. 15. Here the existence of the cause of the interdiction at the time the mortgage was executed appears to us to be proven; but the Code requires also that we should have proof of the impossibility of the plaintiffs who contracted with the defendant being deceived as to the state of her mind."

See the late case of *Baumgarden v. Langles*, 35 La. Ann. 441, 443. In *Stockmeyer v. Tobin*, 11 Sup. Ct. Rep. 504, (Sup. Ct. U. S., decided March 2, 1891, opinion by Mr. Justice HARLAN,) that tribunal, in affirming the judgment rendered by Judge PARDEE in this court, deals exhaustively with the whole subject, interpreting Civil Code, art. 1788, subd. 3, and affirming the doctrine of the jurisprudence of Louisiana, as stated above. It is to be observed that at the common law incapacity, in and of itself, may be the ground of avoiding a deed, but that, under our law, there must be not only incapacity, but it must be so "notorious"—so generally known—as to make it certain the party sought to be affected by it knew it. I do not think that, under our law, Martinez was insane, or incompetent to contract.

Secondly. Did the defendant practice fraud and exercise undue influence? The parties contradict each other as to who first suggested the purchase by the complainant of the sugar plantation; each attributing it to the other. But the purchase was made after an inspection of the plantation and its stock by the complainant. There is not the slightest evidence that the defendant made any false representations, unless it is to be inferred from the estimated value of the plantation. Of the estimates of the witnesses, that of Mr. Legendre would be the best guide. His outside estimate is \$16,000, and \$25,000 was the price paid. It should be observed that at the time of the purchase the crop, then nearly

made, seems to have been so promising that the parties estimated an outcome net of \$8,000 or \$10,000, against slightly less than \$4,000 as the event proved; so that the case is one where the property was worth about two-thirds of the price paid. As to undue influence, the evidence shows that, after the brothers had objected to the complainant buying, the defendant offered to release the complainant altogether from the bargain, but that the complainant not only declined to be released, but threatened to sue the defendant for damages unless the preliminary contract was carried out. So that the case sums itself up in this: A young man of the age of 28 years, having inherited a property from his father, loses it altogether by an unwise purchase of a property worth only two-thirds of what he gave for it, and by yielding to the seductive hopes inspired in the mind of the inexperienced as to amounts to be made by raising sugar-cane. There is established neither insanity nor fraud nor undue influence. The case made by the proofs shows that the complainant made a poor bargain, and merely on account of this he cannot have relief in a court of equity.

MEYER *et al.* v. RICHARDS.

(Circuit Court. E. D. Louisiana. June 26, 1891.)

NEGOTIABLE BONDS—LIABILITY OF SELLER—WARRANTY.

The *bona fide* owner of negotiable bonds which are fraudulent reissues of genuine bonds is not liable to one who purchases them from him for the amount paid therefor, in the absence of any warranty. Following *Otis v. Cullum*, 92 U. S. 447.

At Law.

Furrar, Jones & Kruttschnitt, for plaintiffs.

Beckwith & Lazarus, for defendant.

PARDEE, J. This cause has been submitted near the close of the term without argument other than that furnished by printed briefs in other cases, where the facts did not fully appear, with a request for a speedy decision. A brief opinion is all that is possible. The agreed statement of facts shows that the defendant, prior to the sale of the bonds herein in question, was the *bona fide* holder of each and all of the bonds described, having acquired each and all of said bonds in open public market for full market value, with no notice whatsoever of any alleged vice or alleged illegality of the bonds; and that the said bonds are in no sense forgeries, but fraudulent reissues of genuine bonds. These facts being admitted, in my opinion the case is controlled by the decision of the supreme court of the United States in *Otis v. Cullum*, 92 U. S. 447. In that case the bank of which Cullum was receiver had sold certain bonds issued by the city of Topeka. The bonds were afterwards judicially declared void, because the act authorizing their issue was unconstitutional.

The purchasers sued to recover the amount paid for the bonds, alleging failure of consideration. The court said:

"Such securities thronh the annals of commerce which they are made to seek, and where they find their market. They pass from hand to hand like bank-notes. The seller is liable *ex delicto* for bad faith, and *ex contractu*, there is an implied warranty that they belong to him, and that they are not forgeries. Where there is no express stipulation, there is no liability beyond this. If the buyer desires special protection, he must take a guaranty. He can dictate its terms, and refuse to buy unless it be given. If not taken, he cannot occupy the vantage ground upon which it would have placed him. It would be unreasonably harsh to hold all those through whose hands such instruments may have passed liable, according to the principles which the plaintiffs in error insist shall be applied in this case."

The doctrine of this case has been recognized and approved in the case of *Orleans v. Platt*, 99 U. S. 676, and in *Insurance Co. v. Middleport*, 124 U. S. 545, 8 Sup. Ct. Rep. 625. It is not necessary to cite authorities to show that the *bona fide* holder of negotiable securities has title. In the view I have taken of the case, the liability of the state on the bonds in controversy is not a material question, and is in no wise passed upon. It is therefore ordered, adjudged, and decreed, that there be judgment in favor of the defendants, with costs.

UNITED STATES *v.* ALEXANDER *et al.*

(District Court, D. Idaho. June 1, 1891.)

1. JUDGE DE FACTO—TITLE TO OFFICE.

Title to an office cannot be determined in a collateral proceeding, but sufficient inquiry may be made to determine whether a claimant is a mere intruder or not.

2. SAME.

De facto officers are those who act under some color of right to the office, who perform its duties, who are generally recognized as the officers, whose acts as such are acquiesced in, and their acts are valid.

(*Syllabus by the Court.*)

At Law. Motion to set aside an order overruling a motion for new trial.

Fremont Wood, U. S. Atty.

James W. Reid, for defendants.

BEATTY, J. Trial of this cause having been had and judgment rendered in the first district court of Idaho territory, and a statement upon motion for a new trial having been settled, such motion was, on April 15, 1889, taken under advisement by the judge of said territorial court. On November 19, 1889, another judge was appointed, who on November 25, 1889, at Boise City, Idaho, duly qualified. On November 27, 1889, the former judge signed an order overruling the motion for a new trial, which was, on December 6, 1889, filed by the clerk of the court.

The defendants claim such order was made without authority, and ask its annulment. It is not, and cannot be, disputed that on the day this order was signed the new appointee was the duly appointed and qualified judge of said territorial court, and was then fully authorized to assume the duties thereof. Neither will it be doubted that if he had in fact then taken possession of such office, was then in the discharge of its duties, and was then generally known and recognized as such officer, no other person could at the same time exercise any authority as judge of that court. It must also be admitted he was the *de jure* judge, but it remains for determination whether his predecessor was a then *de facto* judge, and upon this question rests that of the validity of the order. At the threshold of the argument is raised the proposition of the right, in a collateral proceeding, to determine who was the legal officer. It is claimed that in this action we cannot look beyond the act of the officer, and investigate his title to the office, but that the order must be accepted as one made by a *de facto* officer, and as valid. This proposition, unconditionally accepted, would make valid the unauthorized proceedings of a mere intruder into an office; of any one who might assume, without the semblance of authority, to act, and thus leave us remediless against usurpation and the grossest injustice. While the question of strict title to an office can be inquired into and determined only by direct proceeding, and while courts will not, in a collateral proceeding, make such investigation, they may and will make such inquiry as will establish the line between the mere intruder into an office and one holding it under some color of title, some semblance of right,—between him without any authority whatever and the *de facto* officer.

It has long been established that as to the public and third persons the acts of a *de facto* officer are valid, and their virtue cannot be impeached by any inquiry, in a collateral way, into the strict title to the office. This rule is established as a matter of public policy and necessity, for the protection of the public who have dealings with officials. It would be a disastrously inconvenient requirement that all who have business with an official person must, before it can be transacted, inquire into the validity of the officer's claim to the office, and that the acts of those who have not legal right, although the semblance thereof, must in all cases be held void. We think the rule is that inquiry into the title to the office of a party acting therein may be pursued far enough, in any case, to show whether or not he is a *de facto* officer, but further than this the investigation will not go in a collateral proceeding. The question here arises, what is a *de facto* officer? Generally there must be found some color of title, some semblance of right, to the office, either by some election or appointment, though invalid, upon which the claim rests. The possession by the claimant of the office and the *indicia* thereof, the performance by him of the duties, in such an open and public manner as will justify the public generally in the belief that he is the officer, and especially the recognition by the people of and their acquiescence in his acts as such officer, are all elements which go to establish the character of a *de facto* officer. When one has been elected or appointed to an of-

fice, which he continues to hold, and of which he continues to perform the duties, even after the expiration of his term, but under some contest or claim of title; and he not only performs the duties, but is generally recognized by the public as the officer, and his acts are acquiesced in, he is a *de facto* officer. Or, even if there were no contest, and the old officer continues to be regarded as the officer, and to act as such, even after his successor is elected or appointed, and, without his knowledge, qualifies, his acts, so performed in good faith, may still be held valid; but if the new officer has qualified and assumed the duties of his office, and is generally known and recognized as the officer, the acts thereafter of the old officer, even if performed in good faith, cannot be held as official or legal, for the reason that such facts make the new officer not only a *de jure*, but also a *de facto*, officer, and there cannot be two *de facto* officers at the same time. When, therefore, the acts of the retiring officer will be sustained as those of the *de facto* officer, must depend much upon the facts and circumstances of each case. What are the controlling facts in this case? In addition to those already stated, it appears from the defendants' affidavits that the new judge qualified and assumed the duties of the office on November 25th, which he thence continued to perform; that he was from that date generally recognized by the people and bar as the judge; that on November 27th the clerk of the court received at Lewiston, Idaho, information that such judge was then in the district, and had qualified, which information he at once communicated to the retiring judge, and then left; that upon his return to Lewiston, on December 6th, the judge gave him said order to be filed, and it appears that on November 19th he had tendered his resignation, and on the next day saw the notice of his successor's appointment. The United States attorney says in his affidavit, upon his information, that the new judge did not assume his duties until after said order was signed, on November 27th; that said clerk informed him that the judge signed said order on said day before he was informed his successor had assumed such duties; and that after receiving such information he performed no other official acts. If this order is of force only from the date it was filed, no doubt can be entertained of its invalidity, for it is clear that prior to that time the new judge had both qualified and assumed his duties, and his authority to do so was not disputed, but was fully recognized by his predecessor, who had ceased to act. If the order was signed on the 27th day of November, after the judge was informed his successor had assumed his duties, it would be void. If it had already been signed when the clerk on said day communicated the information referred to, it is strange it was not delivered to the clerk to be filed. That it was not, is strongly suggestive either that it had not been signed, or, if signed, that the judge doubted its validity, and held it for further consideration. If so held, then it was not an order, even though signed, and no subsequent conclusion or determination concerning it can give it vitality, under the facts as they appear in the record. After a full examination of all the facts, it is concluded the order was erroneously made, and was not justified under the circumstances.

There is also another reason why this order should not be sustained. It was made when it was well known by all, including the judge who made it, that another judge had been appointed, whose qualification and assumption of the duties of the office it was reasonable to anticipate might occur any day. By a little care and inquiry it could easily have been learned just when this would happen, and thus avoid unnecessary conflict, and especially might this have been done, as there was no such emergency as demanded hasty action. Judicial officers, of all others, should observe the greatest care in the exercise of the important power delegated to them. In view of all the circumstances, I think the order was improvidently made. To hold it valid would be a precedent justifying a practice which courts should discourage rather than sustain. Courts have sustained the acts of *de facto* officers only as a matter of necessity, to avoid serious damage to those not at fault; but the encouragement of a careless practice on this subject would result in far greater injury than benefit. Rather is it better that it be understood that the acts and orders of those without the legal right to exercise official trust must pass the ordeal of the closest scrutiny, and be ratified only so far as justified by public policy and necessity.

The defendants' motion to set aside the order complained of is granted.

FIRST NAT. BANK OF PLATTSBURGH v. SOWLES *et al.*

(Circuit Court, D. Vermont. July 9, 1891.)

1. REPRESENTATION AS TO ANOTHER'S CREDIT.

Defendants, as directors, during a run on their bank, posted conspicuously in the bank a notice, signed by them, and addressed to the general public, representing the bank to be solvent. Plaintiff saw the notice, and, after a consultation with the directors, loaned the bank money, which was lost. *Held*, that the notice, not being addressed to plaintiff, could not entitle it to recover from the directors, under R. L. Vt. § 983, which provides that no action shall be brought to charge any person upon a representation concerning the credit of another, unless such representation is in writing, and signed by the party to be charged; and the fact that the notice was signed by defendants as directors would prevent a recovery from them individually, even if the notice were a sufficient representation in writing.

2. SAME—PAROL EVIDENCE.

Such representation in writing cannot be aided by evidence of additional verbal representations.

At Law.

G. H. Beckwith, for plaintiff.

Willard Farrington and Geo. A. Ballard, for defendant Burton.

WHEELER, J. This suit is brought upon alleged representations by the defendants that the First National Bank of St. Albans was sound and solvent, whereby the plaintiff was induced to loan it \$10,000; and after a trial by jury, on which a verdict was directed for the defendants, has now been heard on a motion for a new trial. The laws of Vermont pro-

vide that "no action shall be brought to charge a person upon or by reason of a representation or assurance made concerning the character, conduct, credit, ability, trade, or dealings of another person, unless such representation or assurance is made in writing, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized." R. L. § 983. And that "the word 'person' may extend and be applied to bodies corporate and politic." Section 21. There was a run on the First National Bank of St. Albans. The defendants were a majority of the directors, and signed and had posted conspicuously in the public banking-room, this:

"NOTICE. This bank is sound, and will pay all its liabilities, and creditors need not have any fears of loss, as we have sufficient assets to pay all liabilities.

"*St. Albans, Jan'y 14, 1884.*

E. A. SOWLES,
"O. A. BURTON,
"ALBERT SOWLES,
"Directors."

The president of the plaintiff read this notice, and afterwards, on the same day, on consultation and discussion with the defendants as to the prospects of their bank, made this loan, for which he took collaterals, from which the plaintiff has realized all but about \$1,900 of the loan. The plaintiff insists that whether the statements in the notice were relied upon in making the loan should have been submitted to the jury, with directions to find for the plaintiff, if they were. There was a representation in writing of the credit and ability of the bank, signed by the defendants; and this claim of the plaintiff has some plausibility. But that such a representation was so made somewhere, at some time, to some person, by the persons sought to be charged, is not sufficient; it must be made to the person seeking to charge them. In *Grant v. Naylor*, 4 Cranch, 224, a letter of credit, addressed to John & Joseph Naylor & Co., was delivered to John and Jeremiah Naylor, there being no such firm as John & Joseph Naylor & Co., and the writer was sought to be charged, on the corresponding section of the statute of frauds, by John and Jeremiah Naylor. As to this Chief Justice MARSHALL said:

"In such a case, the letter itself is not a written contract between Daniel Grant, the writer, and John and Jeremiah Naylor, the persons to whom it was delivered. To admit parol proof to make it such a contract is going further than courts have ever gone where the writing is itself the contract, not evidence of a contract, and where no preceding obligation bound the party to enter into it."

The same judge said in *Russell v. Clarke*, 7 Cranch, 69, on the same statute:

"It is the duty of the individual who contracts with one man on the credit of another not to trust to ambiguous phrases and strained constructions, but to require an explicit and plain declaration of the obligation he is about to assume."

The requirement for charging a person in that section was similar to that in this. This writing was not delivered to, nor to any one for, the plaintiff, and the plaintiff was not one of those for whom it was obvi-

ously intended. If it had been signed by the defendants as individuals instead of as directors, it would not appear to have been a representation to the plaintiff on which they could be charged, within the meaning of this statute. But, further, this notice was an official statement of the defendants as directors, on its face made to the then creditors, to inspire confidence, rather than as individuals, to procure loans. The evidence by which the notice was sought to be pieced out would make a case on oral representations, which is what the statute forbids. The statute stands squarely in the way of any recovery by the plaintiff, and precludes all necessity for examining the cases referred to, where no such statute prevails. Motion denied, stay vacated, and judgment on verdict for defendants.

BROWN v. AMERICAN WHEEL CO.

(Circuit Court, N. D. New York. July 9, 1891.)

RIGHTS OF ACCOMMODATION INDORSER.

Defendant bought out a company for which plaintiff was an accommodation indorser, agreeing to pay \$26,000 of its debts, and, on notice that the notes on which plaintiff was indorser was part of the \$26,000, requested plaintiff to continue his indorsement, and agreed to pay the notes. Plaintiff did so, and was compelled to pay the debt. *Held*, that defendant was liable to plaintiff, though the debt was not in fact a part of the \$26,000 assumed by it, and though it had paid other debts to the amount of \$26,000.

At Law.

Frank Rice, for plaintiff.

Thomas Hogan, for defendant.

WHEELER, J. The plaintiff has paid \$9,000 as an accommodation indorser. The question raised by the demurrer to the complaint is really whether he paid it for the defendant. According to the allegations of the complaint, he was accommodation indorser for the Shortsville Wheel Company. The defendant bought out that company, and agreed to pay \$26,000 of its debts, and, on notice that the paper on which the plaintiff was so an accommodation indorser was a part of the \$26,000, "requested the plaintiff to continue his indorsement, and assist the defendant by continuing to carry said loan" "for a short time, until the defendant could and would pay and discharge the same; that in compliance with said request, and for the sole accommodation and benefit of the defendant, and relying upon the said promise and agreement of the defendant to pay the same, the plaintiff" "continued or renewed his indorsements," and has been compelled to pay in consequence of them. The want of any allegation that the debt which the plaintiff has paid was in fact a part of the \$26,000 of debts which the defendant agreed to pay, or that the defendant has not paid debts of the Shortsville Wheel Company to the amount of \$26,000 besides this, is the principal ground

urged in support of the demurrer. If the action was upon the agreement to pay \$26,000 of the debts of that company, this point would seem to be well taken. But it is not. It is upon the implied agreement to repay what the plaintiff has been compelled to pay for the accommodation of the defendant. If the defendant assumed to the plaintiff that this was its debt, and the plaintiff stood as an accommodation indorser for its benefit and at its request, and was thereby compelled to pay, whether the debt was actually one which the defendant had otherwise assumed to pay would be immaterial. If the defendant had borrowed money of the plaintiff to pay this debt with, that the debt was not in fact the defendant's would be no answer to an action for the money. Procuring the plaintiff to continue to stand liable for the debt under a promise to pay it, and leaving him to pay it in discharge of his liability, amounts to about the same thing. Demurrer overruled.

MAGEE v. OREGON RY. & NAV. Co.

(Circuit Court, D. Washington, N. D. June 9, 1891.)

1. EJECTION OF PASSENGERS—PLEADING—NONSUIT.

In a suit against a carrier of passengers to recover damages for the wrongful ejection of a passenger who claimed to have purchased a ticket for his passage, and to have tendered it, before being ejected, the plaintiff was allowed to amend his complaint, and to plead either (1) the contract, and its breach, and claim only the damages ordinarily recoverable for breach of such a contract; or (2) the tort, as the *gravamen* of his case; or (3) the contract, the breach of it, and any circumstances of aggravation in the manner of the breach, causing additional injury, as ground for claiming special damages. In an amended complaint, the third plan was adopted. On the trial the plaintiff failed to prove a contract, and, on motion for a nonsuit, *held*, that failure to prove the contract alleged was equivalent to a total failure of proof, and the motion should be granted.

2. SAME—USE OF FORCE—LIABILITIES.

Where the officers of a passenger train or vessel do not act wantonly or maliciously, or unnecessarily resort to violence or use excessive force, in ejecting a traveler for non-payment of fare, though wrongfully exacted, their employers are not liable for injuries other than such as necessarily result from the wrongful exaction.

3. SAME—REFUSAL TO PAY FARE.

A person traveling on a passenger boat, who neither produces a ticket good for the trip nor pays fare when called upon, and who after being informed that if he does not pay his fare he will be put ashore, and is allowed a reasonable time to deliberate, and who then suffers himself to be landed on a shore to which he is a stranger, at a point distant from any habitation, during a storm in the night, rather than pay 50 cents to complete his journey on the vessel, although possessed of ample means to pay, is without any just cause of complaint, and cannot recover damages in an action against the owner of the vessel, there being no statute forbidding the landing of a passenger at such place.

(Syllabus by the Court.)

At Law.

In an action to recover damages for being forcibly ejected from a passenger steam-boat, upon the trial before the court and a jury, after the introduction of evidence on the part of the plaintiff, the defendant moved

the court for a judgment of nonsuit, on the ground that the plaintiff had failed to prove his case.

Alfred S. Black and E. B. Leaming, for plaintiff.

J. C. Haines and J. N. Davis, for defendant.

HANFORD, J., (*orally*.) I have no doubt whatever that the defendant is entitled to have this motion granted. The original complaint filed in the case contained two counts,—the first pleading a cause of action *ex contractu*, and claiming damages for breach of contract for a passage by a line of steam-boats owned and operated by the defendant from Tacoma to Whatcom, in this state, evidenced by a ticket for such passage purchased and paid for by plaintiff; and, in the second count, pleading a cause of action *ex delicto*, and claiming damages for a tort pure and simple; both causes of action, however, depending upon the same facts, and being exactly the same transaction, stated in two different ways. Upon a motion to make the complaint definite and certain, so as to ascertain what the plaintiff claimed and what he relied on, for the purpose of simplifying the framing of issues, and to enable the parties and the court to know beforehand what rules of law would be applicable in the trial and decision of the case, I held that it was not permissible, under the system of practice here, to plead in that way, to have a complaint containing repetitions, and aiming in different directions. I stated, however, that the plaintiff had a right, in my opinion, to elect whether to proceed in this case upon the contract, relying upon the contract by itself, and claim only such damages as would be recoverable for a breach of the contract; or he might, in the second place, choose to say nothing about the contract, and recover damages for the tort, treating that as the *gravamen* of his case; or he might, in the third place, in one pleading, and setting it out as one cause of action, plead his contract, plead the breach of it, and, for the purpose of enhancing damages, plead the special facts connected with the breach of the contract, as the ground for the recovery of special damages. An amended complaint was filed, by which it appears that the plaintiff chose the third method of stating his case, and the case now, upon the amended complaint, may be termed an action to recover damages for the tortious breach of a contract. The contract, therefore, is the foundation of the case, and upon that theory the trial has proceeded. All the testimony offered has been either admitted or rejected on legal grounds. The plaintiff has rested, and, as the case is now submitted to the court, there is no contract. The foundation of the case is gone. The Code of this state, which governs the practice in cases of this kind, recognizes a distinction between causes of action *ex delicto* and causes of action *ex contractu*, and necessarily there is a difference. The rules of law to be applied in the determination of the case are entirely distinct, and therefore, notwithstanding the Code has abolished the common-law forms of action, and the refinements growing out of the observance strictly of forms, there is a difference in the law, a difference in the rights of the parties, in cases founded on contracts from those which

are founded on torts. The Code provides that a mere variance in the proof from the allegations of a complaint are not to be deemed material unless the adverse party has been misled; and it provides, further, in section 107, that where the proof does not simply show a different state of facts, but fails to prove the cause of action set out in its entire scope and meaning, there is not a mere variance, but a failure of proof. Now here the evidence does not simply vary from the facts alleged in the complaint, but, as I have said, the entire foundation of this case is gone, because there is a total failure to prove a contract. It is frankly admitted by the plaintiff's attorney that there is no contract proven in this case, and no right of recovery, based on the contract, is claimed in the argument made in opposition to this motion. So I think on that ground a judgment of nonsuit is proper in the case.

I will say further, however, that the assumption that, with proper pleadings, this plaintiff would be entitled to recover any damages for a tort on account of the misconduct charged against the defendant company in ejecting him from the steam-boat Hassalo at an improper place, considering the time of night and the state of weather, is in my opinion unwarranted. There being no statute in this state forbidding the ejection of a person from a vessel or a railroad at any place other than a regular landing place or station, I cannot assent to the doctrine that a common carrier is guilty of such a wrong as entitles the injured party to recover damages for the mere fact of ejecting a passenger, or one who is seeking to travel by means of a steam-boat or railroad, at a place other than a regular landing place or station. Certainly the law would not sanction the use of unnecessary force, even in dealing with an intruder or a trespasser; and, even if the circumstances of the intrusion or the trespass involved an attempt at crime, it would not sanction any wantonness in dealing with the offender. The master of a ship at sea has no right to take a stowaway found on his vessel, and heave him overboard in mid-ocean. But the principle which governs such cases is exactly the principle governing all cases affecting the rights of persons and their property. The owner of a house, which he uses as his dwelling, and inhabits with his family, has a right to the quiet, exclusive, and undisturbed possession thereof. He can exclude an intruder, but he has no right to kill him unless it is necessary to do so. The rule of necessity is the rule of law, limiting the right to use force. All that the law forbids is that there shall be no wantonness or malicious conduct on the part of common carriers, or unnecessary injury done, in removing persons who have no right to travel by their conveyances. I think, too, that even in cases where a person claiming a right to travel founded upon a contract, where he is in the right, is required to act with common prudence, and to submit to the exaction, even though wrongful, of the officers in charge of steam-boats and trains, when they are able to do so, and rely upon an appeal to the superior officers of those who thus treat them wrongfully for redress of their wrongs, and, if they fail to get it by such effort, then to go to the courts of the country for redress of

any wrong or imposition which they may have suffered during a journey, so that a person who is able to pay his fare twice should pay twice if it is exacted, rather than suffer unnecessarily the humiliation and other consequent injuries of being ejected, and then claim enhanced damages by reason of peculiar suffering from the ejection. Of course it is not the duty of a person to submit to any personal violence or to receive blows in that situation any more than if not on board a train or steam-boat. Passengers during a journey have the same right as at other times to defend their persons. What I mean is that they have no right, when they are put to an election to pay fare or suffer an ejection, having the ability to pay the fare, to elect to be ejected, and then claim additional compensation for that part of the injury which could not result from the wrong, otherwise than by choice of the injured. So long as the officers of a passenger train or vessel do not act wantonly or maliciously, or unnecessarily resort to violence or use excessive force, in ejecting a traveler for non-payment of fare wrongfully exacted, their employers should not be held liable for injuries other than such as necessarily result from the wrongful exaction. The officers of this steam-boat found the plaintiff on board the steamer, traveling from Tacoma to Seattle. They demanded of him that he should produce a ticket good for the passage, or pay his fare. He did neither. They explained the matter to him fully, what their rights were, as they claimed, and what their duties were. They explained to him what would be the consequences to him of persisting in his refusal. They gave him every opportunity to make up his mind as to which he would do, gave him time to deliberate, and after deliberation he chose to suffer himself to be removed from the steam-boat, and landed on the shore of Puget sound, in a spot where he was unacquainted, on a stormy night, and distant from any habitation, rather than pay the sum of 50 cents to be carried to Seattle, when he had plenty of money in his pocket, and he could have paid it if he had chosen to do so; and, having received just the treatment that he chose, he is without any just cause of complaint in a legal sense, and therefore this motion for a judgment of nonsuit will be granted on that ground, as well as for the other reason which I have stated.

MILLS *et al.* v. UNITED STATES.

(District Court, S. D. Georgia. July 17, 1891.)

1. CONSTITUTIONAL LAW—TAKING PRIVATE PROPERTY FOR PUBLIC USE.

For the purpose of improving a navigable river the government erected a dam, which raised the level of the river, and thus prevented the owner of adjoining rice fields from draining his canals into the river between high and low water marks, as he had previously done, but did not actually invade his premises. *Held*, that the injury to the rice fields did not constitute a taking of private property, within the meaning of the constitutional prohibition against taking private property for public use without just compensation.

2. NAVIGABLE WATERS—RIPARIAN RIGHTS.

The Savannah being a navigable stream, the rights of the plaintiffs in the ebb and flow of the tide are subordinate to the control of the government, for purposes of navigation; and it having determined that the current shall be confined for the purpose of scouring and deepening the channel, an injury resulting from an elevation of the flow of the tide, which prevents the discharge of the plaintiffs' canals between high and low water mark, is *damnum absque injuria*.

3. JURISDICTION—CLAIMS AGAINST THE GOVERNMENT.

Act Cong. March 3, 1887, (24 St. at Large, p. 505,) which gives the federal courts jurisdiction of actions against the government for claims upon contracts or for damages in cases not sounding in tort, does not give them jurisdiction of an action against the government for an alleged wrongful diversion of a water-course, since that is an action sounding in tort.

At Law.

Lawton & Cunningham, for plaintiffs.

Marion Erwin, U. S. Atty.

Before PARDEE and SPEER, JJ.

SPEER, J. The plaintiffs filed their petition under the provisions of the act of congress of March 3, 1887, (24 St. at Large, p. 505,) to recover from the United States compensation for injury to the value of their lands caused by the erection of works by the government, for the improvement of the navigation of the Savannah river. The petition avers that the plaintiffs owned rice plantations on Hutchinson's island, in the Savannah river, and on the main-land opposite. These lands have been prepared at large expense for the purpose of rice cultivation, and have their chief value because of that fact. It is essential to the cultivation of rice on such plantations that there shall be a system of canals both for flooding and draining the rice fields. The lands in question were drained into the front river—that is, the river proper—prior to the acts on the part of the government complained of. The bottoms of the plaintiffs' ditches and the sills of the trunks and flood-gates were above low-water mark, their system of drainage was complete; and it is complained that the erection by the government of what is called the "cross-tides dam," running from the upper end of Hutchinson's island to the lower end of Argyle island, cuts off all the flow of water from the stream connecting front and back rivers, has raised both the high and low water levels in front river, and has not only destroyed the facilities for draining these lands into front river, but has rendered it necessary to raise the levees around the rice fields, to prevent flooding the fields at high water. This,

it is alleged, has unfitted the lands for rice culture, and makes it necessary that new drainage into back river be provided where the water levels are suitable. The expense of doing this will amount to \$10,000, and plaintiffs insist that they are thus damaged to that extent. This cross-tides dam was erected by the United States as a part of a system of harbor improvements, with the full knowledge of the fact that the drainage of plaintiffs' land would be thus impaired and destroyed. The case of the plaintiffs depend upon the following proposition: (1) The action of the government officials in erecting the cross-tides dam amounts to a taking of their property for public use without just compensation. (2) The right of drainage into the river is appurtenant to the land, and has been taken in the same manner. (3) The government by taking this property entered into an implied contract for the compensation of complainants. (4) Their right to this compensation is a claim arising under the constitution of the United States; and (5) also under an act of congress, to-wit, the act authorizing harbor improvements.

The defendant demurred to the petition upon the grounds: (1) That the plaintiffs have not set forth a cause of action against the government. (2) In so far as it is set forth, it is an action *ex delicto*, and of actions against the government sounding in tort the court has no jurisdiction. There are other grounds, but the decision must depend, in our opinion, upon the grounds stated.

The material clauses of the act of congress under which it is sought to maintain this suit confers jurisdiction on the court of claims to try—

“(1) All claims against the United States founded upon the constitution of the United States or any law of congress, except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable: provided, however, that nothing in this section shall be construed as giving to either of the courts herein mentioned jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as ‘war claims,’ or to hear and determine other claims which have heretofore been rejected or reported adversely by any court, department, or commission authorized to hear and determine the same.

“(2) That the district courts of the United States shall have concurrent jurisdiction with the court of claims as to all matters named in the preceding section where the amount of claims does not exceed one thousand dollars; and the circuit court of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars, and does not exceed ten thousand dollars. All causes brought and tried under the provision of this act shall be tried by the court without a jury.” 24 St. at Large, p. 505.

It appears from these provisions of the statutes that the government has, with somewhat unusual magnanimity, opened the portals of its courts to a very large class of litigants having claims against it. It is equally observable that certain marked and distinct limitations, upon this enlargement of the jurisdiction of the courts, were defined. It will

be obvious, also, that it was not the purpose of this legislation to create new causes of action, but merely to provide a convenient forum for the adjudication of certain specified controversies.

The first, and the more important inquiry presented by the demurrer is this: The jurisdiction being granted, do the facts set out in their entirety constitute a cause of action between plaintiffs and the government? The entire declaration, with the bill of particulars must be considered in order to determine this question; otherwise a very partial, and, indeed, imperfect, view of the claim may be formed, and the questions are of importance, in contemplation of the extensive and generous appropriations annually made by the national legislature for the improvement of navigation, and the great volume of litigation which may depend upon the decision of cognate questions. It is insisted by the plaintiffs that the action of the government constitutes a taking of their property without just compensation, in violation of the fifth amendment of the constitution, which provides: "Nor shall private property be taken for public use without just compensation." Do the averments show a taking of private property for public use, in the meaning of this provision of the constitution? In the case of *Transportation Co. v. Chicago*, 99 U. S. 640, decision by Mr. Justice STRONG, for the court, a statement of the law fundamental to this inquiry will be found. In that case the action was to recover damages for injuries alleged to have been sustained by the plaintiffs in consequence of the action of the city authorities in constructing a tunnel or passage-way under La Salle street, and under Chicago river where it crosses that street. The plaintiffs were the lessees of a lot, bounded on the east by the street and on the south by the river, and the injury of which they complained was that, by the operations of the city, they were deprived of access to their premises both on the side of the river and of the street, during the prosecution of the work. It is true in that case it was not claimed that the obstruction was a permanent one, and it appeared, as in the case now before the court, that there were no averments that the works were unnecessary. They were indeed indispensable for the construction of the tunnel. Also, it was argued that the erection of the coffer-dam was not only a public nuisance, but, as in this case, caused special damage to the plaintiff, for which the right of action was maintainable. The argument was met by the following observations by the court:

"That cannot be a nuisance such as to give a common-law right of action which the law authorizes. * * * A legislature may, and often does, authorize, and even direct, acts to be done which are harmful to individuals, and which, without the authority, would be nuisances; but in such a case, if the statute be such as the legislature has power to pass, the acts are lawful, and are not nuisances, unless the power has been exceeded. In such grants of power a right to compensation for consequential injuries caused by the authorized erection may be given to those who suffer, but then the right is a creature of the statute,—it has no existence without it."

It was there insisted that, though the city had the legal right to construct the tunnel, and to do what was necessary for its construction, subject to the condition that in doing the work there should be no unnece-

essary interference with private property, yet it was liable to make compensation for the consequential damage to persons specially injured. To this proposition the court withheld its assent. The learned justice adds—“That acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking, within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the state or its agents, or give him any right of action. This is supported by an immense weight of authority.”

“The extremest qualification of the doctrine,” continues Justice STRONG, “is to be found, perhaps, in *Pumpelly v. Green Bay Co.*, 13 Wall. 166, and in *Eaton v. Railroad Co.*, 51 N. H. 504. In those cases it was held that permanent flooding of private property may be regarded as a taking. In these cases there was a physical invasion of the real estate of the private owners, and a practical ouster of their possession.” In the case of *Pumpelly v. Green Bay Co.*, *supra*, to which the reference above quoted is made, the plaintiff's demand for damages was based upon the following averments. The defendants had erected a dam across Fox river, the northern outlet of Lake Winnebago, by which the waters of the lake were raised so high as to forcibly, and with violence, overflow the plaintiff's land from the time of the completion of the dam, in 1861, to the commencement of the suit, the water coming in with such violence as to tear up his trees and grass by the roots, and wash them, with his hay by tons away, to choke up his drains and fill up his ditches, to saturate some of his lands with water, and to dirty and injure other parts by bringing and leaving on them deposits of sand, and otherwise greatly injuring them. It is to be observed, also, that the waters of Lake Winnebago were raised so high as to overflow with violence all the lands of the plaintiff from the time of the completion of the dam, in 1861, until the commencement of the suit, in 1867. It was insisted by the defendants that they had erected a dam in accordance with the act of congress, and that the lands in question had not been taken or appropriated. Upon this contention Mr. Justice MILLER, in rendering the decision on appeal, announced: “We are of the opinion that the statutes did not authorize the erection of a dam which would raise the water of the lake above the ordinary level;” thus indicating, as will presently appear, a controlling distinction from the facts before the court here.

With reference to the contention of the defendants, that there was no taking of the plaintiffs' land, within the meaning of the constitutional provision, and that the damage was a consequential result of such use of a navigable stream as the government had a right to make for the improvement of its navigation, Justice MILLER further observes:

“It would be a very curious and unsatisfactory result if, in construing a provision of constitutional law always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators, as placing the just principles of common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that, if the government refrain from the absolute conversion of real

property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction, without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen as those rights stood at the common law, instead of the government, and make it an authority for the invasion of private rights, under the pretext of public good, which had no warrant in the laws or practices of our ancestors."

To this cogent statement, however, the learned justice adds:

"We are not unaware of the numerous cases in the state courts in which the doctrine has been successfully invoked that for a consequential injury to the property of the individual arising from the prosecution of improvements of roads, streets, rivers, and other highways for the public good there is no redress, and we do not deny that the principle is a sound one in its proper application to many injuries to property so originating. And when, in the exercise of our duties here, we shall be called upon to construe other state constitutions, we shall not be unmindful of the weight due to the decisions of the courts of those states. But we are of the opinion that the decisions referred to have gone to the utmost limit of sound judicial construction in favor of this principle, and in some cases beyond it, and that it remains true that, where real estate is actually invaded by superinduced additions of water, earth, sand, and other materials, or by having any artificial structure placed on it so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principles. Beyond this we do not go, and this case calls us to go no further."

It seems evident, therefore, that an "actual" invasion of property is essential for the full application of the doctrine thus announced. The case just quoted, declared, as we have seen, in *Transportation Co. v. Chicago*, *supra*, to be a somewhat extreme statement against the public, of what constitutes a taking of property for the public use, is readily distinguishable from that before the court. In the one case the construction of the dam so as to raise the waters of the lake was not authorized. In the other, the Cross-tides dam, as it stands, about which the complaint is made, is part of an authorized system of river and harbor improvements, and this has been expressly so decided by the supreme court itself in the case of *South Carolina v. Georgia*, 93 U. S. 4; a case having in question the legality of this identical structure. It will be further observed that in *Pumpelly v. Green Bay Co.*, there was a continuous and virtually permanent submersion of the land by the waters of the lake, and its practical destruction for all the valuable purposes for which it might otherwise have been utilized. In the case at bar it is simply complained that the drainage of the rice land is impaired by raising the low-water level of the Savannah river two or three feet, thus making the bottoms of the plaintiffs' ditches and canals and sills and flood-gates from one to two feet below the low-water level, and by increasing the liability of said rice lands to overflow; the frequently occurring freshets in the Savannah river rendering it necessary for the plaintiffs to raise banks surrounding the rice fields.

Aside from the doubt which exists as to the right of the plaintiffs, as against the public, to divert the waters of this navigable stream to the injury of navigation, or to use them for any other purpose save that of navigation, to be presently considered, it is evident that the injury complained of is by no means so direct and absolute as in the case of *Pumpelly v. Green Bay Co.*, *supra*. It is moreover true that whatever may be the franchise of the plaintiffs in the lands submerged by the flow of the tide, this franchise was subordinate to the power of congress to provide for the necessities of navigation, by means of which the interstate and foreign commerce of the country is carried on. *Wood, Nuis.* § 615. The paramount authority of congress to control the entire subject of the improvement of navigation upon the waters of the United States is affirmed by the supreme court of the United States, not only in the case of *South Carolina v. Georgia*, *supra*, but also in the case of *Bridge Co. v. U. S.*, in 105 U. S. 470, and in a multitude of other cases. There can be no doubt of the general doctrine on this subject. It is within the power of the legislature to change or obstruct the course of public waters as the public convenience may require it. Those upon whom authority is conferred for this purpose are not liable for the consequential injuries resulting from their acts, but could not trespass upon or cut a channel through private lands without making compensation for the land so taken. *Gould, Waters*, §§ 248, 249; *Ang. Tide-Waters*, p. 92 *et seq.*

It has been long settled that the right of the riparian proprietor is to be considered as a valuable property right, although, in the language of Mr. Justice MILLER in *Yates v. Milwaukee*, 10 Wall. 504, "it must be enjoyed in due subjection to the rights of the public." Rights of this character are, such as access to the navigable part of the river from the front of his lot, the right to make a landing, wharf, or pier for his own use, or for the use of the public, subject to such general use or regulation as the legislature may see proper to impose for the protection of the rights of the public, whatever those rights may be. In the case of *Miller v. Mendenhall*, decided by the supreme court of Minnesota April 3, 1890, and reported in 44 N. W. Rep. 1141, it is held that the riparian proprietor is entitled to fill in and make improvements in shallow water in front of his land to the line of navigability, and this right, though subject to state regulations, can only be interfered with by the state for public purposes. See, also, *Society v. Halstead*, 58 Conn. 144, 19 Atl. Rep. 658; *Boston v. Leckraw*, 17 How. 426; *Gregory v. Forbes*, 96 N. C. 77, 1 S. E. Rep. 541; *People v. Railroad Co.*, 117 N. Y. 150, 22 N. E. Rep. 1026; *Steers v. City of Brooklyn*, 101 N. Y. 51, 4 N. E. Rep. 7; *Railroad Co. v. Scharmeir*, 7 Wall. 272; *Parker v. Packing Co.*, (Or.) 21 Pac. Rep. 822; *Tuck v. Olds*, 29 Fed. Rep. 738. There cannot be any doubt, however, that all of these rights are subject to the paramount right of the public to use the river for navigation; nevertheless, if the structures described in many of the cases above cited are absolutely destroyed or injured for the benefit of the public, the riparian proprietor is entitled to compensation. It being true, however, in this case, that whatever rights the plaintiffs may

possess are subordinate to the paramount public right to improve the navigation of the river, and that the structure of the defendant is not on the land of the plaintiffs, it follows that the plaintiffs' demand must depend upon the alteration in the flow between high and low water mark of the navigable stream itself. A franchise so depending has been held to be not private property, but an incorporeal hereditament. *Parker v. Packing Co.*, (Or.) 21 Pac. Rep. 822. But whether the franchise or usufruct of the plaintiffs in the flow of the stream between high and low water mark, for injury to which the suit is brought, be strictly an incorporeal hereditament or otherwise, it would appear difficult, upon reason or authority, to justify the action they have brought. It would seem to be otherwise if the stream were not navigable, but upon navigable waters, any franchise depending upon the use of the stream itself seems to be common to all, and to relate to the purposes of navigation and to facilities therefor. The recent case of *Fulmer v. Williams*, decided on the 8th day of October, 1888, by the supreme court of Pennsylvania, and published in 15 Atl. Rep. 726, is an instructive decision upon this topic. In that case the plaintiff owned a factory on the west bank of the Lehigh river, and had constructed a dam to an island about 80 feet from that bank, the effect of which was to raise the water about one foot above its ordinary level, thus supplying the water-power for his mill. The defendant, Fulmer, owned land adjoining, and next above, the land of the plaintiff. The evidence showed that he deliberately and maliciously filled up the channel below low-water mark for the express purpose of depreciating the value of the plaintiff's property, and of destroying his water-power. The Lehigh river is a navigable stream, and the plaintiff had no grant from the state to use the water for any purpose. The defendant denied that the plaintiff had title to the water-power as riparian owner or otherwise. The court below instructed the jury, however, that between low and high water marks the plaintiff was the owner of the soil, and subordinate to the right to navigate the stream by the public. He had a right to use the water, and could recover for the destruction of his water-power so far as it occurred with relation to the water flowing above the low-water mark. Upon this subject the supreme court, WILLIAMS J., delivering the opinion, held that—

"The grant of land bounded upon a stream not navigable extends *usque ad filum medium aquæ*; but a grant of land bounded upon a navigable river extends to ordinary low-water mark only. Between this line and high-water mark the land of the grantee is, by the nature and necessities of the situation, subject to a servitude in favor of the public. * * * The grantee takes subject to the rights of the public in and upon the highway, and, as between him and the public, he may use his lands below the line of high water for such purposes only as do not interfere with the free flow and navigation of the water that flows over it." "What rights," the learned justice continues, "has a riparian owner in the water of a navigable river flowing between high and low water marks? The water of a stream is not the subject of ownership, in the ordinary sense of that word. * * * The right to the use of the water follows the ownership of the bed in which it flows. The common wealth is therefore the owner of the rivers, and holds them for the use of its citizens. They are public property,—natural highways,—open to all who may have oc-

casion to use them. When the volume of the stream swells in time of high water, its surface remains the surface of the highway, and the riparian owner must do nothing that shall interfere with the use of the highway, or any part of it, by the public up to the line of high water. * * * The owner of the shore, having no ownership in the water, has, as between him and the commonwealth, no greater rights in it than any other citizen. He has no right to erect a dam to turn the water to his mill without a grant from the commonwealth of the right so to do; and, if he erects such a dam without a grant, he is a trespasser, and acquires no title to the water-power resulting therefrom. He stands in the same position as an intruder upon a public road, without right, and liable to removal at any moment. He has an indisputable right as a citizen to the use of the river as a public highway, but as a riparian owner he has no right to obstruct its flow, or to divert its waters, except for domestic purposes, and within certain limits, for purposes of irrigation. If he does erect a dam, and turn the water to his mill, he ordinarily infringes the public right only. * * * Applying these principles to the case now before us, it is clear that the plaintiff was allowed to recover for what did not belong to him. He had no title to the water, whether above or below low-water mark, and he could have no legal right to the power resulting from the erection of his dam. Its destruction was therefore *damnum absque injuria*."

This use seems altogether applicable to the use of the waters of the Savannah river by the plaintiffs for the purpose of flooding their rice fields. The Savannah has been repeatedly held to be a navigable river. See the recent case of *Lawton v. Comer*, 40 Fed. Rep. 480, (affirmed by the supreme court of the United States, decision rendered May 25, 1891,) 11 Sup. Ct. Rep. 840. If the malicious and deliberate diversion of the water by the defendant in the case of *Fulmer v. Williams*, *supra*, so as to destroy the water-power of the plaintiff's mill, is *damnum absque injuria*, much more is this true of the diversion of the waters of the Savannah from the rice canals and ditches of the plaintiffs by the officers of the government, for the improvement of the navigation of the stream, and for the most important uses of the public. In the case of *Henry v. City of Newburyport*, decided by the supreme court of Massachusetts, September 5, 1889, 22 N. E. Rep. 75, it was held that the owner of lands not accessible to navigation from the sea has no cause of complaint because of being deprived, by the erection of walls, or by the filling up of flats, of the ebb and flow of the tide to his premises, or the right thereof to drain from the lands of others; and, further, that such an owner can only maintain an action for damages by reason of nuisance when some right of his own has been invaded. In the case of *Fitchburg R. Co. v. Boston & M. R. Co.*, 3 Cush. 88, it was held, Chief Justice SHAW rendering the opinion, that if the piers of a bridge which is authorized by the legislature, change tidal currents, a littoral proprietor is not entitled to recover the expense of a structure necessary to protect his land. It is incident to the power of the legislature to regulate a navigable stream so as best to promote the public convenience. These cases are valuable, because in Massachusetts, as in Georgia, the low-water line is the boundary of littoral proprietors on the tide-waters. In the case of *Davidson v. Railroad Co.*, 3 Cush. 105, certain riparian proprietors were using for their mills, and for navigation

in connection therewith, certain flats from which the tide wholly ebbs, lying between upland territory and navigable water. The plaintiff had erected a mill, the motive power of which was the ebb and flow of the tide. The defendant, a railroad company, which the legislature had required by the provisions of its charter to pay for private property taken by it, built a solid embankment across the flats, thereby entirely cutting off the flow of the tide, and thus destroying the value of the plaintiff's mill. It was held by the court, upon suit brought to recover the value of the water-right taken, that the plaintiff had no right, as against the public, to have these flats kept open.

The plaintiffs here rely upon the act of the general assembly of Georgia of 1790, (Code, § 2232.) It is as follows:

"All persons owning, or who may hereafter own, lands on any water-courses in this state, are authorized and empowered to ditch and embank their lands, so as to protect the same from freshets and overflows in said water-courses: provided, always, that the said ditching and embanking does not divert said water-course from its ordinary channel; but nothing shall be so construed as to prevent the owners of land from diverting unnavigable water-courses through their own lands."

Aside from the fact that this would seem to deny to the plaintiffs the right to divert the water of a navigable stream through their lands, the act was passed after the adoption, by the state of Georgia, of the constitution of the United States, and is, of course, subordinate to the provision in the latter instrument relating to the control of commerce, and, as a consequence, of the navigable waters, by congress. And there are many authorities to the effect that this control is paramount even where the state has undertaken to make enactments upon the subject of navigation itself. Gould, Waters, § 149, citing *Lyon v. Fishmonger Co.*, L. R. 1 App. Cas. 662; *Ewing v. Colquhoun*, L. R. 2 App. Cas. 839; *South Carolina v. Georgia*, 93 U. S. 4; *Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S. 1; *Cardwell v. Bridge Co.*, 113 U. S. 205, 5 Sup. Ct. Rep. 423; *Bridge Co. v. U. S.*, 105 U. S. 470; *Mobile Co. v. Kimball*, 102 U. S. 691; *Com. v. City of Roxbury*, 9 Gray, 491; Gould, Waters, § 27.

Very great importance is attached by the plaintiffs to the decision of the supreme court of the United States in the case of *U. S. v. Manufacturing Co.*, 112 U. S. 647, 5 Sup. Ct. Rep. 306. There, however, was an actual appropriation of the plaintiffs' lands, and the water-power they were bought to control. There was an actual conversion of private property to public use. Besides, the appropriation was not for the purpose of the improvement of a navigable stream; and the property of the plaintiffs in that case, unlike that involved in the question before this court, was in no way subservient to the government for the public use for which it was taken. It was a distinct exercise of the right of eminent domain, and not, as in the case here, the proper exercise of the legitimate and ordinary functions of the government, from which a consequential damage to the plaintiffs may have resulted. Moreover, congress had distinctly recognized the right of the Great Falls Manufacturing Company

to compensation, and had submitted the liability of the United States for the conversion of the property, to arbitration, the results of which, merely, were affirmed by the supreme court of the United States.

Upon a careful consideration of all that has been advanced by the plaintiffs in support of their claim, we are of the opinion that all the right they have in the ebb and flow of the tide of the Savannah river is subordinate to the control of the government over that navigable stream, for its free navigation by the public.

We are further of the opinion that the free navigation of that stream comprehends, necessarily, all of those improvements which the government is at liberty to make to facilitate and enlarge the interstate and foreign commerce carried upon its waters, and, the sovereign authority of the nation having determined that the waters of the river shall be confined, for the purpose of scouring and deepening the channel, the plaintiffs have no legal claim against the government for the diversion of those waters from their rice fields, or for an increase in the flow of the tide which will fill the canals and ditches they have constructed on the level between low and high water mark; a level which is subservient to the government for the purposes of navigation.

It must be observed, with relation to the claim of damage caused by the overflow of the plaintiffs' lands during the freshets, that they do not stand in the attitude of land-owners above mean or high water level. Their lands are reclamations as appears from the declaration, which would be covered, not only by ordinary high water, but by the ordinary flow of the tide. The government, as we have seen, has found it necessary to change this flow for the purposes of navigation, and the reclamations of the plaintiffs are subservient to that necessity. *Com. v. City of Roxbury*, 9 Gray, 491-495; *U. S. v. Pacheco*, 2 Wall. 587; *Martin v. Waddell*, 16 Pet. 411; *Barney v. Keokuk*, 94 U. S. 324; Gould, Waters, § 27.

If it had been possible, however, to have reached a different conclusion as to the rights of the plaintiffs, we are clearly of the opinion that the court has no jurisdiction to hear and determine the plaintiffs' demand, because it makes a case sounding in tort, and therefore is especially excepted from the operation of the statute extending the jurisdiction of the court of claims to the circuit and district courts of the United States. If it were an action pending between individuals, it would be necessarily *ex delicto*. It is a nuisance to stop or divert waters that used to run to another's meadow or mill. 3 Bl. Comm. 218. Running out a dam into the water-way of a navigable river, giving new direction to the current, causing his neighbor's land to be washed away, is a tort. 1 Add. Torts, § 4. The overflow of lands by a mill-pond is a tort. 4 Amer. & Eng. Enc. Law, p. 978; citing *Wilson v. Myers*, 4 Hawks, 73. See, also, 1 Chit. Pl. pp. 140-142. Tort includes wrong suffered in consequence of the negligence or malfeasance of others, where the remedy at common law is by an action on the case. *Leathers v. Blessing*, 105 U. S. 626-630.

Plaintiffs insist that the dam erected to improve the navigation of the river has raised the level of mean low tide, and the latter result has destroyed their usufruct in the waters of the river for the purposes of rice culture on their lands on Hutchinson's island and on the main-land. They are not suing for the conversion of the land, nor is it alleged that the government has converted to its own use the water-rights connected with the lands, but they are suing for consequential injuries to their water-rights, resulting indirectly from the act of the government, which act was performed for a lawful purpose, and not performed on the land with which the usufruct was connected. It is true that if the property be tortiously taken or converted, the tort-feasor may be sued in trespass or trover, or the injured party may waive the tort, and sue in *assumpsit*, upon the implied contract to compensate. In the latter case the same result follows as if there had been an implied contract, as insisted by the plaintiffs here. *May v. Le Claire*, 11 Wall. 217. This, however, is applicable where there has been an actual conversion of the property, and not an indirect injury to it, resulting from acts which the alleged tort-feasor had the legal right to perform. Any demand of the plaintiffs, therefore, must be based upon the tortious conduct of the defendant's agents; but to constitute a tort two things must concur,—actual or legal damage to the plaintiff, and a wrongful act committed by the defendant. The court being of the opinion that neither of these essentials exists in the case at bar, we feel constrained, on both the questions herein considered, to sustain the demurrer to the plaintiffs' declaration, and to order the case dismissed.

UNITED STATES *v.* WILSON

(Circuit Court, D. Idaho. June 1, 1891.)

1. CRIMINAL LAW—SUSPENSION OF SENTENCE.

Courts have no power to suspend sentence except for short periods pending the determination of other motions or considerations arising in the cause after verdict.

2. SAME—REVOCATION OF ORDER.

When the court has by order indefinitely suspended sentence, it cannot thereafter, and especially at a subsequent term, revoke such order, and proceed to judgment by sentencing the defendant.

(Syllabus by the Court.)

At Law. Indictment for adultery.

Fremont Wood, U. S. Atty.

James H. Hawley, for defendant.

BEATTY, J. On June 7, 1888, the defendant was arraigned in the third district court of Idaho territory upon the charge of adultery, to which, on the same day, he pleaded guilty, and upon his promises there made in open court to obey the laws upon that subject, it was "ordered that the sentence be suspended, and until further orders of this court, and that

said defendant be released, and his bail exonerated." On June 12, 1890, said order was revoked, and by another judge, the successor of the judge who suspended sentence, and on the following day defendant was sentenced to imprisonment, from which judgment he appealed to the supreme court of Idaho, whence the cause has been transferred here.

The questions for determination are, first, the power of a court to indefinitely suspend sentence, and, next, to revoke such order of suspension and to proceed to judgment. There can be no doubt of the right of a court to temporarily suspend its judgment, and continue to do so from time to time in a criminal cause, for the purpose of hearing and determining motions and other proceedings which may occur after verdict, and which may properly be considered before judgment, or for other good cause. In this cause however, the record does not show that the suspension was for any such reason, or for a certain or short time, but on the contrary, it appears it was for such uncertain time as the defendant should continue to remain so favorably impressed with the laws of the land as to obey them. Instead of this being a mere suspension of sentence, it operated as a condonation of the offense, and an exercise of a pardoning power, which was never conferred upon the court. In this I think the court clearly transcended its authority. The court having erred in its order of suspension of sentence, can it subsequently, at another term of court, and especially by a judge, who did not try the case, revoke such order, and proceed to a rendition of judgment? To hold that a court may from time to time, and term to term, revoke its orders, and by new orders attempt the correction of former errors, to say the least, would lead to a most uncertain practice. In support of the court's action in this matter, attention has been called to *People v. Reily*, 53 Mich. 260, 18 N. W. Rep. 849. In that case it appears that after verdict a motion for a new trial was interposed, and, pending its disposition, defendant entered into a recognizance for his appearance from time to time for sentence, which, in the mean time, and for about 13 months after verdict, remained suspended, when judgment was pronounced. This was, on appeal, affirmed, but not without dissent, by one of the most able members of the Michigan bench. The facts in that case are not like those in this. Quite similar to this is the case of *People v. Blackburn*, (Utah,) 23 Pac. Rep. 759, in which it was held the order of suspension could not be revoked, nor sentence be rendered. In support of the foregoing conclusions will be found *People v. Morrisette*, 20 How. Pr. 118; *People v. Brown*, (Mich.) 19 N. W. Rep. 578; *Weaver v. People*, 33 Mich. 296,—and attention has not been called to any contrary authorities. It may be further noted that section 7980, Rev. St. Idaho, contemplates that sentence must be pronounced during the term of court when the conviction was had, unless suspended, pending the consideration of some motion in the cause, or for some good reason, as above stated. It appears that not only had the term passed, but two years had expired, and in the mean time no motion was either made or pending. It is concluded that the territorial court in its order of judgment erred, and it is now ordered that the same be set aside, and the defendant be discharged.

UNITED STATES v. HIGGERSON.

(Circuit Court, D. Idaho. June 1, 1891.)

1. UNLAWFUL COHABITATION—EVIDENCE—TESTIMONY.

In the trial of such offense, as well as of its kindred offenses of adultery and bigamy, as defined by the laws of the United States, proof of the existence of the marriage relation is pertinent; it being a collateral fact which aids in explaining the association of a man and woman, and tends to show whether such association is justified and innocent, or that of unlawful cohabitation.

2. MARRIAGE—EVIDENCE OF BY REPUTE.

The general reputation in the community of the existence of the marriage relation is competent as tending to prove such relation, but is not alone sufficient to establish it.

(Syllabus by the Court.)

At Law. Unlawful cohabitation.

Fremont Wood, U. S. Atty.

James H. Hawley, for defendant.

BEATTY, J. The defendant is charged with the crime of unlawful cohabitation, in violation of section 3, 22 St. U. S. p. 31. After his conviction in the third district court of the territory of Idaho, he appealed to the supreme court of such territory, whence the cause has reached this court. In asking the reversal of the judgment below, the defendant assigns as reasons therefor the insufficiency of the evidence, and errors of the court in the admission of evidence of general repute of marriage, and instructions sustaining such evidence, but upon this hearing has relied chiefly upon the alleged errors. The testimony however, seems sufficient to justify the verdict. It appears, among other things, by several witnesses, that there was no other family in the neighborhood by defendant's name but his; that there were two women there known by his name, and as his wives; that in the year 1888 defendant was found in a small house on his farm with two women and four or five small children, each woman having a small child eight or nine months old; that he said they constituted his two families; that he was afterwards seen by the same witness with the same two women in Soda Springs; that afterwards he had on his farm a house for each woman, not over a quarter of a mile apart; that the women had been seen there for over a year past, and when arrested he told the officer that one of the women was his second wife. It cannot be said the jury reached an erroneous conclusion when they found these facts constituted unlawful cohabitation. On page 21 of record this interrogatory appears: "In that community who is her reputed husband? [It does not appear clearly which woman is meant, but probably the second wife.] Answer. Higgeson." And on page 23 is this: "Question. You stated that the husband of that woman is reputed to be the defendant. Answer. Yes, sir." And on page 28 the court, as part of its instructions, said:

"The court charges you, also, that the question as to whether one of the women named in the indictment is the wife of the defendant is a material issue, and must be proven beyond a reasonable doubt by competent evidence.

It cannot be assumed, and cannot be proven by guessing or common repute. As to the first or either wife the reputed acts of the defendant, and recognition by the defendant of such relation, is evidence of such relation as to either or both of the wives. Repute is a circumstance to be considered in connection with the facts and acts, though a man may not be convicted on reputation alone, even if it be the family of the defendant."

The question raised by the foregoing interrogatories and instruction is the right to establish any collateral fact which would tend to the proof of the offense charged, by the introduction of testimony of the general reputation in the community of the existence of such fact. The crime of unlawful cohabitation is the living with two or more women as wives; of treating and associating with them as such; the giving to the world the appearance that the marital relation exists with them. It is the living with them in the habit and repute of marriage. The statute is to prevent even the appearance of evil, and, as said by the supreme court of the United States, it is "to prevent a man from flouting in the face of the world the ostentation and opportunities of a bigamous household, with all the outward appearance of the continuation of the same relations which existed before the act was passed." The direct evidence to sustain this charge is any which shows that the defendant actually lived at the same time with two or more women, in such manner as would sustain the appearance of maintaining with them the marriage relation. To establish this principal fact, others, collateral in their nature, but bearing upon and tending to prove the main question, may be shown, and among such is that of marriage. It is true the offense charged here may be established without the proof, or even the existence, of actual marriage between the parties; nevertheless, the existence of such relation is a fact which would aid in showing why a man and woman associated with each other; whether their treatment of each other in the presence of their neighbor is that of husband and wife, or simply of acquaintances or friends; whether the favors, attentions, and assistance he gives her are those of the generous friend only, or of the husband. In so far as it explains these matters, it aids in the elucidation of the main issue, and is a pertinent fact. In these cases, and their kindred crimes of bigamy and adultery, no other collateral fact so frequently occurs as this. In such cases, is evidence of the general repute of its existence competent? If the propositions were to show that it was generally reputed in the community that the defendant was living in unlawful cohabitation, or, if charged with adultery, that he was guilty of that, it could not be entertained, any more than would be the evidence of general repute that a defendant committed the murder with which he might be charged. That the fact of marriage, when it is an incidental question in a cause, may be thus shown, has been a proposition of much controversy. If, however, there is any such question that may be so shown, it should be this. The proof of it is frequently required many years after and remote from the place of its occurrence, when the written evidence and the record of it may be lost or are inaccessible, when its eye-witnesses are dead or forgotten. Not only that, but in this coun-

try the laws governing it are unfortunately so varied, some not even requiring any record of it, or even a nuptial ceremony, that the difficulty of direct proof, and the expediency of permitting the indirect, become evident, and more apparent, in this, when the attempt is made to prove a marriage among that sect, which, though they keep a record of it, hide it from the eyes of the courts in the secret and mysterious chambers of the endowment house. Under such circumstances, why should not the fact that a man and woman have lived in a community with the apparent relation of husband and wife, have been received in society and been known as such, have so conducted themselves publicly as to lead their neighbors to believe them such, have by their acts established in the community a general reputation that they are married, be permitted as evidence tending, at least, to show the existence of such relation?

The proposition that marriage can be proven only by the eye-witnesses thereof, or by record evidence, is now overthrown by the great weight of authority, including that of the United States supreme court, which, in the *Miles Case*, 103 U. S. 311, says "that to hold in a bigamy case the first marriage can be proven only by eye-witnesses is to apply to this offense a rule not applicable to any other." In that case the declarations of the defendant were admitted. It is said that "cohabitation and reputation of being husband and wife are usually considered together in questions concerning the proof of marriage. Some authorities favor the idea that reputation, of itself, may be received as sufficient proof, *prima facie*, but it must be uniform and general; and, if there be a conflict in the repute, it will not establish the marriage. On the other hand, its sufficiency in any case has been denied." Also that "such evidence was, after verdict, held sufficient, *prima facie*, to warrant the jury in finding the fact of marriage, the adverse party not having cross-examined the witness, nor controverted the fact by proof." In the proof of pedigree the facts of birth, marriage, and death, and the dates thereof, may be proven by reputation in all cases where they occur incidentally, and in relation to pedigree. 1 Bish. Mar. & Div. §§ 433, 540; 1 Greenl. Ev. §§ 103, 104, 107; *U. S. v. Tenney*, (Ariz.) 8 Pac. Rep. 295. These views are sustained by sufficient authority, as well as by reason, to justify their adoption, and in criminal as well as in civil cases. It must not, however, be concluded that proof of reputation of the marriage relation is alone sufficient; it is but one of the proofs; it only tends to establish the fact which, with other proofs, may become conclusive. This is what the instructions complained of, when all considered together, declare the law to be. They do not go beyond the law as settled by the weight of authority, and are even more favorable to the defendant than some of the authorities. To the contrary is cited the case of *U. S. v. Langford*, (Idaho,) 21 Pac. Rep. 409. This was a case of adultery, at the trial of which, the question, "What was the general repute in that community as to the relations existing between the defendant and Rhoda Dimmich?" was permitted. The full purport of the question cannot be gathered from the report of the case, or what relation between the parties it could be expected the answer to the question would develop; whether it would show,

or tend to show, simply the existence of the marriage relation, or whether, when considered in connection with the immediately preceding questions and answers, it would show directly that the relation sustained was the criminal one charged in the indictment. The reviewing court, however, seemed to treat the question as an effort to establish by common repute the existence between the parties of the bigamous relation charged in the indictment; to prove by common repute the crime itself. If such was the object of the question, the conclusion of the court was unquestionably correct. If, on the contrary, the court meant to declare that such evidence of the existence of the marriage relation was incompetent in any case, its view cannot be followed here.

It being concluded in this cause that the evidence was sufficient to justify the verdict, and that there was no error in the admission of the testimony, or in the giving of the instructions complained of, it is therefore ordered that the judgment appealed from be affirmed.

UNITED STATES v. DURANT.

(District Court, E. D. South Carolina. July 8, 1891.)

POST-OFFICE—MAILING OBSCENE MATTER.

A letter in which the person to whom it is addressed is called "a son of a bitch," inclosed in a sealed envelope, does not render the sender liable, under Rev. St. U. S. § 3893, as amended by Act Cong. Sept. 26, 1888, prohibiting the mailing of matter "upon the envelope or outside cover of which, or any postal-card upon which, are any delineation, epithets, terms, or language" of an indecent, libelous, or defamatory character, etc.

At Law. Indictment for mailing obscene matter.

A. Lathrop, Dist. Atty.

Thomas E. Miller, for defendant.

SIMONTON, J., (*charging jury*.) The defendant sent through the mail, sealed, a letter addressed to one E. H. Deas. In the letter he speaks of a prosecution set on foot against him by Deas for forgery, and of his acquittal, and, referring to Deas' testimony, calls it a lie, winding up by calling him "a lying son of a bitch." He is indicted under section 3893, Rev. St. U. S., as amended by act of congress approved September 26, 1888. This section punishes the sending through the mail, sealed or unsealed, "any obscene, lewd, or lascivious book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character." The district attorney rests on the fact that this letter is obscene, within the words of this section. It seems to me that this section is intended to forbid the dissemination through the mails of obscene literature, of the use of words or pictures, appealing to the animal passion, stimulating it, corrupting and debauching the mind and heart, (see *U. S. v. Clark*, 43 Fed. Rep. 574;) and that when congress seeks to prevent the use of the mail

v.46f.no.12—48

for the employment of language of an insulting character it confines itself to postal-cards and letters on the envelope of which this language appears. In the act containing the amendment to section 3893, on which this indictment is framed, is a section declaring unmailable "matter upon the envelope or outside cover of which, or any postal-card upon which, are any delineation, epithets, terms, or language of an indecent, lewd, lascivious, obscene, libelous, scurrilous, defamatory, or threatening character, or calculated, by the terms or manner or style of display, and obviously intended, to reflect injuriously upon the character or conduct of another." The letter of the defendant comes within this description, and, as he sealed the letter, he did not violate the law. The jury will find the defendant not guilty.

BEACH *v.* UNITED STATES.

(*Circuit Court, N. D. California.* June 9, 1890.)

CRIMINAL LAW—REFUSAL OF WITNESS TO TESTIFY—MISCONDUCT OF COUNSEL.

Where a witness called by the government refuses to answer certain questions on the ground that the answers may tend to criminate him, it is reversible error for the court to charge the jury that such refusal is a circumstance from which it might be argued that the object of the witness was to shield the defendant rather than himself, and to allow the district attorney to argue that such refusal was a circumstance to be considered by the jury in making up their verdict.

On Writ of Error from District Court.

S. M. Buck and *A. P. Van Duzer*, for plaintiff in error.

John T. Carey, for the United States.

Before FIELD, Justice, and SAWYER, Circuit Judge.

FIELD, Justice. We are clear that the court below erred in allowing the district attorney to argue to the jury that the refusal of Marks to answer certain questions on the ground that his answers might criminate himself, was a circumstance to be considered by them in making up their verdict; that they had a right to consider whether it was not his real object to protect the defendant, and not himself; and that, "if he was thus particular to protect the defendant," it must have been from a knowledge that his answers might criminate, not himself, but the defendant. It was also error in the court, while stating generally to the jury that the refusal of Marks to answer could not be considered as evidence against the defendant, to accompany the statement with the charge that it was a fact in the case from which the district attorney had a right to argue that the refusal was not to save himself, but to save the defendant; that he had a right to argue from the character of the questions put, and the persistent refusals of the witness to answer any of them, and from the fact that it was not apparent to any one how the answers to the questions, or to some of them, could criminate him, "that his real object was

to protect Mr. Beach, and not himself; and that, when he was so particular to protect Mr. Beach, it must have been from the knowledge that his answers might criminate him;" that this was a question of inference and argument; and that the inference to be drawn from it, and how important it was in determining the main issue in the case, was for the jury to decide. The refusal of the witness to answer the questions, if he thought his answers would criminate himself, was his constitutional right, which the defendant could not control, and no inference should have been permitted to be drawn against the defendant because of the assertion by the witness of this right to protect himself. Marks was called by the government. If he had testified, his testimony might have been in favor of the defendant, though criminating himself. It might have entirely exonerated the defendant. To infer that the very opposite would have been or might have been the effect of his testimony, had it been given, was unwarranted. The intimation even that any such inference was justifiable, as plainly is to be drawn from the charge of the court, and its permission to allow the district attorney to argue to that effect to the jury, was calculated to work injustice to the defendant, and to lead the jury to yield to suggestions and suppositions rather than to the actual evidence in the case. It would, indeed, be strange doctrine that any one could be found guilty, or even that his guilt could be seriously debated, because another party, called as a witness, who had no relations and was not a conspirator with him, or charged in the same indictment, had refused to testify in order to protect himself. There is neither reason nor authority for any such doctrine. For these errors the judgment must be reversed, and the cause remanded for a new trial.

UNITED STATES v. TRUMBULL.

(District Court, D. Washington, N. D. June 15, 1891.)

CHINESE—UNLAWFUL LANDING—AIDING AND ABETTING—INDICTMENT.

An indictment under Act Cong. May 6, 1882, (22 St. p. 61,) making it unlawful for any person "to aid or abet the landing in the United States from any vessel of any Chinese person not lawfully entitled to enter the United States," must state facts sufficient to show that the Chinese person was one prohibited from landing, and that he was brought on the same vessel from which he landed on a voyage which terminated at the time of the landing. It is demurrable if it merely shows that he was a Chinese laborer, and alleges that he was not lawfully entitled to enter the United States, and that he landed from a certain vessel.

At Law.

Defendant was indicted for knowingly aiding and abetting the landing in the United States of Chinese persons, not lawfully entitled to enter the United States. Some of the counts charged that defendant did "knowingly aid and abet the landing in the United States from the steam-vessel City of Kingston of a certain Chinese person not lawfully entitled to enter the United States, to-wit, one * * *." Others charged that

he knowingly aided and abetted the landing of a certain named Chinese person by falsely representing such person to be a merchant residing in the United States, knowing him to be a laborer. None of the counts set forth facts to show that the Chinese person alleged to have been aided in landing was not entitled to land, except by charging that he was "not lawfully entitled to enter the United States." Defendant demurred to the different counts of the indictment, on the ground that none of them stated facts sufficient to constitute offenses or an offense against the laws of the United States.

P. C. Sullivan, for the United States.

A. R. Coleman, for defendant.

HANFORD, J. This indictment is founded upon the acts of congress by which the coming into the country of Chinese laborers was intended to be restricted and prohibited, and particularly the eleventh section of the act of May 6, 1882, (22 St. U. S. p. 61,) which reads as follows:

"Sec. 11. That any person who shall knowingly bring into, or cause to be brought into, the United States by land, or who shall knowingly aid or abet the same, or aid or abet the landing in the United States from any vessel of, any Chinese person not lawfully entitled to enter the United States, shall be guilty of a misdemeanor, and shall, on conviction thereof, be fined in a sum not exceeding one thousand dollars, and imprisoned for a term not exceeding one year."

Manifestly the intention of the grand jury was to charge the defendant by this indictment with the commission of criminal offenses committed by aiding and abetting the landing in the United States of Chinese persons who had been unlawfully brought into the country by vessels, but the pleading is fatally defective, because it does not allege that the Chinese persons named were brought into the United States in the vessels named, or that they ever were unlawfully brought into the United States. It only goes to the extent of describing the Chinese as persons not lawfully entitled to enter the United States,—that is, if they were now out of the United States they would not be lawfully entitled to enter; and it may be assumed that, if they were not in the country prior to the enactment of the exclusion acts, they must have entered unlawfully. But the allegations of this indictment do not allege facts sufficient to show the court, after indulging in all permissible presumptions, that their entry was unlawful. All that is alleged is not inconsistent with a state of facts which would render the landing of the persons named, at the time and place mentioned, from the vessel named, lawful and proper; for example, if they were Chinese laborers, who were in the country prior to May 6, 1882, and who had remained within it continuously from that time, and who landed from the vessel mentioned at the time stated, after making a passage in her from some other point within the United States to the place of landing, without having during the journey been outside of the United States. In such a case, there could be no violation of law by aiding and abetting such landing. The law must be so interpreted, by reference to all its parts, as to give effect to the manifest intention of

congress in enacting it. I think the intention is quite clear to make the aiding and abetting of the landing of Chinese persons criminal only in those cases in which the bringing of such persons in the same vessel and on the voyage terminating at the time of the landing; and it is therefore necessary in a good indictment to allege facts sufficient to make it appear that the landing was itself unlawful by reason of being an unlawful entry into the country of persons prohibited from coming.

In prosecutions for offenses against the laws of the United States, an indictment in which the charging part follows the language of the statute upon which it is founded is not sufficient, unless such words indicate the acts constituting the offense. Every defendant in a criminal case has a constitutional right to be informed by the indictment of the nature and cause of the accusation against him, and the cause must be stated with such particularity as to indicate clearly the facts to be proven on the trial. Article 6, Amend. Const. U. S.; *U. S. v. Cruikshank*, 92 U. S. 542. This indictment does not state the facts with enough of the details to show how the defendant aided or abetted the landing of any Chinese person, and therefore does not either show how he has violated the law, or that there has been any violation.

The demurrer interposed will therefore be sustained; but I will hold the defendant until the matter can be passed upon by another grand jury, and will order the case to be submitted to the next grand jury to be convened at this place.

HAT-SWEAT MANUF'G CO. v. PORTER *et al.* SAME v. AUSTIN *et al.* SAME v. MCGALL *et al.* SAME v. BERG *et al.* SAME v. MCCHESENEY *et al.* SAME v. ELLOR *et al.*

(Circuit Court, D. New Jersey. June 20, 1891.)

1. SUIT FOR ACCOUNTING—JURISDICTIONAL AMOUNT.

In a suit against manufacturers to recover royalties for use of a patent, and for an accounting, an objection on demurrer that the amount involved is insufficient to give the circuit court jurisdiction is without merit if the bill on its face shows that the amount is sufficient. Until a decree for an accounting is made, proof of the amount recoverable would be premature.

2. PATENTS FOR INVENTION—LICENSE—FRAUDULENT REPRESENTATIONS.

The owner of a patent on hat-sweats, having sued for infringement, to compromise, granted defendants a license to use the patent in their manufactures, in consideration of a certain royalty, and agreed to give them a rebate of 50 per cent., and not to grant a license to any other manufacturer except for the same royalty, without rebate. The terms of the licenses were kept secret from other manufacturers, and the owner of the patent issued to them a circular stating that the licenses had been granted to the other manufacturers for the specified royalty, but saying nothing as to the rebate, and through his agents the other manufacturers were induced to accept licenses under the terms specified in the circular. *Held*, that the owner's fraudulent representations preclude his recovery of the royalties.

In Equity.

John R. Bennett, for complainants.

Wetmore & Jenner, for defendants.

Before ACHESON and GREEN, JJ.

ACHESON, J. These six cases were argued together, and, as they are substantially alike in their facts, this opinion will apply to them all. Upon the question of jurisdiction little need be said. The want of jurisdiction was set up *in limine*, and the question was considered and passed on by the judge then holding this court, whose carefully prepared opinion is to be found in 34 Fed. Rep. 745. His decision sustaining the jurisdiction of the court we accept as correct, and conclusive of the question. It is, indeed, now further urged that the court is without jurisdiction because of the insufficiency of the amounts involved. But on the face of each of the bills the amount in controversy is over the jurisdictional sum. True it is that the fact has not yet been established by proof. But, no decree for an account having yet been made, proof of the amounts recoverable by the plaintiff under the allegations of the bills would have been premature. We are therefore of the opinion that at the present stage of the cases this objection is not well taken.

We pass then to a consideration of the merits of the controversies. The foundation of each of these suits is an agreement of license issued by the plaintiff to the defendants, respectively, purporting, upon certain conditions, to license them to make hat-sweats under certain recited letters patent, at specified rates of royalty. The licenses were issued in the year 1884, and they are alike in their terms. The defendants made returns and paid royalties up to different dates in the latter part of the year 1886 and early part of 1887, when they refused to pay further royalties, on the ground that they were induced by the plaintiff to execute the licenses by means of fraudulent representations made by the plaintiff's agents. The defense in each case, in brief, is that the agreement sued on is based on a fraud practiced by the plaintiff upon the defendants, whereby they were induced to accept the license, and that upon discovering the imposition they rescinded the contract. In disposing of the cases we will not undertake to recite or discuss at any length the voluminous proofs. They have received our most careful consideration, and all that it is needful for us to do is to state our conclusions of fact and law. It is shown that prior to December 1, 1883, the corporation plaintiff had brought several suits for the violation of its patents, which were defended by an unincorporated association of hat manufacturers, composed of 21 companies and individuals, who were extensive and leading hat manufacturers, styling themselves "The Associated Hat Manufacturers." Negotiations for the settlement of the litigation ended in a secret agreement in writing, dated December 1, 1883, between the plaintiff and the members of this association, whereby it was agreed that the plaintiff should grant to them, respectively, licenses under its patents at certain rates of royalty, but that each of the members of the association so licensed should receive back from the plaintiff a rebate of 50 per centum of the royalties paid by them, respectively, and the plaintiff thereby agreed not to grant licenses for any lower rates of royalty than those stated, and that it would exact from all other licensees the full rates

of royalty, without any rebate. Upon the execution of this agreement, the members of the association took licenses in ordinary form, and thereafter made their returns and received back their rebates. During much of the time these rebates were paid back in a roundabout way, and under the fictitious name of "earnings," to obscure the true nature of the transaction. Soon after the signing of the agreement, the plaintiff sent out to the trade a circular dated December 1, 1883, wherein it was announced:

"The Associated Hat Manufacturers, comprising most of the leading fur and wool hat manufacturers in the country, who undertook the defense of the suits brought by the company under its patents against various infringers in New York city and elsewhere, have, after a very thorough investigation, by the advice of their counsel, acquiesced in the rights of the company, and have admitted the validity and sufficiency of its patents, and have agreed to take licenses to manufacture for their own use under the same, at the schedule of royalties hereto annexed. The company is now prepared to extend the privileges to any and all hat manufacturers, and to grant licenses to them to manufacture for their own exclusive use, upon their effecting satisfactory settlement for previous user."

Here followed a "schedule of royalties required to be paid [the circular declared] by all licensees of the company." It is shown that the several defendants, all of whom had previously been making the hat-sweats, were induced to execute and accept the licenses in suit, at the rates of royalty specified in the circular, by reason of representations made to them by the plaintiff's agents, authorized to negotiate the licenses, that all the plaintiff's licensees were on the same footing, and paid the same royalties. We think the representations so made were quite material, for they were to the effect, if not in terms, indeed, that the leading hat manufacturers in the whole country were on an equality in respect to royalties, which in the sharp competition of trade was highly important to the defendants if they took licenses. We are satisfied that the respective defendants believed the representations so made to be true, and acted on the faith thereof in taking licenses. That the representations were false is certain, and we think the plaintiff's agents knew them to be untrue. But whether or not they had knowledge, the plaintiff is responsible for their statements, especially in view of the false and misleading circular it had issued to the trade.

Under the circumstances disclosed by the proofs, we are of the opinion that the several defendants acted with sufficient promptitude in repudiating the license after discovering the fraud. In some instances the information which first reached them was under the seal of confidence, and they were not at liberty to act upon it. Moreover, it was no easy thing to get at the truth, as the agreement between the plaintiff and the members of "The Associated Hat Manufacturers" was kept a close secret. Indeed, that there was a written agreement first became certainly known to the defendants during the progress of these cases, and its production before the examiner was accomplished with great difficulty, and eventually was effected only under the pressure of an order of court.

Such being the material facts of the case, we have no difficulty as to the law. The plaintiff is in a court of equity. The substantial relief sought is the specific enforcement of these contracts of license. But no such relief is obtainable where the contract has had its inception in the plaintiff's fraud, and was obtained from the defendants by misrepresentation and deceit. Upon the proofs, the plaintiff is in no position to successfully invoke the intervention of a court of equity for relief of any nature. We may add that our conclusion is in accord with that of Judge LACOMBE in the case of *Hat-Sweat Manuf'g Co. v. Waring*, 46 Fed. Rep. 87, 106, where the facts were essentially the same as they are here.

There must be a decree, in each of the cases, dismissing the bill, with costs.

GREEN, J., concurred on all points.

ANDERSON v. SAINT.

(Circuit Court, W. D. Pennsylvania. July 2, 1891.)

1. PATENTS FOR DESIGN—IMPROVEMENTS.

A patent for an improvement in a design is valid where the description in the specification, referring to accompanying drawings, and explaining the same, shows that the new design is original and distinctive of itself, and an improvement as compared with other designs, and not merely an improvement on some other particular design.

2. SAME—PATENTABILITY.

A design for a mantel, consisting of a combination of scrolls and ornamentations, producing an effect upon the eye substantially different from any previous design, is patentable, though many of the elements going to make up the design have been in use before.

3. SAME—FAILURE TO MARK DATE OF PATENT—PLEADING.

In a suit for infringement of a patent, the defense that complainant's articles were not marked with the date of his patent, as required by Rev. St. U. S. § 4900, cannot be raised for the first time at the hearing, but must be raised by the answer.

4. SAME—PENALTY FOR USE OF PATENT—EVIDENCE.

Defendant purchased mantels, of a design patented by complainant, from a manufacturer who had no license to use the design, and resold them. A circular had been addressed to defendant by complainant giving notice that the design was protected by patent, and complainant's agent testified that, in a conversation with defendant in regard to his use of the design, the latter stated that complainant should hold the manufacturer to account, and not him, (defendant.) *Held*, that the evidence showed that defendant knew that the manufacturer had no license to use the patent, and was liable for the penalty of \$250 prescribed by Act Cong. Feb. 4, 1887, making it unlawful for any person, during the term of letters patent for a design, to sell any article of manufacture containing the design, knowing that the design has been applied without consent of the owner of the patent.

In Equity.

Wm. L. Pierce, for complainant.

Levi Bird Duff, for defendant.

REED, J. The bill in this case alleges infringement of design patent No. 19,876, for which an application was filed March 17, 1890, and let-

ters patent granted June 3, 1890. The answer has raised several defenses, first of which to be considered is that the specification of plaintiff's patent does not contain a written description of the invention in such full, clear, and exact terms as to distinguish the same from designs before known. The specification states that William Anderson has invented new and useful improvements in a design for mantels. The description refers to accompanying drawings, showing a front and a sectional elevation of the mantel, respectively, and the description contains an explanation of the drawings, and of the letters which designate the several parts of the mantel. The claim is:

"The design for a mantel herein described and shown, consisting of the pilasters, *a*, the caps, *c*, the brackets, *m*, the facing pieces, *f*, and corner pieces, *g*; the frieze, *h*, backing strip, *k*, and moulding, *l*; the mantel board, *b*, side, *n*, and fire strips, *o*,—substantially as described."

Defendant's counsel has argued that the patent is void because the statute does not authorize patents for improvements in designs; and if not void for that reason, then it is void because, being for improvements, the specification does not distinguish between what is new and old. In *Wood v. Dolby*, 7 Fed. Rep. 475, it appeared that the specification used the expression, "a new and improved design for jewelry settings;" and the defendant claimed that a patent for an improved design was not within the statute, which only provides for patents for new and original designs. The court said:

"Perhaps, as has been argued for the defendant, the statute was intended to protect such designs only as would be original and distinctive of themselves, and not those which would be mere improvements upon others; but if so, the word 'improved,' in this patent, is not understood as representing that this design is a mere improvement upon another, especially as no other is mentioned, but is considered to mean that this design is of itself new and distinctive, and improved as compared with others, and, in connection with the new, to represent that it was original with the orator."

And in the case of *Dobson v. Dornan*, 118 U. S. 10, 6 Sup. Ct. Rep. 946, the supreme court held the specification of letters patent for a design for a carpet as setting forth a sufficient description and claim, and the patent valid, in which the inventor stated that he had—

"Invented and produced a new and original design for carpets, of which the following is a specification: The nature of my design is fully represented in the accompanying photographic illustration, to which reference is made. I claim as my invention the configuration of the design hereunto annexed, when applied to carpeting."

Under these authorities, I think the defendant's objections are not well taken, and the patent valid in this respect.

Defendant's answer further avers that the design was used, in combination and detail, more than two years before the plaintiff's application for a patent, and is not novel or original. In this connection, defendant's counsel has contended that the testimony shows sales by the plaintiff before obtaining his letters patent, and that, under the law, sales and public use, at any time (no matter how short) before the letters patent were granted, invalidate the patent. The testimony shows sales by

the plaintiff, of mantels bearing his design, within two years before filing his application for a patent, but does not show any sales prior to that time. I have already held in the case of *Anderson v. Eiler*, 46 Fed. Rep. 777, that such sales and public use must be more than two years before the filing of the application, and, for the reasons given there, now hold this objection as not well taken. The testimony in relation to the patent in issue in this case does not show any acts on the part of the plaintiff from which abandonment by him of his rights can be presumed or inferred. The testimony upon the question of want of novelty shows the manufacture and sale by Schuette & Co. of mantels of different designs, and photographs of some of these designs were offered in evidence. Schuette & Co. have had mantels of these designs on sale since January, 1886. Defendant's counsel also offered in evidence a book called the "Universal Moulding Book," and another called "Thompson's Album of Mantels," both of which had been published long prior to the filing of plaintiff's application for a patent, and both of which books were for general use in the trade. In the well-known case of *Gorham Co. v. White*, 14 Wall. 511, the supreme court say:

"The appearance may be the result of peculiarity of configuration, or of ornament alone, or of both conjointly; but, in whatever way produced, it is the new thing or product which the patent law regards. To speak of the invention as a combination or process, or to treat it as such, is to overlook its peculiarities. * * * A patent for a product is a distinct thing from a patent for the elements entering into it, or for the ingredients of which it is composed, or for the combination that causes it. We do not say that, in determining whether the two designs are substantially the same, differences in the lines; the configuration, or the modes by which the aspects they exhibit are not to be considered; but we think the controlling consideration is the resultant effect. * * * What is the true test of identity of design? Plainly, it must be sameness of appearance, and mere differences of lines in the drawing or sketch. A greater or smaller number of lines, or slight variances in configuration, if sufficient to change the effect upon the eye, will not destroy the substantial identity. * * * If, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other, the first one patented is infringed by the other."

Where a patent was for a design consisting of the representation of a bird upon a branch or twig, with various accessories, and the evidence showed several pre-existing bird designs, held, that the design was yet new and original, since none of the alleged anticipations were like it in appearance, either in outline or detail. *Wood v. Dolby*, 7 Fed. Rep. 475. A claim is not defeated merely because scrolls and ornamentation similar in effect to the scrolls and ornamentation described have before been employed, if a new idea is embodied in their method of their arrangement. The statute permits a patent for any new, useful, and original shape or configuration of any manufacture; and, where the arrangement of ornament and shape is new, useful, and original, the invention is patentable. *Simpson v. Davis*, 12 Fed. Rep. 144; Judge BENEDICT saying:

"Against this claim the only defense made is that the distinctive features of the newel-post described were to be found in other newel-posts prior to the date of the plaintiff's invention, and many of them, in fact, copied by the inventor himself from newel-posts erected in New York. But here the difficulty with the defense is that there is no evidence that any newel-post substantially similar in shape and configuration to the one described in the plaintiff's patent had ever been designed. The arrangement of ornament and shape presented by the plaintiff's post is new, useful, and original."

To the same effect is *Kraus v. Fitzpatrick*, 34 Fed. Rep. 39. In the present case no mantel which has been shown in evidence to have been designed before the plaintiff's mantel is like the plaintiff's in appearance, either in ornament, shape, or configuration. The Schuette mantels, in some of the details of ornamentation, are similar to the plaintiff's mantel, but the difference between the two designs is plain to the eye, even, of the ordinary observer. In neither of the books offered in evidence do I find any design which, under the rules I have cited, resembles the complainant's design. In my judgment his patent is valid upon the question of novelty.

Defendant further claims that the design is a mechanical aggregation of old forms and ornaments, shows no invention, and is not patentable.

"Design patents stand on as high a plane as utility patents, and require as high a degree of exercise of the inventive or originative faculty. In patentable designs a person cannot be permitted to select an existing form, and simply put it to a new use, any more than he can be permitted to take a patent for a mere double use of a machine; but the selection and adaptation of an existing form may amount to patentable design, as the adaptation of an existing mechanical device may amount to patentable invention." *Electric Manuf'g Co. v. Odell*, 18 Fed. Rep. 321.

"Invention indicates genius, and the production of a new idea. Mechanical skill is applied to an old idea, and suggests how it may be modified, and made more practical." *Belting Co. v. Magowan*, 27. Fed. Rep. 362.

In *Untermeyer v. Freund*, 37 Fed. Rep. 342, Judge COXE says:

"The defendants introduced a large number of tracings from drawings found in volumes belonging to the Astor Library. * * * None were designed for watch-cases, and none, if put on a watch-case, would be mistaken for the complainant's design. None, if made now for the first time, would infringe; none can be said to anticipate. It is probably true that an expert, with the patent before him, can select from these drawings every separate feature of the design; often finding two or three of them in similar juxtaposition. The drawings would not, however, suggest the design to one who had not seen it before. A design requires invention, but a different set of faculties are brought into action from those required to produce a new process or a new machine. In each case there must be novelty, but the design need not be useful, in the popular sense. It must be beautiful. It must appeal to the eye. * * * If it presents a different impression upon the eye from anything which precedes it; if it proves to be pleasing, attractive, and popular; if it creates a demand for the goods of the originator, even though it be simple, and does not show a wide departure from other designs,—its use will be protected. * * * It is impossible to read the literature upon this subject without being convinced that the courts, though applying the same rules, have looked with greater leniency upon design patents than patents for other inventions. From the nature of things, this must beso. A design patent must relate to subject-matter comparatively trivial. The object of the law is to encourage

those who have industry and genius sufficient to originate objects which give pleasure through the sense of sight."

In *Redway v. Stove Co.*, 38 Fed. Rep. 582, Judge SAGE says:

"The design must be new, original, and an invention. But there need not be a great invention. That is not essential to the validity of any patent. The statute must have a construction reasonable, and at the same time favorable to its beneficial operation. * * * The design patented to complainants displays invention, and is not anticipated by any of the designs produced upon the hearing. It is not a mere aggregation of parts, as claimed by the defendant, not only for the reasons already suggested, but also because, as testified, it is a conventional design. And in this very respect it displays invention."

In *Hollister v. Manufacturing Co.*, 113 U. S. 59, 5 Sup. Ct. Rep. 717, the supreme court say, in speaking of the improvement in question in that case:

"It is but the display of the expected skill of the calling, and involves only the exercise of the ordinary faculties of reasoning upon materials supplied by a special knowledge, and the facility of manipulation which results from its habitual and intelligent practice; and is in no sense the creative work of that inventive faculty which it is the purpose of the constitution and the patent laws to encourage and reward."

In *Atlantic Works v. Brady*, 107 U. S. 192, 2 Sup. Ct. Rep. 225, the supreme court say:

"The design of the patent laws is to reward those who make some substantial discovery or invention, which adds to our knowledge, and makes a step in advance in the useful arts. Such inventors are worthy of all favor. It was never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea which would naturally or spontaneously occur to any skilled mechanic or operator in the ordinary process of manufactures."

Keeping in mind the limitations and principles of the cases I have cited, I think the design shows invention. It is necessarily a small invention. The complainant was restricted within narrow limits. His mantel must conform to the general shape and configuration of mantels, to be of any utility. To be marketable, the design must be simple, not elaborate. Remembering this, the design shows invention. It differs in appearance from prior designs shown to the court. No previous design would be held, under the authorities, to be an infringement of complainant's design, if subsequent to it. It is a conventional design, and, while some of its elements are old, still the combination has resulted in a new and harmonious design. It was the production of a new idea, and not the result of mechanical skill applied to an old idea. An examination of prior designs would not suggest complainant's design to an expert who had not seen it before. It presents a different impression to the eye from anything which has preceded it, and is pleasing and attractive. The testimony shows that complainant's mantel has commended itself to the trade, and immediately became popular. This public acceptance is to be considered as persuasive in favor of the invention, and has also a bearing upon the question of utility. *Box Co. v. Nugent*, 41 Fed. Rep. 139; *Simpson v. Davis*, 12 Fed. Rep. 144; *Stearns v. Phillips*, 43 Fed.

Rep. 792. Part of this popularity was doubtless due to certain mechanical improvements in construction, which rendered the mantel more durable, and less likely to be injured in handling and shipping; but the testimony shows that the popularity was largely due to the design. The case of *Lehnbeuter v. Holthaus*, 105 U. S. 94, has a direct bearing upon the question of utility, as well as novelty; the supreme court saying:

"The patent is *prima facie* evidence of both novelty and utility, and neither of these presumptions has been rebutted by the evidence. * * * The fact that it has been infringed by defendants is sufficient to establish its utility as against them."

The patent may be sustained either as for a new and original design for manufacture, or as for a new, useful, and original shape or configuration of an article of manufacture. *Manufacturing Co. v. Adkins*, 44 Fed. Rep. 280; *Simpson v. Davis*, *supra*.

Defendant's counsel has raised the question as to the failure of complainant to mark his mantels as patented, accompanied by the date of the patent, as required by section 4900 of the Revised Statutes. The mantels were stamped with the words, "Our designs patented," but no date was given. Notice was given verbally, and by written circular, to the defendant by plaintiff, but no date appears to have been mentioned; and it was held in *Association v. Tilden*, 14 Fed. Rep. 740, that the notice of the existence of the patent must also be accompanied by notice of the time when the patent was granted. This defect would go to the question of damages, were it not for the fact that it is raised for the first time at the hearing, and, not being raised by the answer, cannot now be considered. *Rubber Co. v. Goodyear*, 9 Wall. 788.

No question arises as to the infringement by defendant. It is substantially admitted by the answer; and, even if it were not, it was conceded by defendant's counsel on the argument, and the testimony clearly shows it.

One other question remains to be considered. Complainant's counsel, at the hearing, gave notice that, in the event of a favorable decision, he would move for a decree imposing the penalty of \$250 provided by the act of congress of February 4, 1887. Testimony has been taken on both sides upon this question, and counsel have argued it; so that it may be properly considered at the present time. The act provides that, during the term of letters patent for a design, it shall be unlawful for any person other than the owner, without the license of such owner, to apply the designs secured by such letters patent, or any colorable imitation thereof, to any articles of manufacture for sale, or to sell or expose for sale any article of manufacture to which such design or colorable imitation shall, without the license of the owner, have been applied, knowing that the same has been so applied. And the act further provides that any person violating the provisions of the act shall be liable to a penalty of \$250. That portion of the act which is penal in its nature must be strictly followed, and the defendant brought within its letter and spirit. The complainant must show that the defendant, who was a dealer, not a manufacturer, sold the mantels in question in this case, knowing that

the maker had no license to apply complainant's design. In a case against a maker, he would know he had no license; and proof of manufacture and want of license would satisfy the statute. *Pirkl v. Smith*, 42 Fed. Rep. 410. But in the present case the complainant must go one step further, and prove the knowledge by the dealer of lack of license by the maker. Complainant's counsel concedes this, but contends that he has proven such knowledge, or facts and circumstances from which it can be inferred. It appears that this defendant purchased the mantels which infringe from Edward Germain, a manufacturer of East Saginaw. Germain had no license from complainant to apply or use his design. The patent was granted June 3, 1890. In the same month a circular, signed by Anderson and addressed to the defendant at his place of business, was deposited in the post-office at complainant's place of business. The presumption is that it reached him. *Rosenthal v. Walker*, 111 U. S. 185, 4 Sup. Ct. Rep. 382. That circular stated: "Our mantels are now protected by design patents, and which means that any parties manufacturing after any of our designs will be prosecuted for infringement." A. M. Turner, agent for the complainant, testifies that he had a conversation with defendant, shortly after the patents were granted, on the subject, and the defendant told him that he thought the complainant "should go for Germain instead of him, [the defendant.]" Mr. Saint was called as a witness in this case on other matters, but was not examined by his counsel on this matter. I think the testimony warrants the conclusion that he was fully aware when he sold mantels of this design after June, 1890, that the maker had no license from complainant. It may be possible that some of the mantels which he sold after this period were made and purchased by him before June 3, 1890, including the one sold to complainant's witness; but this is a fact peculiarly within his own knowledge, and he has not seen fit to testify on the subject. It would be matter of defense in any event, and complainant is not obliged to prove the contrary, in order to get the benefit of the act of 1887. I think the complainant is entitled to move for the penalty imposed by the act of 1887, if he so desires. Let a decree be drawn in accordance with this opinion.

JACOBSON *et al.* v. ALPI *et al.*, (seven cases.)

(Circuit Court, S. D. New York. June 18, 1891.)

PATENTS FOR INVENTIONS—PRELIMINARY INJUNCTION—PRIOR ADJUDICATION.

Where a prior adjudication sustaining a patent is decided on the ground that the defendant's own testimony that "he did not think there was any invention in the patent" is not sufficient to overcome the *prima facie* effect of the patent, such decision is not sufficient to justify the issuance of a preliminary injunction, restraining an alleged infringement of the patent, where the existence of an anticipating device is shown on the application for injunction by evidence which is undisputed, except by the opinion of an expert.

In Equity. Motion for preliminary injunction.

Walter R. Beach, for complainants.

Edward K. Jones, for defendants.

LACOMBE, Circuit Judge. The patent for the branched foundation for artificial flowers (Jules Lambert, No. 264,308, Sept. 12, 1882) has never been judicially sustained, and there is not sufficient proof of public acquiescence to take the place of such adjudication, and justify the issuing of a preliminary injunction. The patent for an improvement in gauges for making foundations for artificial flowers (Jules Lambert No. 276,430, April 24, 1883) was sustained by Judge WHEELER in *Lambert v. Hofheimer*, 18 Fed. Rep. 654. It appears from the opinion in that case, however, that the only proof introduced by the defendant was his own testimony that "he did not think there was any invention in the patent;" no reasons being given for such opinion. The court reached the conclusion that such testimony was not sufficient to overcome the *prima facie* effect of the patent; the device, in the opinion of the court, seeming "to be quite ingenious, and well worthy to be called the result of the exercise of inventive faculties, especially in the absence of any proof of prior contrivance of this sort." A very different case is made out upon this motion. Undisputed testimony shows the existence for years of a gauge for making fringes, etc., which is plainly a prior contrivance of the same sort as the patent. Whether or not the complainant may be able to differentiate this fringe gauge from his own contrivance sufficiently to disclose patentable invention in the mere shifting of the position of the pins, which is the only apparent difference between the two, may be left for determination at final hearing. His case is certainly not strong enough on these papers to warrant the granting of a preliminary injunction. A prior adjudication sustaining a patent, where the defense interposed was so weak as in *Lambert v. Hofheimer*, is not necessarily constraining, when, upon a subsequent application for a preliminary injunction, the existence of an anticipating device is shown by testimony which, as in this case, is undisputed save by the opinion of an expert.

CHALLENGE CORN-PLANTER CO. v. GEARHARDT *et al.*

(Circuit Court, S. D. Ohio, E. D. July 7, 1891.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—CORN-PLANTERS.

Letters patent No. 279,822, June 19, 1883, to Levi Schofield, for improvement in corn-planters, consisting in the combination with a tooth seed-plate of vibrating pawl-carriers, pivoted on diagonally opposite corners of a stationary casting, and carrying pawls for acting alternately upon the seed-plate to rotate it, are not infringed by a corn-planter in which the pawls are carried on a U-shaped slide operating as a rectilinearly moving pawl-carrier, the slide being guided by links which neither support nor carry the pawls.

2. SAME.

Nor is the claim in said patent of the combination with a toothed seed-plate of pawl-carriers pivoted on diagonally opposite corners of a stationary casting, the gravitating pawls mounted on the pawl-carriers, and flanges on the stationary casting for guiding the pawls laterally, and insuring their positive and certain engagement with the teeth of the seed-plate, infringed by a corn-planter, which, instead of pivoted pawl-carriers, and gravitating pawls mounted thereon, has a sliding frame and gravitating pawls, such as were known and in common use prior to the date of the patent.

In Equity.

Suit for infringement of patent No. 279,822 for improvement in corn-planters, issued to Levy Schofield, June 19, 1883, and assigned to complainant.

Arthur Stem, for complainant.

H. H. Bliss, for respondents.

SAGE, J. Complainant's contention is that the respondents are infringers of the first, second, third, and fifth claims of the patent sued upon, which are as follows:

"(1) In a corn-planter, the combination with the toothed seed-plate of the vibrating pawl-carriers, pivoted on diagonally opposite corners of the stationary casting, and carrying pawls for acting alternately upon the seed-plate to rotate it, substantially as described.

"(2) In a corn-planter, the combination, with the toothed seed-plate, of the pawl-carriers, pivoted on diagonally opposite corners of the stationary casting, the gravitating pawls mounted on said pawl-carriers, and the flanges on the stationary casting for guiding the pawls laterally and insuring their positive and certain engagement with the teeth of the seed-plate, substantially as described.

"(3) In a corn-planter, the combination, with the toothed seed-plate, of the vibrating pawl-carriers, pivoted to diagonally opposite corners of the stationary casting, the gravitating pawls mounted on said carriers, and the bifurcated operating slide having its arms connected to the pawl-carriers, substantially as described.

"(5) In a corn-planter, the combination, with the stationary casting, of the vibrating pawl-carriers, pivoted on diagonally opposite corners of the casting, the ribs on the casting for supporting the outer ends of the pawl-carriers, the reciprocating slide connected to the pawl-carriers below the casting, and the roller for supporting the slide, substantially as described."

The respondents rest their defense upon the issue of non-infringement. They leave with the court the question of the validity of complainant's patent. The court concurs in the statement of their expert that the

patentee has not made any radical changes in the construction or operation of this class of machines, and that it appears from the patent itself that he does not pretend to have done so. The construction which he claims in each of the several claims in suit is a mere structural modification of what he admits to have existed before, and, as a matter of fact, in making the changes which he claims, he has not introduced into his machine a single new part, function, or element.

What is claimed as new relates exclusively to the devices for supporting and moving the pawls used to impart the intermittent motion to the seed-plate, and to the particular arrangement of parts which connect the pawls with respect to the bed-plate on which the seed-plate rests.

The court also adopts the statement of respondents' expert, that, in view of the prior art, the claims must be limited to the particular construction described and claimed. The vibrating arms, E, E, must actually carry the pawls. The bifurcated operating slide cannot be a pawl-carrier, but must be merely a slide for operating the separate vibrating pawl-carrying arms, which it connects with each other, and with the reciprocating shake-bar of the machine.

Recognizing the complainant's patent as valid to this extent, and only to this extent, the question which will be decisive of this case is, do the respondents infringe?

The respondents' corn-planter differs from complainant's in the following particulars: (1) Instead of vibrating pawl-carriers pivoted on diametrically opposite corners of the stationary casting, and carrying pawls for acting alternately on the seed-plate to rotate it, as described and claimed in complainant's patent, the pawls in defendants' corn-planter are carried on a U-shaped slide, which operates as a rectilinearly moving pawl-carrier. This slide is guided by links, but they neither support nor carry the pawls. The respondents' pawl-carriers are also clearly shown to be old, and more nearly correspond with those described in patent No. 252,526, to Schofield, dated January 17, 1882, differing, however, from that in the employment of two link guides beneath the slide instead of one. Bifurcated slide-bars for carrying pawls are shown in reissued letters No. 10,197, to Frank W. Young, September 12, 1882, original No. 142,320, August 26, 1873; in patent to J. Kelley, No. 212,708, February 25, 1879; to F. W. Shellabarger, No. 190,087, April 24, 1877; to J. B. Johnson, No. 232,826; to Shelby, No. 274,981; to Hearts, No. 228,258; and to Brown, reissue 6,384. I am of opinion, therefore, that respondents do not infringe the first claim of the complainant's patent.

With reference to the second claim, the respondent's corn-planter does not contain either pivoted pawl-carriers or gravitating pawls mounted thereon, but has, instead, a sliding frame and gravitating pawls, such as were known and in common use prior to the date of the invention described in the patent in suit. The only novelty in this claim is in the mere formal matter of vibrating arms, supporting and carrying the pawls, and arranged as described in the patent. Respondents do not infringe claim 2.

The third claim is not infringed. The guide-links in respondents' corn-planter are nothing more than mere guides for the true pawl-carrier. They perform no function as pawl-carriers.

The respondents' corn-planter does not contain, as we have seen, the "vibrating pawl-carriers pivoted on diagonally opposite corners of the casting," nor "the reciprocating slide connected to the pawl-carriers below the casting," which are included in the fifth claim. The respondents' slide is above the casting, and rides upon it. It results that the fifth claim is not infringed.

The bill will be dismissed, with costs.

HAFCKE v. CLARK.

(Circuit Court, D. Maryland. March 30, 1891.)

1. PATENTS FOR INVENTIONS—NOVELTY—REFRIGERATORS.

Held, that claim 4 of patent No. 343,369, June 8, 1886, to Charles Haffcke, for the use of an exposed body of salt in a refrigerator, for the purpose of purifying the air of the refrigerator, was void for want of novelty.

2. SAME.

Held, that claim 5 of the same patent, for a perforate hopper to contain a body of salt, in combination with a frigerating chamber, was invalid for want of patentable novelty.

(Syllabus by the Court.)

In Equity. Bill of complaint for infringement of patent.

Price & Stewart, for complainant.

A. I. S. Owens and John H. Thomas, for respondent.

MORRIS, J. The patent in suit was granted to the complainant, Charles Haffcke, June 8, 1886, No. 343,369, for improvement in the art of frigeration. The claims which the defendant is charged with infringing are claims 4, 5, and 6, and are as follows:

"(4) In combination with a frigerating chamber, an exposed body of chloride of sodium, arranged to absorb moisture from the air in the chamber, and to establish in said chamber a saline atmosphere, substantially as and for the purpose specified.

"(5) In combination with a frigerating chamber, a perforate hopper, containing a body of chloride of sodium, arranged to absorb moisture from the air in the chamber, and to establish in the said chamber a saline atmosphere, substantially as and for the purpose specified.

"(6) In a frigerating chamber a perforate hopper, containing chloride of sodium, secured to the wall of the said chamber, substantially as and for the purpose specified."

In his specifications Haffcke thus states the nature and scope of his invention:

"The third part of said invention relates to means for absorbing moisture from the air in the frigerating chamber, and diffusing throughout the said

chamber a saline atmosphere, which has antiseptic qualities, and thereby assists in the preservation of meats placed in the chamber."

He thus describes the apparatus employed by him:

"E is a hopper formed of some perforate material, preferably galvanized woven wire, to contain salt; and it may extend partially or entirely around the chamber, as may be preferred. The salt in the hopper, E, absorbs moisture from the air in the chamber, which air becomes strongly saline, and an effective preservative agent. * * * I am aware that common salt [chloride of sodium] has been combined with ice in a refrigerator to increase the cooling effect of the ice by hastening its liquefaction. * * * Further, I am aware that chloride of calcium has been exposed in a refrigerating chamber to absorb moisture from the air therein; but this salt will not answer the purpose I have in view, partly owing to its extreme deliquescence, but principally from the reason that it would not diffuse a saline atmosphere in the chamber. Instead of chloride of calcium, I employ chloride of sodium, which I find is sufficiently deliquescent for all practical purposes, and by its use I am enabled to obtain a saline atmosphere in the chamber, which, in itself, is a preserving agent. I disclaim the use of combined ice and salt in a refrigerating chamber, as also an exposed body of chloride of calcium."

It is obvious that the essential thing claimed by Haffcke as his patentable contribution to the art of refrigeration is the use of an exposed body of salt in the refrigerating chamber; and the practical method of exposing the salt to produce the results intended by him is by placing the salt against the walls of the chamber, sustained there by any perforated contrivance, which keeps it in place, and exposes it to the air. In his specifications Haffcke concedes that the use of an exposed body of chloride of calcium in a refrigerating chamber was old, and he might well have conceded that the exposing of chloride of sodium was also old. In the English patent to Jolley, No. 3,069, of 1861, the patentee says:

"Also, I claim as new another way of extracting damp, etc. I place anywhere within this safe carbon, lime, salt, sulphuric acid, or any other absorbent which has an affinity or attraction for whatever is required to be absorbed or extracted, to prevent decomposition, for keeping and preserving meat, poultry, and all kinds of provisions," etc.

In the English patent to Lake, No. 3,043, of 1865, dated 24th April, 1866, there is described a method of preserving fruits and other perishable substances in a refrigerating chamber, cooled by ice, and in which the moisture is absorbed from the air by well-known absorbents. He says: "The cheapest and best absorbent known to me is the refuse bittorn of salt and chemical works." He claims the use of a refrigerating chamber "kept dry to any extent desired by waste bittorn, or other absorbents, spread on extended surface within." Waste bittorn is the brine which remains in salt works after the salt is concreted.

In patent No. 168,833, October 10, 1875, to Ehert, he claims a method of filling an interspace of the walls of the refrigerator with salt, and perforating the zinc lining, and he claims that, through these perforations, the salt lining will have the effect of purifying the air of the chamber.

In patent No. 259,401, June 13, 1882, to Kepler, there is described a complicated set of troughs for the interior of a large refrigerating room,

for the purpose, in part, of holding some suitable deliquescent material, to absorb the moisture from the air, "as it circulates freely around and over the deliquescent in the trough." The patentee says: "The material which I prefer to employ for this purpose is chloride of calcium, for it is easily obtained, and is exceedingly cheap." Salt was, however, is, in fact, just as well-known an absorbent or deliquescent as chloride of calcium. There can be no doubt, I think, that at the date of Haffcke's patent it was not new to expose salt in a refrigerator in various ways, for the beneficial effect which it had in preserving the contents of the chamber. Whenever it was so exposed it had in some degree the effect which Haffcke claims it has in his refrigerator. If its only effect is to absorb moisture, then it had that effect. If it has also the effect of creating a saline atmosphere, as he claims, then it had that effect also. Haffcke may use more of it, and he may expose a greater surface of it, and he may get better results than others had, but, though greater in degree, they are the same results, obtained in the same way, and involved no new discovery or invention. If there had been any patentable novelty in the mechanical device contrived by Haffcke for exposing the salt in the chamber, such a device might have been the subject of a patent; but it seems clear to me that there is nothing patentable in the contrivance used by Haffcke for holding and exposing the salt, and which appears to be claimed in his fifth and sixth claims. In fact, the perforated hopper is not used by the respondent or by Haffcke himself, but he uses a rack made of wooden slats, it having been found by him that the wooden contrivance was better because it did not corrode. It is strenuously urged in support of the patent that, while the use of salt in a refrigerating chamber, to absorb the moisture arising from the melting of the ice, or from the condensation of vapor arising from the cooling of the air, or from the perishable articles themselves, was old, Haffcke was the first to make known that there was also produced what he calls a "saline atmosphere" by the passing of the currents of air over the exposed surfaces of the salt; and that the improved results obtained from the Haffcke refrigerator can only be accounted for upon the theory that a saline atmosphere is produced, and that it has very valuable antiseptic properties. The fact of the existence of this saline atmosphere, as distinguished from the salt held in solution by vapor, and thus suspended in the air, is a matter by no means clearly established. But if it be true that there exists this antiseptic quality in dry air which has been passed over exposed salt, and that Haffcke was the first to recognize it, still, I cannot see that Haffcke makes use of this discovery in a way not practiced before. Whenever before his alleged discovery salt was used as a deliquescent in a refrigerator, the saline atmosphere must have been produced, and the discovery by Haffcke that the salt had two uses, and produced two effects instead of one, is not a patentable discovery. The knowledge of all the uses and effects of a substance or of a law of nature enables one to use it more intelligently, so as to get with more certainty the best results, but there is nothing patentable in such knowledge, unless it is made use of in some new way.

It has been repeatedly held that, if an inventor describes a process or mode of operation which will produce the improved results, it is immaterial whether or not the inventor understood the scientific principle or philosophy of its working. On the whole case, I am of opinion that the use of salt exposed in a frigorating chamber, to improve the preserving qualities of the air of the chamber, was known and practiced before the invention claimed by Haffcke; and that, therefore, the claims of his patent now in controversy are invalid, for want of patentable novelty.

MARYLAND HOMINY & CORALLINE CO. OF BALTIMORE CITY v. DORR.

(Circuit Court, D. Maryland. March 23, 1891.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—CORALLINE.

Claim 1 of patent No. 341,355, May 4, 1886, to Solter, Robbins & Sheppard, for process of manufacturing coralline from corn, *held* to be valid, and to have been infringed.

2. SAME—EXTENT OF CLAIM.

Claim 2 of the same patent for the product *held* not to be sustainable.

(Syllabus by the Court.)

In Equity. Infringement of patent.

John C. Rose and *T. J. Johnson*, for complainant.

Price & Stewart, for defendant.

MORRIS, J. The complainant corporation is the owner of patent No. 341,355, granted May 4, 1886, to Solter, Robbins & Sheppard, for "Prepared cereals, and mode of production." The claims are as follows:

"(1) The hereinbefore described process of heating cereals in the form of hominy or samp, consisting, first, in cooking the product in a moistened condition to a point at which it still retains the granular form, then passing the same, in its moist condition, through a grinding-mill, and finally drying it substantially as described.

"(2) The hereinbefore described product from Indian corn, consisting of separate grains, in a stringy or coralline form, and cooked and dried condition, substantially as described."

In their specifications the patentees described their method of cooking the broken grains of samp or hominy, the object being to reduce them to a softened but tough condition, each granule separate from the others, and retaining its form, and not reduced to a mush. They then explain that they have discovered that these tough, softened granules, cooked and softened as described by them, if put through a mill of meal or grooved stones, will come out, not as a meal, but each granule as a distinct piece, of a stringy or coralline form, which is rough, light, and porous, and easily dissolved, and which keeps well if dry, and is useful for various purposes, particularly for brewing. The specifications state that the grains of samp or hominy, prior to this discovery, had been softened

in substantially the same manner, and then passed through warm rollers, which pressed the granules into flakes, and dried them so that they came out reduced to dry, hard flakes; and the only novelty they claim is the discovery that the granules, if properly prepared after their method, can be so passed through a grooved mill that they will come out as light, porous, spongy, coralline-shaped pieces, each piece corresponding in bulk to a granule of the hulled corn, and the product having qualities which give it a distinctive value.

So far as the testimony discloses, the result obtained by the patentees was new. Many patents for the treatment of Indian corn and other cereals, and their preparation for use, have been put in evidence, but none of them of date prior to the complainant's patent describe a production similar to the coralline of this patent. Most of them produce some form of meal, others flattened disks or flakes, others interlaced fibers, formed by forcing the material through a perforated plate, and others a product formed of a pasty mass run into molds. So far as the testimony discloses, it was the discovery of Solter and Robbins that hulled and broken corn, usually known as "samp" or "hominy," could be so cooked and passed through a mill that it would come out neither as a paste nor as a meal, but in elongated curled granules, having certain distinctive qualities, which make the product useful and commercially profitable. Immediately upon their discovery, Solter and Robbins, together with Sheppard, to whom they had assigned an interest in the patent, proceeded to manufacture coralline, and have ever since had for it a considerable sale. Their first experiments had been with an iron disk mill, which they found discolored the product. They soon substituted a burr mill, revolving at a high speed of about 1,050 revolutions a minute. With this mill it was found that the friction caused so great a heat that the warm, wet material which went into the hopper came out of the mill as coralline, accompanied by steam, and so hot that it could not at once be held in the closed hand, and in such a state that mere cooling, exposed to the air, more especially as it was found that it had to be fanned or winnowed to get rid of the fine mealy portions, was quite sufficient to dry it. They therefore dispensed with the steam-drier, which had been necessary when they used the iron mill. Some time in the summer of 1889 the defendant, having employed Sheppard, who had sold out his interest in the complainants' business and patent, and having employed others who had been in the coralline mill of complainants, began the manufacture of an article he called "Barlyne." This is the same product as coralline, manufactured precisely as it is manufactured by the complainants, except that there is sometimes added to the hominy a small percentage of rye, wheat, and barley, but not always, as they sometimes use pure corn. The addition of this very small quantity of other grain is shown not to affect the product in any perceptible way, and other testimony showing an intention to use the complainant's process, to employ their workmen familiar with it, and to compete with the same customers, produces the conviction that the addition of the other grains is not a substantial difference. The respondent relies very earn-

estly upon the defense that he does not use one step in the complainants' process, viz., drying the coralline after it leaves the curling mill. It is very obvious that when the patentees were making the product with the iron mill, which they were using at the time of the application for a patent, they were obliged to dry it by artificially applied heat. They say in the specifications of their patent: "As stated, the material is dried after it has been through the mill, and this is done preferably by steam heat, but may be done in any well-known way." With respect to the mill, they say: "The mill which we pass the material through may be an ordinary metal mill, or a mill having grooved stones, such as those used to grind ordinary grains." It was an essential of the process that the hulled corn should be sufficiently moist, sufficiently softened, and yet sufficiently tough, or else it would not curl, but would grind into meal; and it was essential that the curled product should be dried, or else it would mat together, and would not be marketable; and it was to be expected that experience would teach the competent miller how best to apply the process. It was found by the complainants, as soon as they began using the fast-running burr mill, that the heat generated by the friction turned out the product very hot, and with much less moisture than the iron mill. It was not dry, because, if it was dry between the stones, it would grind a wasteful amount of meal, but it was so nearly dry and so hot that exposure to the air dried it. I think this is the fair deduction from the weight of the testimony as to the process actually in use, and I think it gratifies the statement in the specification that the drying may be done in any well-known way. That heat would be generated by the friction of mill-stones is known to millers, and is one of the incidents of grinding that they have to guard against, lest it injure the meal. All that is accomplished is done by the very means pointed out in the Solter and Robbins patent, and by the very machinery pointed out by them. I do not, therefore, think that any step claimed by the patentees as necessary is omitted in the process now employed by them, which is the one afterwards adopted by the respondent.

The point of greatest difficulty raised by the defense is the want of patentability in the patented process. I have considered this difficulty with care. The complainants have in their favor the presumption which their patent gives them. They have in their favor the fact that their process has produced an article which appears from the testimony not to have been intentionally produced before, and which, now that it is known, is of commercial value, and the respondent, because of that commercial value, has set to work to manufacture by the same process. It is true that hulled corn, treated substantially as the complainants' process describes, had been flattened into flakes, and mashed through perforated plates into threads. It is probably true that corn, treated in ways different from complainants' process, has been either intentionally or accidentally curled by running through mill-stones into coralline shapes. But in no patent cited, and in no process testified to by any witness, does it appear that the several steps of hulling, moistening, cooking by

steam, and curling were ever described or put into practice by any one, or that the preparation of Indian corn now known as "coralline," was before produced. Milling and the preparation of cereals are among the oldest arts, but slight changes of process have in recent times resulted in marked improvements and economies, and have been sustained as inventions and patentable discoveries in that art. *Cochrane v. Deener*, 94 U. S. 780. The testimony tends to show that Solter and Robbins experimented with the view of obtaining a specific result, which they had conceived as attainable; that by intelligent experiments they finally hit upon the process which would produce it; that the thing they have produced is new and useful, and is recognized as something not before manufactured. They obtained a patent for their process, and have found a commercial demand for the product. All these facts and presumptions tend to establish the validity of their patent, and to overcome the doubt as to its patentability.

It is also urged against the complainant's patent that the statement therein that the separate grains of hominy remain separate in passing through the mill, and each comes out as a separate piece of coralline, is not a fact. It is claimed that the fact is that the hominy is really ground into a paste, which is curled up in the grooves of the stones, and thrown off in broken pieces of a stringy coralline form. It does not seem to me that this is a matter essential to any step in the process. No one does know just what takes place between the rapidly revolving stones. It does appear to be a fact that the size of the pieces of coralline has some relation to the size of the granules of hominy, and the inference is, that, as the material does not come out either as lumps of paste or as meal, each piece of coralline is the product of a granule of the hominy. But this is not essential to the process or the result. It is not a fraudulent or deceptive statement, or one of importance, so far as the process is concerned. It might, perhaps, be of importance, as affecting the second claim of the patent, which is for the product, and which is described as consisting of separate grains, in a stringy or coralline form, substantially as described. But in my opinion the complainants' product, independently of the process of making it, cannot be supported as for a new composition of matter, or a new substance not before known. Commercially speaking, it may be a new article of manufacture, but it is, after all, only an improved preparation of Indian corn, with the same characteristics and qualities as other similar preparations. It may be less liable to spoil, more porous, more easily soluble; it may unite more readily with the diastase of malt,—but these are not new and peculiar qualities; they are only the same qualities in an improved degree, which are inherent in other preparations of the same substance.

In my judgment, the second claim of the patent is invalid, but the first claim is valid, and the respondent has infringed it.

ANDERSON v. EILER.

(Circuit Court, W. D. Pennsylvania. June 22, 1891.)

1. PATENTS FOR INVENTIONS—DESIGNS—ABANDONMENT.

Under Rev. St. U. S. § 4886, providing that the inventor of an art not in public use or on sale for more than two years before his application, unless it is proved to have been abandoned, may obtain a patent therefor; and section 4920, making a defense to a suit for infringement of a patent, the fact that it has been in public use or on sale for more than two years before application for the patent, or that it has been abandoned to the public; and section 4933, providing that all the regulations and provisions which apply to obtaining or protecting patents for inventions or discoveries shall apply to patents for design,—a design is patentable unless it has been in use or on sale for more than two years, or has been abandoned.

SAME—SALE OF DESIGN.

The sale by the inventor of a design of an article bearing his design, before his application for letters patent, to one whom he knows to be a manufacturer of such articles, and to intend to imitate the design, and whose purpose in purchasing he knows to be to obtain a pattern from which to manufacture, is not sufficient to show an abandonment of the invention to the public; but such sale entitles the purchaser to manufacture and sell articles bearing the design, and the purchasers from him to resell the same.

In Equity.

Wm. L. Pierce, for complainant.

Levi Bird Duff, for defendants.

REED, J. The bill in this case alleged infringement by the defendants of design patent No. 19,872, being for a new design for a mantel. To the bill defendants have filed an answer, setting up several defenses, and the case was heard on bill, answer, and testimony. One of the defenses is the claim by defendants that the patent is invalidated by the sale by the plaintiff of mantels of this design and public use of the said design before the date of the granting of the patent, and that therefore there was an abandonment by the plaintiff of his invention. It is conceded that plaintiff commenced the sale of mantels, of the same design as that covered by the patent, as early as April, 1888. Between that time and the granting of the patent he sold mantels of this design to the defendants, and to such others as he could. His application for a patent was filed February 20, 1890, and was granted June 3, 1890. Defendants' counsel contend that sales at any time before the granting of the patent, by the inventor of a design, of articles upon which his design appears, amount to an abandonment of his exclusive rights, and hence his patent is invalid; that the two years' privilege applicable to other classes of patents does not apply to design patents. If defendants' counsel is correct in his latter position, there was such action by the plaintiff in making sales of his mantels, and such public use of the design, as would justify the conclusion that he had abandoned his invention. The sales and the public use were all within the two years prior to the filing of the application, but were such acts as have been held in other cases to justify a presumption of abandonment, when proven to have existed prior to the two-year period. The provisions in the statutes relating to sales and use of the invention, and protecting the inventor

for a period of two years prior to his application, in my judgment apply as fully to design as to other patents and inventions. Section 4933 of the Revised Statutes provides "that all the regulations and provisions which apply to obtaining or protecting patents for inventions or discoveries, not inconsistent with the provisions of this title, shall apply to patents for design." Section 4886 provides that any person who has invented or discovered any new and useful art, etc., not in public use or on sale for more than two years prior to his application, unless the same is proved to have been abandoned, may obtain a patent, etc. Section 4920 provides, in relation to defenses: "*Fifth*, that it had been in public use or on sale in this country for more than two years before his application or had been abandoned to the public." "Regulations and provisions applicable to the obtaining or protection of patents for inventions or discoveries not inconsistent with the existing patent act, apply to patents for designs without modification or variation. * * * Delay for less than the period of two years constitutes no defense in any case, but the respondents may allege and prove that the invention in question had been in public use or on sale more than two years prior to the application of the party for a patent, and, if they allege and prove that defense, they are entitled to prevail in the suit." *Miller v. Smith*, 5 Fed. Rep. 359. "All regulations and provisions that are applicable to the obtaining or protecting of invention or discovery patents are by section 4933 also made applicable to design patents." And in this case the court held the two-year provision applies to the latter class of patents. *Theberath v. Rubber, etc., Co.*, 15 Fed. Rep. 246. In an action on a design patent, plea that the invention was in use or on sale before the application for the patent is demurrable, unless the plea aver an abandonment, or that such use or sale was for more than two years before the application; for under section 7 of the act of 1839 such use or sale must have preceded the application more than two years, in order to validate the patent. *Root v. Ball*, 4 McLean, 177. In *Booth v. Garely*, 1 Blatchf. 247, it was held that the seventh section of the act of 1839, allowing two years' public use and sale of an invention prior to the application for a patent, was applicable to design patents granted under the act of August 29, 1842. The two cases of *Root v. Ball*, and *Booth v. Garely* were upon patents granted under the act of August 29, 1842, which provides that "all regulations and provisions which now apply to the obtaining or protection of patents, not inconsistent with this act, shall apply to applications under this section;" and defendants in the present case seem to have been of the belief, when they filed their answer, that the two-year provision applied to design patents, for the answer says that the design "was known and used in combination and in detail more than two years before the filing of plaintiff's application for a patent, and is not novel or original." From the statutes and authorities cited, I conclude that the two years apply to design patents, and that sales and public use within that time do not invalidate a subsequently issued patent.

Under the provisions of the statutes, however, an abandonment by the inventor of his invention, at any time before the granting of letters pat-

ent, will invalidate his patent. "An abandonment of an invention to the public may be evinced by the conduct of the inventor at any time, even within the two years named in the law. The effect of the law is that no such consequence will necessarily follow from the invention being in public use or on sale with the inventor's consent and allowance at any time within two years before his application, but that, if the invention is in public use or on sale prior to that time, it will be conclusive evidence of abandonment, and the patent will be void." *Elizabeth v. Pavement Co.*, 97 U. S. 134. But the testimony must clearly show such conduct on the part of the patentee as to indicate an intention on his part to dedicate his invention to the public. "From some acts the law raises no presumption, but leaves it for a jury to decide whether from them an intention to abandon appears. From others it conclusively presumes abandonment. The act from which alone it presumes abandonment of an invention is its public use and sale for more than two years." 1 Rob. Pat. p. 475. "An abandonment before application consists in any conduct of the inventor in regard to his invention which indicates an intention on his part to dedicate it thenceforth to the public. It may comprise a single instantaneous act or a long series of acts, or mere neglect to act when action is required. * * * Thus where a public use or sale of an invention, though for less than two years, is accompanied by other circumstances showing that the inventor has relinquished his monopoly therein, in this and similar instances it has been decided that the actions or omissions of the inventor were sufficient evidence of an abandonment. But in all cases of this kind the strict presumption is in favor of the inventor, and no conduct which is not entirely voluntary, or can be reasonably regarded as consistent with an honest intention to obtain for his invention the protection offered by the law, is ever taken as proof of an abandonment." *Id.* p. 477. To justify the defense proof should be clear and satisfactory; the right of the infringer to invalidate the patent for this cause should be undoubted. *Graham v. McCormick*, 11 Fed. Rep. 859.

The testimony in this case shows the sale by the plaintiff of mantels bearing his design within the two years preceding his application. It also shows that in October, 1888, he sold one mantel bearing the design in controversy to Mershom, Brown & Co., of East Saginaw, Mich., knowing that they were manufacturers of mantels, and would imitate his designs. Mr. Turner testifies that he was agent for the purchasers, and told the plaintiff that, if he did not send it, he (Turner) would have no trouble in buying one elsewhere, as the trade demanded these mantels, and Mershom, Brown & Co. were going to make them. The plaintiff admitted, when examined on this point, that he knew Turner's object in purchasing the mantel, and that it was ordered as a sample; and it appears that he made no objection at the time, nor did he state that he intended to apply for a patent. The mantel sold by the defendants to plaintiff's agent, and which sale is proven in this case as evidence of infringement, was one purchased by them from Mershom, Brown & Co., the manufacturers of the mantel. Plaintiff's counsel claims that this sale only entitled Mer-

shom, Brown & Co. to sell the particular mantel so purchased from the plaintiff, while defendants' counsel claims that the sale amounted to an abandonment of his exclusive rights by the plaintiff, or, if not, that under the provisions of section 4899, Rev. St., the firm of Merzhom, Brown & Co. acquired, by their purchase of the mantel, (their purpose being expressed, and well understood by the plaintiff,) the right to manufacture mantels of that design, and the defendants, having purchased the mantel in question from Merzhom, Brown & Co., are not liable in this proceeding. I do not think the facts and circumstances warrant the conclusion that the plaintiff abandoned his invention, and dedicated it to public use. "An abandonment or dedication may occur within the two years, and at any time down to the procurement of the patent. The mere use or sale of the machine within the two years will not alone nor of itself work an abandonment. The use or sale must be accompanied by some declarations or acts going to establish an intention on the part of the patentee to give to the public the benefit of his improvement." *Pitts v. Hall*, 2 Blatchf. 229. And although evidence had been given in that case that on several occasions the patentee had expressed a determination not to take out a patent, but to give the public the benefit of his invention, the court held that this would not amount to an abandonment, saying:

"There must be something more than mere words to fasten upon him the intention which, in judgment of law, would work an abandonment. There must be acts. The invention is his property as much as his farm, and the mere expression of an intention not to take measures for the purpose of securing to himself exclusive enjoyment of this property, or mere declaration of an intent to dedicate to public use, cannot be regarded as equivalent to actual dedication. The abandonment or dedication, too, operates in the nature of a forfeiture of a right, which the law does not favor, and should be made out beyond all reasonable doubt."

To the same effect is the decision in the case of *Jones v. Sewall*, 3 Cliff. 563, as also that in the case of *Mellus v. Silsbee*, 4 Mason, 111. In the present case there is no evidence either of acts or declarations to sustain the defendants' proposition that plaintiff gave or dedicated his invention to the public.

There remains, however, the question whether Merzhom, Brown & Co. acquired the right, by their purchase, to manufacture and sell mantels bearing the plaintiff's design. Section 4899, Rev. St., provides that every person who purchases of the inventor, or with his knowledge or consent constructs, any newly invented machine or other patentable article, prior to the application of the inventor for a patent, shall have the right to use, and vend to others to be used, the specific thing so made or purchased, without liability therefor. In *McClurg v. Kingsland*, 1 How. 202, the supreme court held that under section 7 of the act of 1839 the words "any newly invented machine, manufacture, or composition of matter," have the same meaning as "invention" or "thing patented," and the purchaser was put on the same footing as if he had had a special license from the inventor to use his invention, which, if given

before the application for a patent, would justify the continued use after it issued without liability; sustaining the right of the purchaser of the process which was the subject of the patent to its continued use without liability. In the case of *Booth v. Garelly*, 1 Blatchf. 247, the patentee, within a few months before his application, sold a button marked with his design upon the open market, at the same time giving notice that he intended to apply for a patent. The court, saying that the question of abandonment was a question for the jury in a trial at law, said that there may be some question whether a sale of the button with the design thereon was a sale of the thing invented within the meaning of the act; that the patent was not for a new and ornamental button, but for a new and ornamental design in the manufacture of the article; that the design was worked on the face of the button, and might perhaps be sold with it. In this view a sale of the button would be a sale of the design,—the thing patented,—and not simply of the product of the invention. In *Adams v. Burks*, 17 Wall. 453, the court say:

“The right to sell and the right to use are each substantive rights, and may be granted or conferred separately by the patentee; but in the essential nature of things, when the patentee, or the person having his rights, sells a machine or instrument whose sole value is in its use, he receives the consideration for its use, and he parts with the right to restrict that use.”

“The implied license that is inferred from the acts and dealings of the parties is in the nature of an estoppel to prevent what would be gross injustice, if not fraud.” *Montross v. Mabie*, 30 Fed. Rep. 234; 2 Rob. Pat. § 834. In *Pitts v. Hall*, *supra*, the court say:

“It is insisted on the part of the defendant that the patentee should be bound by his declarations, and evidence has been given that on several occasions he expressed a determination not to take out a patent, but to let the public have the invention. Undoubtedly a person acting on these declarations would not be liable to the patentee, because the patentee would be estopped from denying the license thus given.”

In the present case the mantel purchased by Mershom, Brown & Co. was only valuable to them because of the design; it was purchased by their agent with the express intention on their part, made known to the plaintiff, of manufacturing mantels of similar design; and, knowing all this, the plaintiff, without any warning that he intended to apply for a patent, and that they would not be permitted to manufacture and sell mantels of his design, sold the mantel to them. In doing this he really sold them the design, the only value of which to the purchasers was the right to use it, and he parted with the right, as against Mershom, Brown & Co., to restrict that use. As the mantels sold by the defendants were purchased by them from Mershom, Brown & Co. the defendants had the right to resell them, (*Wade v. Metcalf*, 129 U. S. 202, 9 Sup. Ct. Rep. 271;) and, this being the only evidence of infringement on the part of defendants, the bill must be dismissed. This conclusion renders it unnecessary to pass upon the numerous other questions raised in the case. Let a decree be prepared accordingly.

AMERICAN LIVE-STOCK & MEAT TRANSP. CO. v. STREET STABLE-CAR
LINE.

(Circuit Court, N. D. Illinois. July 7, 1891.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—CATTLE-CARS—WATER-TROUGHS.

Letters patent No. 161,807, April 6, 1875, to John R. McPherson, (reissue No. 7,028, April 4, 1876,) for an improvement in stock-cars, consisting of the combination with a cattle-car of longitudinal hinged troughs, located within the cattle space of the car, to be emptied outward, in the act of elevating them, by means of water-sheds, so as to carry the water free from the floor of the car, and the combination with the hinged troughs of apparatus for depressing and elevating them by a positive force against the pressure of the cattle, are void for want of novelty, except as to the use of the water-sheds, and are not infringed by the use of troughs not located within the cattle space of the car, and which spill their contents clear of the floor of the car without the aid of water-sheds.

2. SAME.

Letters patent No. 168,061, September 21, 1875, to Steventon and McGrath, consisting, in a stock-car, of a feed and water trough composed of separate sections, each section fitting between two wall-posts, and supported upon a continuous shaft, whereby all the troughs may be simultaneously turned into position for feeding or watering, or turned up out of the way, are void for want of novelty, except as to the support of the troughs on a continuous shaft capable of turning all the troughs simultaneously.

3. SAME.

Letters patent No. 168,063, September 21, 1875, to John R. McPherson, consisting of a series of troughs between the walls of a cattle-car, mounted upon a rock shaft, which is also a pipe for conducting water into all the troughs simultaneously, and by which by a positive force all the troughs can be simultaneously turned into position, are not infringed by the use of similar troughs, which are supplied with water through a fixed pipe, with branches running separately to each trough.

In Equity.

Mr. Clayton, Mr. Dyrenforth, and Dupee, Judah & Willard, for complainant.

McClellan & Cummins and L. L. Bond, for defendant.

GRESHAM, J. This suit is brought for infringement of three letters patent properly assigned to the complainant, all for improvement in stock-cars. The first (reissue No. 7,028) was granted to John R. McPherson, April 4, 1876, on an application filed March 14th of the same year; the original patent, No. 161,807, having been granted to the same person, April 6, 1875. The second, No. 168,043, was granted to John R. McPherson, September 21, 1875, on an application filed May 21st of the same year; and the third, No. 168,061, was granted to Albert N. Steventon and Thomas F. McGrath, assignors to John R. McPherson, September 21, 1875, on an application filed April 25th of the same year. The answer sets up prior use, anticipation by a large number of patents, want of novelty, and non-infringement. The invention, which it is claimed the reissued patent covers, relates to means for feeding and watering live-stock during long journeys, without stopping or unloading the cars. "Capacious and strong water-troughs," say the specifications, "preferably of boiler iron, are arranged on either side, extending from door-ways in the sides at the respective ends of the cars, and longitudinal openings, adapted to accommodate Texan and other long-horned cat-

tle, and to admit a free supply of air while open, are provided immediately above the troughs. The troughs are attached by hinges, so as to be adapted to be lowered and elevated at will, and water-sheds or chutes are provided within the wall openings, to co-operate with the troughs, for discharging the waste water outside of the car, and clear of the floor, when the troughs are emptied, which is accomplished by elevating them. The elevated troughs serve to close the wall openings, measurably, from wind and weather, and still give ample ventilation; to discharge all remaining water or other substance, after the cattle are through drinking, to the outside of the car, and thus prevent freezing in cold weather; to form a pad or shield to prevent the cattle from being injured on the rump by contact with the sides of the cars. The ends of the troughs are beveled, so as not to project at the doors, to prevent the animals striking them in entering. * * * Cogged sectors are attached to the troughs concentric with their hinges, and supported outside by journal bearings. Short parallel shafts are supported adjacently in opposite bearings, and carry pinions which mesh with cogged sectors. Hand-cranks at their outer ends provide for rotating the shafts, and by turning these in their proper directions the troughs are lowered by the force of the gearing, or elevated with facility, the requisite power being thus readily applied. Light longitudinal windlass shafts, at or near the tops of the car, are connected at both ends, and intermediately to the rack covers by cords or chains. These windlass shafts have pulleys at their outer ends, above the trough-handling mechanism. Corresponding pulleys are provided on the short shafts, to which the hand-cranks are attached, and these pulleys are connected by transmitting bands, so that the motion of the cranks by which the troughs are lowered shall raise the rack covers, and expose the racks, the reverse motion elevating the troughs and closing the cribs; or the trough and rack cover may be elevated at the same time." The troughs are hinged to the posts or car uprights, and whether down in position for use, or turned up and out of use, they are thus wholly within the car or the space occupied by the animals. By the mechanism described, an operator, on a short platform at the end of the car, is able to elevate and lower the troughs against the pressure of the animals. The second and tenth claims of the reissue, the only ones in controversy, read:

"(2) Combined with a cattle-car, longitudinal hinged troughs, to be emptied outward from the car in the act of elevating them, substantially as set forth." "(10) The combination, with the hinged troughs, T, of apparatus for depressing them by a positive force, substantially as set forth."

The Robinson patent of 1862 shows metal troughs hinged to the inside of the car on either side of the door, with sections opposite the doors, which are in the middle of the car, these door or sectional pieces being secured for the time being in the ends of the hinged troughs at either side of the doors, thus making the troughs continuous. The door sections are removable to allow ingress or egress. The troughs, when not in use, are turned up by mechanism adapted to that purpose, and, like those of the reissue, are wholly within the car space; but, not having the

water-shed of the reissue, they dump or spill their contents upon the floor of the car. When released from their upturned position, the troughs turn down on their hinges by gravity, or are forced down by hand. The Kendall patent of 1869 shows troughs hinged to the face of the car posts or uprights, and "swung up for use by the chains, O, which are attached to the troughs, and extend to a winding shaft or roller, P, that is conveniently operated to wind up said chains from the outside of the car, the top of the car, where the brakeman can operate it." The car uprights, just below the hinged attachment, are cut away or hollowed out, thus forming a place or recess into which the troughs drop by gravity entirely out of the way, when released from their elevated position in the car space, and in doing so spill their contents on the floor.

The complainant's principal expert witness testified that the new thing covered by the tenth claim consisted of positively acting mechanism for forcibly tilting the troughs in either direction, at the will of the attendant, against the pressure of the animals. The claim is for "apparatus for depressing them [troughs] by a positive force."

Kendall lifts his troughs into position for use by positive force against the pressure of the animals, and McPherson depresses or turns down his troughs from their upturned position in which they act as pads, by the same force and gravity, against the same pressure. McPherson was not the first to use positive force to extend the troughs into position for use. The troughs which constitute an element of the combination covered by the tenth claim are troughs hinged or attached so as to be within the cattle space at all times for the purposes described. He extends the pivoted shaft of his troughs through the end of the car, to which he secures sector gearing and its co-operating mechanism; and, in view of the prior art, the tenth claim, if valid, must be limited to that particular means for the application of positive force. The McCarty patent of 1873 shows longitudinal troughs, hinged at one of their edges to the inside of the car walls, combined with chains and windlasses for raising their unhinged edges. These troughs are raised by positive force, and lowered into position for use by gravity. They are emptied in the act of elevating them, but being hinged to the inside of the car, and having no water-shed like that of the reissue, the water drips from them within the car and on the floor. It will be observed that these troughs, which are pivoted wholly within the car-frame, and in their extended and upturned position are wholly within the cattle space, are swung upward by raising their inner free edges. The Robinson patent shows mechanism located outside the car for elevating the troughs. The troughs of the Kendall patent are elevated into position for use by a shaft operated from without the car, and the McCarty patent shows troughs wound up or elevated by means of a long longitudinal shaft having a hand-wheel at the outside end of the car.

A somewhat extended description of the defendant's alleged infringing car is necessary. Its side walls are double, the inner wall frame being constructed with studding or frame posts morticed into the car sills, which posts are slatted for about two feet from the floor, or up even with

the bottom of the troughs, and from the troughs to the top of the posts they are unslatted or open. On the outside of the main car body or frame there is a secondary or movable frame or shutter, having the same number of upright posts as the fixed car side, which latter posts are slatted on the outer side from a point opposite the troughs to their tops. The posts or uprights of the movable frame or shutter are hinged at their lower ends to the outside of the car sills. Between the wall posts or uprights of the car body proper, hinged troughs are arranged to turn into and out of position between those uprights and the uprights of the frame or shutter. The troughs are between the eight wall spaces on each side of the car, and on each outside end of the car are water funnels, from the lower ends of which pipes run horizontally through the sides of the car, where they connect with an horizontal conduit pipe running along the inside of the inner or main car-frame, just above the upper slat, to the door-ways, thence around the door-ways, and under the floor of the car, and up on the other side of the door-ways to the same level, and on to the end of the car. At each end of the car there is a connection between the horizontal water-pipe, just described, and the end of the first section of the troughs, by a small elbow pipe, one branch being fixedly attached to the water-pipe, and the other branch running into the trough section, and held to the outside of the corner post of the car by a bent iron loop strap forming a hinge at one end of the trough. The ends of the troughs next to the door-ways have solid bolt pivots, held to the outside of the door-posts of the inner car-frame by similar bent iron loop straps, forming the hinges for the ends of the troughs at both sides of the door-ways. Between the ends of the car and door-ways at one side, and at the long end of the car, are two connections between the fixed horizontal water-pipe and the troughs by short T-shaped pipes, the main stem of which is connected through the inner wall posts with the fixed water-pipe, and the ends of the branches, running into the ends of the two adjacent troughs, form hinges for them at those points. Between the ends of the car and door-ways at the other side, the shorter end of the car, there is one connection between the fixed horizontal water-pipe and the troughs, by a similar connection, forming the hinge for the troughs at that point. At three points in the hinge line of the troughs, the adjacent ends of two troughs are connected by short sections of pipe, which are supported by a bent iron strap or loop, bolted to the outside of the inner wall posts of the car, and forming the hinge at those points. The ends of the adjacent troughs are connected together by shoulder bolts. An horizontal shaft, by which the troughs are operated, runs through the rafters on either side of the car, and about the middle of the roof a hatchway is cut, through which an attendant may turn or operate the shaft by a short hand lever attached to it. On this shaft are six pendent arms, from the lower ends of which rods extend to the upper end of the posts of the movable frame or shutter, which may be pushed away from or drawn up tightly against the side of the car. A little below the top of the car and the movable side or shutter, and between the two, are five toggle-joints, the upper ends of the long arms of which are

pivoted to the inner posts of the car body, and, about midway the length of the long arm, a link-rod is attached at one end, the other end being attached to the inner side of the posts of the movable shutter. From the lower end of the long arm of the toggle-joints, link-rods extend downward, connecting with the troughs at their outer edge. When the movable shutter is pushed out, the troughs are forced into position to receive water, but, when forced inward against the car-frame, the outer edges of the troughs are lowered, and their contents emptied outwardly, and the water-pipe under the door-way is supplied with a valve, so that it will empty when the troughs are folded between the car and the movable shutter. Water runs from tanks on the ends of the car through horizontal pipes, also on the ends of the car, and through the water-pipe on the inside of the car into the troughs, through the connections between them and the water-pipe.

One of the complainant's experts—the best-qualified one—testified that the new thing described in the reissue, and “particularly referred to in the second claim thereof, is a longitudinal hinged water-trough for a stock-car, so arranged that, when turned up out of use, it empties its contents outwardly from the car, in contradistinction from the hinged troughs previously employed, which, when turned up out of use, empty their contents upon the floor of the car.” The specifications thus describe how this result is accomplished:

“The troughs are emptied by elevating them, and are provided with flanges, *t*, to overlap those on the water-sheds during this time, to conduct the contents into or onto the water-sheds.”

It is only by the use of the water-sheds or chutes that the troughs of the reissue can dump their contents beyond and clear of the car floor. They are hinged to the inside of the car, and are wholly within the cattle space, and without the water-sheds they are no improvement on what is found in the prior art. It is clear that, without the water-sheds, they cannot accomplish what is claimed for them, and that they will spill their contents on the floor of the car as do the Robinson troughs. Unless the water-shed be read into the second claim, it is clearly void for want of patentable novelty. The defendant's troughs are not within the car or cattle space, and they spill their contents clear of the car floor, without the aid of water-sheds, or any equivalent devices. The troughs, which are part of the combination covered by the tenth claim, are not troughs however constructed or operated, but troughs large or wide enough to close the opening in the wall of the car, which allows the horns of the cattle to protrude while drinking and eating; troughs beveled at their ends and with a flange or back to co-operate with the water-shed, supported by a shaft extending through the end of the car, and elevated and depressed by mechanism operated outside. Being large enough to close the wall openings, hinged to the inside of the car posts, and thus wholly within the car, the inventor deemed it necessary to use positive force to depress the troughs into position for use against the pressure of the animals. The defendant's car shows a rod at the roof connected with each alternate trough section by toggle-

joints, the sections being hinged, or otherwise fastened, to the side of the car, so that by pushing the shutter out, through these rods and toggle-joints, the troughs are brought into position for use, while the act of letting the shutter back into position empties them. The prior art shows positive means for elevating and emptying troughs, and, if there was invention in using the same or similar means for depressing them, the defendant's car does not show the combination covered by the tenth claim. McPherson was a mere improver, and his patent is not infringed by a car differing in form or combination, although it performs the same functions. The inventor of the first improvement cannot invoke the doctrine of equivalents to suppress all other improvements which are not mere colorable invasions of the first.

The Steventon & McGrath patent shows "a trough composed of separate sections, fitting between two wall posts, and supported upon a continuous shaft, whereby all the troughs may be simultaneously turned into position for feeding and watering, or turned up out of the way." These sectional troughs rest upon, and are rigidly secured to, the supporting shaft, which is operated by levers attached to its ends. A water-tank is placed at the end of the car, from which water is distributed to the troughs by means of a pipe running along the side of the car, and provided with an outlet over each sectional trough, the water being turned on and off by means of a valve at the end of the pipe. The improvement may be applied to a double-deck car. The sectional troughs turn down outwardly, within the space and between the timbers which form the walls of the car, in order that they may operate as such, and project as little as possible within the car. The first claim reads:

"(1) In a stock-car a feed and water trough composed of separate sections, each section fitting between two wall posts and supported upon a continuous shaft, whereby all the troughs may be simultaneously turned into position for feeding or watering, or turned up out of the way, substantially as described."

The complainant's expert testified that the difference between a trough in sections, and a long trough like the one of the McPherson reissue, is formal, rather than substantial. Steventon & McGrath were not the first to locate troughs between the wall posts of a car; and, if this claim covers anything that is new, it is sectional troughs supported by a continuous shaft capable of turning all of the troughs simultaneously, and, thus construed, the defendant does not infringe. The defendant's fixed non-rotating water-pipe does not correspond with the continuous rock-shaft of the first claim. The defendant's troughs are not turned into position for use, and then up out of the way, by means of a shaft upon which they are mounted and supported; its troughs, which are supported by separate devices, have pivots. The third claim of the Steventon & McGrath patent was practically abandoned at the argument, and no other claim is in controversy.

Claims 1 and 4 of patent 168,043 remain to be considered. This patent and the Steventon and McGrath patent bear the same date. An interference was declared between McPherson and Steventon & McGrath, and, although the former's patent bears a lower number than the latter's,

McPherson conceded that he was not entitled to full priority. He testified that "the patent to Steventon & McGrath, with whom I got an interference in the patent-office, is principally for the use of the sectional troughs carried also by a rock-shaft." The complainant's leading expert testified, however, that his opinions were based on the assumption that McPherson was the first inventor, and he interpreted the McPherson patent without reference to the Steventon & McGrath patent. The invention is thus described in the specifications:

"The troughs are carried by a continuous pipe, by which they are not only supplied with water, but turned in positions for the animals to drink, and afterwards turned down to empty their contents and that of the supply conduits. The turning conduits are connected with and supplied by fixed branch pipes from a top tank at the end of the car. * * * The sectional troughs extend throughout the length of the car at the bottom, and are combined with platforms at the door-ways to facilitate ingress and egress for the stock over the troughs. * * * The feed-troughs, C, of the lower deck, extend the entire length of the car, crossing the door-ways, A, on a level, or nearly so, when turned down with the platform doors, when the latter are also turned down, as shown in figure 5. * * * For this purpose, they are made in sections, and each section is arranged in the same line, and so as to be turned up and down between the vertical timbers of the car walls. They are fixed upon and carried by pipes, E, E², supported in bearings in the side posts, and the troughs are turned by these pipes into positions to feed and water the stock. These pipes, while serving to operate the troughs, serve also as the means whereby the troughs are supplied with water. They are about two or three inches in diameter, and the troughs or basins are bolted or otherwise secured thereon, and communicate therewith by small openings or perforations, through which the water rises from the conduits into the troughs or basins. Each section of the trough or basin is provided with a perforated shield, d, to prevent the corn from passing into the conduits. * * * To obtain a uniform supply of water to the upper and lower conduits, that portion, G, of the branch pipes between the reservoir and the upper conduit is of greater diameter than that portion, G², between the troughs, thus securing a uniform circulation through all the conduits, and an equal supply in the troughs or basins."

The patent does not show that the troughs are rocked or turned by the pipe, E, otherwise than as the Steventon & McGrath troughs are rocked. In his testimony McPherson thus defined his invention:

"My invention practically consisted of a series of troughs located between the wall posts, mounted upon a rock-shaft, which was a pipe also, for conducting the water into all of the troughs simultaneously through an opening between said pipe and said series of troughs, and in which, by means of the positive force, all the troughs could be turned into position simultaneously, and receive food or water, or turned down or outwardly to prevent fouling by the animals. The patent of Steventon & McGrath, with whom I got an interference in the patent-office, is principally the use of the sectional troughs carried also by a rock-shaft. It is not a water-pipe, but receives the water above the troughs, which is in practice a better plan, because, under this plan, the freezing of the water in the pipes in the coldest weather is impossible."

I think it fairly appears from the two patents, and the other evidence in the record, that McPherson simply substituted for the Steventon & McGrath rotatable shaft a hollow shaft capable of acting as a water conduit;

and he concedes practical superiority to the Steventon & McGrath method of supplying the troughs with water. The first claim reads:

"(1) A feed and water trough for stock-cars, combined with the pipe or conduit which supplies its water, and arranged to be turned into position for feeding the stock, and out of such position for emptying the contents of such trough, by the same pipe or conduit, essentially as herein set forth."

If this claim covers anything that is patentable, it must be found in the method or means of getting the water into the hollow shaft, and conducting it therefrom into the troughs, and, thus construed, it is not infringed. The fourth claim reads:

"(4) The combination, in a stock-car having rotatable feed and water troughs turned into and out of position by the conduits, E, by which they are supplied with water, of fixed pipes, G, G², connecting with said conduits, and the elevated reservoir, F, whereby the movable trough conduits form extensions or continuations of supply-pipes fixed upon the end of the car."

The fourth claim is for the combination of troughs, rotated in and out of position by the supply pipe, with fixed pipes, G, G², at the end of the car leading from the elevated reservoir, so that the rotatable trough-conduits form extensions of the fixed supply-pipes. If the manner of connecting the fixed pipes having unlike diameters, with the tank and the rotatable troughs, involves invention,—and in view of the prior art I do not say it does,—the defendant's car does not infringe, as these features are not found in it. Both the first and fourth claims of this patent are for troughs rocked into and out of position by the same pipe or conduit that supplies them with water, and the defendant's car contains no such pipe. On the contrary, its troughs are supplied with water through a fixed pipe, with branches running separately to the troughs. The bill is dismissed for want of equity.

POPE MANUF'G CO. OF CONNECTICUT v. CLARK.

(Circuit Court, D. Maryland. March 21, 1891.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—VELOCIPEDE PEDALS.

Claims 1 and 2 of patent No. 329,851, November 3, 1885, to Albert H. Overman for improved pedals for velocipedes, *held* to be valid and to have been infringed.

2. SAME—NOVELTY—HOLLOW WHEEL-RIMS.

Claims 8 and 9 of patent No. 301,245, July 1, 1884, to Emmit G. Latta for a hollow wheel-rim, made of a single strip of sheet-metal, *held* to be void for want of patentable novelty.

(*Syllabus by the Court.*)

In Equity. For infringement of patents relating to velocipedes or bicycles.

William A. Redding and Edmund Wetmore, for complainant.

Thomas R. Clendinen, for respondent.

MORRIS, J. This bill of complaint charges the defendant with infringement of claims of six different patents, relating to velocipedes and bicycles. Three of these patents were withdrawn by amendments, and one was withdrawn at the hearing, leaving for consideration in this opinion the claims of two patents, which are as follows, viz., claims 1 and 2 of patent No. 329,851, dated November 3, 1885, to Albert H. Overman; and claims 8 and 9 of patent No. 301,245, dated July 1, 1884, to Emmet G. Latta.

The Overman Patent, No. 329,851. The only defense as to claims 1 and 2 of the Overman patent No. 329,851 is the want of patentable novelty. The first and second claims of this patent are thus stated:

"(1) A pedal for velocipedes, having bars located upon opposite sides of a central working bearing, and provided with wide working faces, and arranged to turn to incline the upper or exposed faces towards each other, substantially as set forth.

"(2) A pedal for velocipedes, having rectangular bars located upon opposite sides of a central working bearing, and arranged to turn to incline their upper or exposed faces towards each other, substantially as set forth."

In his specifications the patentee very fully states the nature and scope of his invention. He says:

"Heretofore pedals for velocipedes have been provided with a single turning polygonal bar, composed of an envelope of rubber inclosing a skeleton frame bearing at each end upon the spindle of the pedal. Pedals for velocipedes have also been provided with two essentially round, and sometimes fluted, bars of solid rubber located upon opposite sides of the working bearing of the pedals, and arranged to be turned, so that when one portion has become worn another may be exposed for wear. Pedals of the construction first mentioned are objectionable in that the single bar does not prevent the boot from slipping, except through friction, which does not procure a sufficient hold for safety. In this pedal also the frame of the bar forms the active or working bearing of the pedal and is necessarily made of metal which makes the bar heavy and expensive. Pedals of the type described as having two essentially round bars located upon opposite sides of their working bearings are also objectionable, for while the bars are engaged with the sole of the boot at separated points thereupon the area of contact upon an essentially round bar is necessarily small; and the surfaces in contact being in the same horizontal plane, the boot is prevented from slipping only by friction and this being insufficient to retain it in place it often slips. With the end in view of obviating the objections above stated incident to pedals as heretofore constructed, and of producing a pedal retaining the foot in place by other means than friction alone, and of durable and cheap construction, my invention consists in a pedal having bars located upon opposite sides of a central working bearing, and provided with wide working faces, and arranged to turn to incline their upper or exposed faces towards each other. By locating bars having flat bearing surfaces upon opposite sides of the working bearing of the pedal and arranging them to swivel upon their bearings, they will turn towards each other, and incline their upper or exposed bearing surfaces to meet the sole of the boot at points of contact therewith, and retain the foot in place, not only by the friction of the broad flat bearing surfaces, but also by the inclination of the same in converging planes, as shown in Fig. 1 of the drawings, whereby ease to the foot and security against slipping are secured.

Any polygonal bar offering bearing surfaces of good width may be employed in my improved pedal. The rectangular shape herein shown is commended by its provision of four bearing surfaces and its compact form."

The essential features claimed by the inventor are that there shall be broad flat bearing surfaces on opposite sides of the central working bearing, and that the bars shall swivel or turn on their own bearings, so that their surfaces shall always meet the sole of the boot, and conform to any changes in the curvature of the sole as it presses the pedal and follows its revolutions. If the round or fluted bars had been made to turn, the turning would have made them less efficient. If the flat bars had been made rigid, they would not have conformed at all to the curvatures of the sole. The Overman device is therefore distinguishable in principle from either of the preceding types of pedals. The device has proved to be of utility, and has gone largely into use. The defense of want of patentable novelty rests upon the state of the art as shown by a large number of patents put in evidence by the defendant. Among these are No. 30,369, to Williamson, and No. 143,732, to Thompson, for improvements in stirrups for equestrians. They show bars both round and polygonal, but not with broad surfaces, and which revolve; but they do not, and are not intended to present inclined surfaces to the curve of the sole, their design being merely in case of accident to allow the foot of the rider to quickly and easily slip from the stirrup. I can see no suggestion or idea of analogous use which could be obtained from these stirrup patents.

The patent of Laubach, No. 86,235, is for a single bar, turning upon the spindle of the pedal. The patents to Price, No. 243,346, and to White, No. 269,609, show the round rubber bars confined by rods, so as not to turn, and they are of the type disclaimed by Overman in his specifications. The patent to Warner, No. 282,938, shows flat rubber bars rigidly fixed in the pedal, and designed for use in bicycles where an entire revolution of the pedal is not required. The patent to Hadley, No. 313,323, also shows flat rubber bars rigidly fastened to the pedal. The English patent to Rae, No. 979, of 1878, provides for preventing the foot from slipping, and affording some elasticity, by having the rubber bars made corrugated, or with conical shaped projections, but suggests nothing like the independently rocking bars, adjusting themselves to the curvatures of the foot. The English patent to Bown, No. 369, of 1879, shows flat bars on opposite sides of the treadle, but rigidly fixed, and with no adaptability to the foot except from the elasticity of the rubber.

Nothing has been adduced by the defendant in this case to show that the state of the art was other than is frankly set forth in the specifications of the Overman patent, and I think that it appears that Overman made a distinct step in the adaptation of pedals to the requirements of improved bicycles. The utility is not denied, and the difference, although slight, appears to be important, and one of principle, not attainable by mere mechanical improvement. That it required the exercise of invention, and is patentable, I think has been successfully maintained.

The complainant acquired the title to this Overman patent on June 10, 1886, by assignment from Albert H. Overman and the Overman Wheel Company; and by agreement of that date it was stipulated between the same parties that the Overman Wheel Company should have the right, without payment of royalty, to make, use, and sell the inventions described in that patent, and that the complainant would not make, use, or sell pedals of the form then made by the Overman Wheel Company, but that the complainant and its licensees might use the form of pedals then used by them, or any other form not substantially similar to the form then used by the Overman Wheel Company. The purpose of this agreement was to prevent the parties to the agreement from imitating the style and appearance by which the forms of the Overman patent used by each were known in the trade. It is clear that the legal title of the Overman patent is in the complainant, and that the Overman Wheel Company is only a licensee. There is no doubt that the complainant is the proper party to bring suit for infringement and injunction. *Waterman v. Mackenzie*, 138 U. S. 252, 11 Sup. Ct. Rep. 334. The form of the pedal sold by the defendant appears to be the form which the Overman Wheel Company have the sole right to make, use, and sell under their license, but this fact affects only the question of damages, and need not now be considered.

The Latta Rim Patent, No. 301,245. The defenses as to claims 8 and 9 of the patent to Emmitt G. Latta, No. 301,245, dated July 1, 1884, on application filed July 27, 1883, are want of patentable novelty and non-infringement. The eighth and ninth claims of this patent are thus stated:

"(8) A wheel-rim consisting of a single strip of sheet-metal, bent to form a hollow rim, and having its overlapping edges arranged on the outer side of the rim, substantially as set forth.

"(9) A hollow wheel-rim, composed of a single strip of sheet-metal constructed with overlapping edges secured together, substantially as set forth."

Although the application of Latta for this patent was filed July 27, 1883, it is contended that the proof establishes that his invention was perfected and exhibited in a drawing made by him as early as December, 1882. It appears, however, that prior to December, 1882, it was well known that rims for bicycle wheels must be hollow, and that they must be made with a concave on the outer side, to receive a heavy rubber tire, so that a cross-section would show a double crescent, one within the other, united at the horns. The British patent to Salamon, No. 3,689, of 1877, in its specifications thus describes such a rim:

"This hollow fellow may be made in the following manner: Take a strip of thin sheet-iron or steel of a length equal to the periphery of the wheel intended to be made, and of a breadth somewhat in excess of twice the depth of the fellow, and by means of swages or rollers convert the strip into a V-shaped trough; then join the ends, and the hoop thus formed overlay with sheet-metal, also made trough-shaped, and with its edges turned over, to lap the edges of the hoop. By soldering or brazing the parts together a strong hollow fellow will be produced. Another mode of constructing the fellow is to provide a steel tube of suitable dimensions, and to form therewith a hoop cor-

responding in diameter to the wheel desired to be made; then, by means of compressing rollers or swages, to compress the tube to the desired hollow section by forcing inwards the outer side of the tube, and thus doubling the metal upon itself. A recess will thus be formed for the elastic tire, as before, and the operation of soldering or brazing before mentioned may thus be dispensed with."

We have here as far back as 1877 a description of the two kinds of hollow rims; one made from a steel tube, the other from sheet metal, two sheets being bent, and then soldered together. In the English patent to Smith, No. 4,687, of 1877, we have a description of a rim precisely similar to Salamon's. The patentee says:

"I form the fellow of the wheel, which receives the India rubber tire, of two metal rings, each of trough-like sections. The outer ring may be semi-circular in section, and of suitable size to receive the India rubber into its concavity. The inner ring is considerably deeper in its concavity, and the spokes of the wheel pass through its bottom, and are there secured. The two troughs are connected together by their edges, so that they form, when so connected, a tubular ring or fellow, which, by its form and structure, is very stiff and light."

The next in date is the English patent, No. 4,092, of 1879, to Hawker, Puntis & Boyce, and describes a rim made of a single piece of sheet-metal as follows:

"Our improved fellow is formed of a plate of steel, rolled so as to form a groove around its outer circumference. It possesses the great advantages that it offers the greatest possible resistance with the least and simplest arrangement of metal; and, while very rigid as a whole, it gives an elasticity and springiness to the fellow which greatly reduces the oscillations caused by uneven roads. In order to give the wheel a better 'foothold' on slippery or loose tracks, we construct the rubber with two parallel ribs or divisions, bound together at the part within the fellow."

The transverse section of the rim made from this sheet of metal is thus shown in the drawing:



In the English patent to Humber, Marriott & Cooper, No. 891, of 1881, we find this statement:

"Our invention consists of improvements in the construction of cellular wheel rims for bicycles and other vehicles, and in attaching the spokes to such rims. Cellular rims are usually constructed of one or two plates of thin metal, formed into a single cell of various sectional forms."

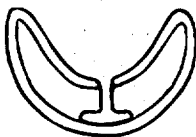
The patentees then describe their improvement, which consists in placing inside the hollow rim additional plates of metal, to act as struts or stays, to give greater rigidity to the hollow rim.

In the English patent to Challis & Challis, No. 911, of 1881, we have a description of a hollow rim rolled out of one piece of sheet metal. In the specifications it is said:

"Many plans have been devised for producing a light but strong rim for wheels. Now we produce a form which can be rolled in one piece. The rim,

when completed, is of the external form known as a U rim, but the sides are bent over so as to form a second rim inside the first one, and, after touching, are prolonged down, so as to form a midfeather between the first and second rims, and are finally bent back from each other, so as to lie upon the inside of the outer rim. The sides are brazed or soldered together where they join, and a strip can, if desired, be brazed or soldered over the joint, for extra strength and for fastening the spokes to."

The form is thus shown in the drawing:



In the English patent to Thomas Warwick, No. 4,597, of 1882, the provisional specifications for which were filed 27th September, 1882, and the final specifications for which were enrolled on 22d March, 1883, we find the rim patented to Latta, now in controversy, accurately described, and careful instructions furnished for making it out of a single strip of sheet-metal. This English patent was taken out in the United States by Warwick upon application filed June 11, 1883, and a United States patent granted to Warwick dated December 4, 1883, No. 289,733; so that Warwick's application in the United States patent-office preceded Latta's, and the grant of the patent to Warwick was prior in date to patent granted to Latta. That there was no interference declared must have been due to the fact that the rim device in Latta's specification was overlooked; possibly from being mentioned in his specification quite obscurely, in the midst of a description of other matters. But, conceding that Latta was an independent inventor, and that the proof carries the date of his invention as exhibited in a drawing back to a time prior to the date of the publication of Warwick's English patent, I have been unable to find, taking the state of the art as shown by unquestionably prior patents, that it required any invention to produce the rim claimed by Latta. There was nothing new in the shape of the rim, there was nothing new in its being made of a single strip of metal, there was nothing new in any function or advantage claimed for it. The overlapping or brazing or soldering of the two edges of a hollow tube of sheet-metal, and the strengthening that came from the two thicknesses of metal, was an idea familiar to any mechanic. The strengthening of the rim by overlapping of the joints is a feature in nearly all of the earlier rim patents.

The reason why the Warwick and Latta form did not come sooner into general use was not, I think, because it was not an obvious form, but because of the difficulties in making it without too great cost, and the doubt of its strength as made of the materials and with the tools then at hand. All the earlier patents seek to strengthen and stiffen the hollow rim by interposing folds and struts of the sheet-metal. Even now the rim most relied upon and used by the complainant itself is that made from a steel tube, and the one sold by the respondent, and claimed to be an infringe-

ment, has an increased thickness in the sheet of metal, on the inner side of the rim.

In the English patent No. 4,092, of 1879, we have everything that is shown in Latta's patent except that the two edges of the single strip of metal do not overlap, and are not brazed together. They are left free, apparently, only to obtain increased elasticity. In a manufacture such as the production of bicycles, in which there is such an enterprising determination to bring them to the highest attainable point of excellence, so that each year sees an advance in the art and in the perfection of the machines, every improvement which watchful attention can suggest is adopted, and each improvement gives value and importance to every other; but their combined success must not blind us to the fact that many of them are the result of fine mechanical adjustment, and not of patentable invention.

I hold that the first and second claims of the Overman patent No. 329,851, for rocking pedals, is valid, and has been infringed; and I hold that the eighth and ninth claims of the Latta rim patent No. 301,245 is invalid for want of patentable novelty.

It is but right to say that I have been relieved of much labor, and greatly assisted, by the thorough and able manner in which counsel have prepared this case for hearing and have presented it in argument.

THE PIETER DE CONICK.¹

HUGHES v. THE PIETER DE CONICK.

(District Court, E. D. New York. June 2, 1891.)

PERSONAL INJURY—FALL INTO HOLD OF VESSEL—USE OF TEMPORARY LADDER.

Where libellant, a stevedore, did not make use of the fixed iron ladder belonging to a vessel in descending into her hold, but instead used a temporary wooden ladder, which broke under him, allowing him to fall into the hold, and it did not appear who placed a wooden ladder in the hatch, the ship was held not liable for libellant's injury.

In Admiralty. Suit to recover damages for personal injury.

H. A. McTernan, for libellant.

Wing, Shoudy & Putnam, for claimant.

BENEDICT, J. This is an action by a longshore-man to recover for personal injuries caused by falling from a ladder while going down into the hold of the steamer *Pieter de Conick*. The testimony shows that the libellant was employed by a regular stevedore, who had contracted to load the steamer independent of the owners or master. Access to the hold of the steamer from the deck was provided for in the construction of

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

the ship by a fixed iron ladder, built into the fore side of the hatch. At the time of the accident a wooden ladder some 20 feet long had been put down from the deck to the hold, and the libelant, when going down the ladder to his work in the hold, stepped upon a rung of the ladder which broke under him, whereby he was precipitated into the hold, and suffered injuries, to recover for which this action is brought. There is no positive evidence in the case as to who put the wooden ladder down into the hold. In the absence of any evidence as to who placed the wooden ladder in the hatch, and as it appears that a permanent iron ladder was in position, fit for use, at the same time, the presumption would seem to be that the wooden ladder was placed in the hatch by the stevedores, who used it to pass into the hold more easily than by the iron ladder which had been furnished by the ship. The ship had furnished proper access to the hold by the permanent iron ladder, and she cannot be held liable for a defective ladder, which, although owned by the ship, does not appear to have been furnished for that purpose by any person connected with the ship, and presumably was placed there by a co-laborer of the libelant. The fatal defect in the libelant's case is that it is not made to appear that the defective ladder which caused the libelant's fall was furnished by the ship, while it does appear that a safe ladder was furnished, which the libelant declined to use.

The libel must be dismissed. I give no costs.

THE CARRIE.¹

JONES v. THE CARRIE.

(District Court, E. D. New York. July 1, 1891.)

MARITIME LIEN—ENFORCEMENT OF—LACHES—TRANSFER OF OWNERSHIP.

A material man *held* to be entitled to enforce his lien against a vessel, notwithstanding a subsequent transfer of the ownership of the boat, which the evidence did not show to be *bona fide*, and notwithstanding a delay of between two and three years in enforcing the lien.

In Admiralty. Suit to enforce a maritime lien.

Alexander & Ash, for libelant.

D. D. McKoon, for mortgagee.

BENEDICT, J. This is an action to enforce a lien for a material-man. It is defended by one Buckley, who claims an interest in the lighter by reason of an unpaid mortgage held by him. Buckley has set up the defense of laches, and transfer of the vessel to one Costigan since the incurring of Jones' lien. No other defense is set up. The owner of the lighter interposes no defense. So far as concerns the transfer to Costigan,

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

it is sufficient to say that the evidence does not show it to be *bona fide*, nor could it in any event avail Buckley. As to Buckley, his interest in the vessel is by way of a mortgage that attached to the lighter long prior to the claim of Jones. The case, therefore, is the same as if a prior owner of the vessel were defending upon the ground of laches. In such a case a lien will not be held lost by laches simply by reason of a delay of between two and three years in enforcing it. A decree must be entered for the libellant, with costs.

THE MANHATTAN.

LAKE v. THE MANHATTAN, etc.

(District Court, D. Washington, N. D. June 22, 1891.)

1. MARITIME CONTRACTS.

Contracts for work to be performed and materials to be furnished in completing and equipping a new vessel, left uncompleted by her builders, where such contracts are entered into and have their inception after the vessel has been launched and named, and become capable of being identified as a vessel, are maritime contracts.

2. SAME—LIEN—ADMIRALTY JURISDICTION.

Where, by a local statute, a lien is given for work done and materials furnished in the construction of vessels, a suit *in rem* against the vessel upon such a contract, as above described, and to enforce such a lien, can be maintained, and is within the admiralty jurisdiction of the United States courts.

(*Syllabus by the Court.*)

In Admiralty.

F. H. Peterson, for libellant.

Carr & Preston, *Weistling & Weistling*, *W. A. Peters*, and *C. D. Emery*, for intervening libellants.

J. B. Metcalfe, for claimant.

HANFORD, J. The Manhattan is an uncompleted vessel. The libellant built her in this state, and launched her upon Lake Washington, for persons who intended to own and run her upon said lake, but failed to pay the libellant for her construction according to their contract. For this failure to pay him, the libellant sold the vessel to other parties in the condition in which she then was; that is to say, a mere hull, without masts, sails, machinery, or other propelling power. The purchasers caused her to be floated or towed upon the waters of Lake Washington, Black river, and Duwamish river to the harbor of the city of Seattle, and thence to a ship-yard owned and managed by the libellant; and afterwards, under a new contract with them, the libellant performed work and furnished materials towards completing and changing the vessel from a side-wheel steamer into a propeller, and there is now due to him the sum of \$1,367.96 for said work and materials, and he has a statutory lien therefor by virtue of the laws of this state in force during the time of the performance of the contract. To enforce said lien this suit *in rem*

against said vessel was brought. Her machinery has not been placed in said vessel, and she has not been surveyed, enrolled, or documented at the custom-house, and she has never been used. Several intervening libels have been filed by parties claiming to have statutory liens for materials furnished and labor performed, and one wherein the intervening libellant claims to have a maritime lien for towing the vessel from the libellant's yard to the place at which she was to have received her machinery. The claimant alleges that he has purchased the vessel from the parties who purchased her from the libellant and contracted the debts in suit. The evidence has been taken by a commissioner, who has certified the same to the court with his findings, which findings the court adopts as the facts in the case.

The ground upon which the claimant defends is that the contracts sued on are not maritime, and not cognizable in admiralty, and that therefore the case is not one of which this court can have jurisdiction. The question here presented is not new. The right to sue in the court of admiralty upon contracts of this class is a subject of discussion which our ancestors brought with them from England before the first courts were established in the American colonies, and the debate upon it has continued through all the changes which have transpired in the judiciary of the country. The lawyers and litigants continue to contend for the right in the face of decisions of the courts, and they seem to be determined to not accept the decisions, or regard them as being decisive, and the decisions have not been uniform nor harmonious. According to the earliest reported cases, all contracts for building, repairing, and equipping vessels were held to be maritime contracts, and cognizable in the admiralty courts. In the case of *Cunningham v. Hall*, 1 Cliff. 43, decided by Mr. Justice CLIFFORD very soon after the decision of the supreme court in the case of *Ferry Co. v. Beers*, 20 How. 393, that learned justice, in his opinion, reported in 1 Cliff. 53, cites the earlier decisions, and in the same connection makes this clear statement:

"Contracts for the building of ships, where a lien is given under the local law, have heretofore been regarded as maritime, and in repeated instances the lien so created has been enforced by a proceeding *in rem*, and the practice appears to be fully sanctioned by the twelfth admiralty rule."

The twelfth admiralty rule, adopted by the supreme court in 1844, which was thus referred to by the justice, reads as follows:

"In all suits by material-men for supplies, repairs, or other necessities for a foreign ship, or for a ship in a foreign port, the libellant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*, and the like proceeding *in rem* shall apply to cases of domestic ships, where by the local law a lien is given to material-men for supplies, repairs, and other necessities."

This rule was amended by the court in 1859, and again in 1872. The decision of the supreme court of the United States in the case of *The General Smith*, 4 Wheat. 438, (in 1819,) was the beginning of a departure; and from that time until the *Lottawanna Case*, 21 Wall. 558, was decided, in 1874, the tendency of the decisions was very strongly against

maintaining admiralty jurisdiction in cases founded upon contracts of the class under consideration; and for upwards of 30 years past the courts have uniformly held that contracts for the building of ships, and for furnishing materials to be used in the original construction thereof, are not maritime, and that suits founded upon such contracts are not within the admiralty jurisdiction of the courts of the United States. *Ferry Co. v. Beers*, 20 How. 393; *Roach v. Chapman*, 22 How. 129; *Edwards v. Elliott*, 21 Wall. 532; *The Orpheus*, 2 Cliff. 29. The courts, however, still maintain that contracts for repairing and rebuilding vessels are maritime; and cognizable in admiralty. *Peyroux v. Howard*, 7 Pet. 324; *The Grapeshot*, 9 Wall. 129; *The Lulu*, 10 Wall. 192; *The Kalorama*, Id. 204; *The Lottawanna*, 21 Wall. 558, Hen. Adm. 44.

I consider that this court is bound to hold, in deference to the decisions of the supreme court, that contracts for the building of vessels, and for furnishing materials to be used in the original construction thereof, are not subjects of admiralty jurisdiction. Such is the doctrine to which that court seems to be fully committed. The opinion in the case of *Edwards v. Elliott*, above cited, was written by Mr. Justice CLIFFORD, who concurred in the decisions of the court in *Ferry Co. v. Beers*, and *Roach v. Chapman*, and who wrote a dissenting opinion in the case of *The Lottawanna*, and it contains the fullest discussion of the subject, and statement of the reasons for its decision, which that court has given. I have looked for the reasons in order to learn, if possible, how to reconcile the decisions holding contracts for the building of ships to be not maritime with those holding contracts for the repair and rebuilding of vessels to be maritime, and where to draw the line dividing contracts for doing mechanical work, and for furnishing building materials and machinery, which are classed as non-maritime, from those contracts for doing precisely the same kind of mechanical work, and furnishing the same kind of materials and machinery, which are maritime. And my conclusion is that, if there is any reason for the distinction other than the mere fact that it exists because the courts have created it by their arbitrary decisions, it is to be found in this: that a maritime contract is defined to be one having reference to commerce or navigation. The particular element essential to give it a maritime character is direct connection with commercial transactions or navigation; and such connection is lacking in a contract to create a new ship, or, if not lacking entirely, it is remote and contingent, so that it is not perceptible at the time the contract goes into effect as a binding obligation. But whatever is done to or about an existing ship has direct reference to commerce and navigation. A ship *in esse* as a maritime subject gives a maritime character to all transactions directly connected with it. The cases are distinguishable thus: One class, founded upon contracts for the repairing and rebuilding of vessels, holds such contracts to be maritime, because they affect vessels *in esse*; and the other class, founded upon contracts for the building of proposed vessels, holds such contracts to be non-maritime, because they touch maritime subjects only by relation to proposed vessels, the future exist-

ence of which is contingent upon performance of the terms of the contract in each case.

The condition of the vessel, whether new or old, whether complete in all respects, and equipped for service, or only a mere hulk, without sails, rigging, or masts, or means of propulsion, is not determinative of the question; and in case of a vessel in the latter condition it makes no difference in principle whether she may have been once complete, and have been disabled and stripped, or whether the things necessary to render her complete and sea-worthy are lacking simply because they have never been supplied. After a new ship has been launched, and embraced by the element upon which she is intended to float, and been christened, and become an entity fully capable of being identified, she is as much a subject of admiralty and maritime jurisdiction as she can be at any later period of her history; and contracts then entered into relating to her completion, equipment, or employment are maritime, and cognizable in admiralty. *The Eliza Ladd*, 3 Sawy. 519; *Revenue Cutter No. 2*, 4 Sawy. 143. In harmony with these views, the contracts under consideration, having originated after the vessel had been launched, are to be regarded as maritime, and the case is within the jurisdiction of this court. It is my opinion, therefore, that the libelant, and each of the intervening libelants except Charles H. Allmond, are entitled to recover the sum due them as per the commissioner's report. As to Mr. Allmond, I hold that he is precluded by the terms of his contract from recovering any sum at the present time, for the reason that he has not completed his contract, which is in writing, and which contains an express provision to the effect that no money in addition to what has already been paid to him is to be due or payable until the contract shall be fully completed. A decree will be entered in accordance with this opinion.

THE REUBEN DOUD.

HOXSIE *et al.* v. THE REUBEN DOUD.

(*District Court, E. D. Michigan.* February 16, 1891.)

SHIPPING—CARRIAGE OF GOODS—DEMURRAGE.

Goods were shipped under an ordinary contract of affreightment, there being no bill of lading, and no special agreement to pay demurrage. On reaching port, the master refused to deliver the goods until he had been paid the freight, and also a charge for demurrage, which, even according to his own figures, was excessive. The consignee, after tendering a larger sum than what was due, notified the master that he abandoned the goods to the vessel. *Held*, that the consignee was entitled to recover from the vessel the value of the goods, less the lawful charges, since the delay was caused by the wrongful acts of the master in making an extortionate demand, and in not storing the goods in a warehouse instead of keeping them on board.

In Admiralty.

In the latter part of April, 1890, the master of the schooner Reuben Doud chartered her to carry for libelants a cargo of ice from Brockville, Ont., to Detroit, for \$350, allowing three days to load at Brockville, and three days to unload at Detroit. She commenced loading Thursday, May 1st; and continued through May 2d and 3d; rested on Sunday, May 4th; resumed Monday, May 5th; finished Tuesday, May 6th. Tuesday she cleared for Detroit, arriving there Thursday, May 15th. On Monday, May 20th, the schooner was notified to go to dock for discharge. Upon arriving there, her master demanded of libelants the freight money, \$350 and \$450 for demurrage, before he would proceed to deliver the cargo. Libelants refused to submit to this demand, and went with the purchaser of the ice to the office of the owners of the schooner, when it was agreed that the purchaser should pay the master of the schooner for the amount of ice he took from the schooner at \$3.25 per ton. The delivery was commenced, and continued till about noon, when the master stopped it, and refused to deliver any more ice until his demand was paid. Thereupon libelants tendered \$350 freight and \$150 for demurrage, and demanded the delivery of the ice, which was refused. Whereupon the owner and master were notified that libelants abandoned the cargo to the schooner, and would hold her for its value.

H. C. Wisner, for libelants.

W. V. Moore, for respondents.

HAMMOND, J., (*orally, after stating the facts as above.*) The contract in this case, as shown by the proof, was not a contract to pay demurrage by special stipulation, which a court of admiralty always rigorously enforces. In the case of *Fish v. One Hundred and Fifty Tons of Brown Stone*, 20 Fed. Rep. 201, the court considers the subject of demurrage in relation to stipulations for the delivery of the cargo; and it is there held that a court of admiralty will enforce those stipulations only when it appears to have been the intention of the parties to make a contract for a time within which the cargo should be discharged. In the absence of such special stipulation, it is the law of admiralty, as well as the common law regulating carriers, that it is the duty of the carrier to deliver the cargo speedily at the place of delivery; and, if for any reason the consignee is not ready to receive delivery, it is his duty to warehouse the goods, and in due time enforce his lien for whatever freight and charges he may have. The consignee cannot be held liable for any delay which is not the result of his fault and negligence in the premises. Now, the proof of this case certainly does not show that there was any contract between the parties that the cargo of ice should be delivered in Detroit within a fixed time. It was, at most, only a suggestion on the part of the captain that he and his owners would be liberal in the matter of giving a few more days of time than the ordinary rule of three lay-days, as understood among vessels. I think it was not a contract to do that. On the other hand, it certainly was not a contract to pay demurrage at the rate of \$50, or any other sum, for any delay over and above the ordinary three days allowed for what is called "lay-days." It was an ordinary contract of affreightment,

by which the vessel undertook to deliver at Detroit a cargo of ice for the sum of \$350, \$25 being added by consent of parties for the delay in loading the vessel at Brockville, Ont., where the ice was taken on board. There was no bill of lading setting forth the terms of the contract as is usual in such cases, and we must rely upon the ordinary obligations of a simple contract of affreightment. My understanding of the law is that in such cases it is the duty of the carrier to promptly and without delay deliver the cargo upon the payment of his charges for freight, but, if for any reason the consignee should not be at hand or ready to take delivery and pay the charges, it is nevertheless the duty of the carrier to unload and store the goods in some warehouse subject to his lien for freight charges; and it certainly never was, either at common law or in admiralty, the rule that the ship could lie by or that the train of cars could hold on to the goods and ask payment for the detention of the vessel, under the name of demurrage, of a larger warehouse charge than would be made if the goods had been stored, nor payment for the rental value of the cars in which they might be kept. Demurrage arises only where the consignee by some fault of his prevents delivery within a reasonable time, either to himself or to some warehouseman for him under the above rule, or where by the usages and customs of the port it might arise under other circumstances. It was therefore, in my judgment, the duty of the vessel, when it reached Detroit, to have promptly unloaded this cargo, and stored it in some proper place, subject to the lien for freight. There is not a particle of proof in this case showing, or tending to show, that this method of delivery was in any way obstructed, either by the consignee or by a condition of things at Detroit which made it impracticable to so store the ice. Instead of doing this, the captain and owner of the vessel proceeded upon the theory that they were entitled to demurrage at the rate of \$50 a day; and at the very first appearance of the consignee made a demand upon him for the sum of \$450 for demurrage, which was, even upon their own theory of being allowed \$50 a day, more than they were entitled to upon any possible computation that could be made upon the facts in this case. There was not a sufficient time to entitle them to that sum, under any circumstances whatever, at the time it was made. They refused to deliver the cargo until this sum was paid, and from that time on until the end of the case, and even up to this very day of trial, there has been no mitigation or lessening of that manifestly extortionate demand. It is true that the respondents in this case busied themselves in efforts to help the libellant sell his cargo of ice, but always with the manifest purpose of keeping possession of the goods or the money until this unjust demand for demurrage should be paid. He was struggling like a fish in a net to be rid of this claim, and was at all times seriously embarrassed in disposing of the cargo, because of the demand of more than double of that which was due to the ship which had possession. There are suspicions in the case, and it is argued, that, being a stranger in Detroit, these unjust claims were set up against him with a hope of so embarrassing him in the disposal of his cargo that the profits of the speculation should be transferred from his pockets to the pockets of the respondents. But it

is immaterial to the decision of this case to decide anything upon that subject. It is sufficient to say that the cargo was not delivered according to the contract and the obligations it imposed in the matter of delivery. This non-delivery entitled the libelants to abandon the cargo to the ship, and sue for its value, which he has done in this case; and he certainly is entitled to recover that value, unless there be something in the facts which will excuse the non-delivery.

It is true that the law of this contract imposed upon the consignee the duty of providing for the payment of the freight and charges that were due the ship, and making provision for delivery without any unnecessary delay. If he had brought with him the money agreed upon as charges for freight, and paid it over to the captain, and had his cargo unloaded, he would only have discharged his duty and obligation under the contract; but he was prevented from doing this, or making any provision for doing it, or even making any disposition of the cargo, so as to enable him to raise the necessary money, if he chose to resort to that means, by this extortionate demand that was made for a sum twice as large as that which was due. The fact that he did not tender, in the first instance, the amount that was due, and insist upon delivery, did not cause the delay; because it is manifest that that sum would not have been accepted. But if, being without the means to discharge the freight, he could not make this payment, it does not follow that the ship might lie in the harbor at its will, and eat up the value of the cargo by charges for demurrage, amounting to whatever the ship might earn if otherwise engaged. The law does not authorize the imposition of such an unjust burden upon the owner of the cargo, but, as has before been stated, directs what the carrier shall do under such circumstances. And it is only the common rule of law that where one has a claim against another for damages, such as have been described, it is his duty to mitigate and lessen those damages as much as possible by reasonable and prudent care of the property involved. The books are full of cases illustrating this rule.

Much stress has been laid upon the fact that there was not a tender of a sufficient amount due at the time the \$500 tender was made; and it is said that the fact of making this tender in some way changed the relations of the parties, and that at that time the respondents can claim that the libelant is in fault for not paying the just charges, and taking his ice. My understanding is that the only effect of a tender is to relieve the one making a proper tender of the costs of litigation that may ensue upon its refusal. I do not understand that it in any sense changes the rights of the parties under the contract, or in any sense binds him who makes the tender to acknowledge that that sum or any sum is due. It might be, as a matter of evidence, taken as an admission that something was due, if unexplained; but I doubt if it could be even used for that purpose. It certainly is not a fruitful soil, out of which the respondents may grow a claim that the libelant has been at fault in not providing for the payment of the freight and demurrage on his cargo, and taking the delivery of his ice. Neither is the fact that a sale was made of

a part of the cargo, and a conditional sale of the balance, and that an order or draft upon the purchaser was given to the ship or its captain for the proceeds of the sale, a fact that shows delivery. It is manifest that that arrangement was a struggle of the consignee to release himself of the burden that had been imposed upon him and an attempt to get out of the toils. As far as it was agreed to by the respondents, it was done in the hope of realizing a sufficient sum to pay their claim, including the extortionate demand for demurrage; and a fair inference from the proof is that they broke up the sale, and prevented its completion, when they found that it would not produce enough to pay their claim, or else in pursuance of a former suggestion that they desired to still further embarrass the libellant in making a sale of his cargo at any profit to himself. At all events, that transaction shows that it was not a delivery of the cargo to the libellant, but only an effort of both parties to get rid of the cargo, and settle the disputed claims in some way subsequently. This was no fault of delay on the part of the libellant to receive delivery which would make him chargeable under the admiralty law for demurrage to the ship, and, whatever other effect the transaction may have upon the rights of the parties, it certainly does not justify any claim for demurrage, and that is all we have to do with it in this case.

The filing of the libel against the cargo by the ship-owner in this court would, under some circumstances, be treated as tantamount to a delivery; but this would only be so where the ship and its owner were without fault on their part in the matter of delivery, and where the libellant was at fault in the non-payment of just charges. His tender of \$500 shows that he was able and willing at that time to discharge the lien for freight, and the libel was unnecessary, except upon the theory that the demurrage was due and demandable, which has been insisted upon all through the trial of this case. Under such circumstances, the filing of the libel cannot be treated as a delivery of the cargo under the contract of affreightment. Moreover, the rights of the libellant to abandon the cargo, and hold the ship for its value for non-delivery, had already been exercised, and had become fixed by the refusal to deliver, or, what is the same thing, the attaching to the offer to deliver the unreasonable, onerous, and extortionate conditions for the payment of charges not due. In a word, it is my judgment that the unlawful and extortionate demand for demurrage was the cause of this delay and of the non-delivery, and that the respondents were themselves, in that respect, at fault. The logical result of this judgment would be that the respondents would be allowed only their freight charges, to be deducted from the reasonable value of the cargo; but the libellant has conceded, and now concedes, a willingness to pay the sum of \$150 for demurrage in addition to the \$350 freight charges, making \$500, which he tendered before the bringing of this suit. Solely because of that concession, and for no other reason, the court will here allow the \$150 for demurrage. There is some dispute as to the amount of the cargo, but I think, allowing for possible waste, it may be put at 472 tons, and that the reasonable market price at that time was \$3.25 per ton, making the money value of the cargo \$1,560; from

which, deducting the \$500 allowed for freight charges, would leave the libelants entitled to a decree for \$1,060, with interest from the filing of the libel. The respondents will pay the costs.

THE RENEE.

ANDERSON *et al.* v. THE RENEE.

(District Court, N. D. California. May 6, 1890.)

1. SHIPPING—CARE OF SEAMEN—LIME JUICE.

It is no excuse for not serving out lime juice to the crew daily, as required by Rev. St. U. S. § 4569, that the seamen preferred to receive coffee instead of lime juice.

2. SAME—LIABILITY OF SHIP.

When no lime juice is served, and the crew are attacked with scurvy, the ship is liable for the damage the seamen sustain on account of the disease, in the absence of any proof that they had contracted scurvy before the voyage began.

In Admiralty.

H. W. Hutton, for libelant.

T. C. Coogan, for claimants.

HOFFMAN, J. The claim of the libel in this case is for "wages, for provisions of bad quality, and a failure to furnish antiscorbutics, and for damages for the same cause; also, damages for furnishing improper subsistence, cost of maintenance during sickness contracted in the service of the vessel, and cost of care, under the statutory and general admiralty law." The evidence as to the quantity and quality of the provisions furnished to the men is very voluminous and conflicting. The seamen's statements with respect to the bad quality of the food are evidently much exaggerated, and I think it unnecessary to decide whether on that account alone they would be entitled to damages. Under the provisions of section 4568, their compensation is limited to a sum not exceeding one dollar a day during the time of the continuance of the supply of food of bad quality. The substantial cause of action, however, is for damages for pain and suffering caused by scurvy contracted during the voyage. By section 4569 of the Revised Statutes, the master is required to serve out to the crew lime juice and sugar daily at the rate of half an ounce each per day, and the vinegar weekly, at the rate of half a pint per week for each member of the crew. It is not disputed that the master during a considerable part of the voyage, amounting to about 25 days of its entire duration, omitted to serve the lime juice to the crew as required by law. The provisions of the statute in this respect are mandatory, and the captain will be liable to the infliction of a fine if convicted of an omission to comply with his duty in this respect, even though the omission should be followed by no ill consequence to

the crew. In this penalty, however, the seamen have no interest. It is imposed by the court after the master is convicted of a statutory offense. The excuse set up by the master for his failure to furnish the crew with lime juice, as required by law, is that the men preferred to receive coffee instead of the lime juice. The consent of the men to a violation of a positive provision of law can in no respect modify the captain's liability for his offense, nor does it, in my opinion, affect the seamen's right of recovery, if by reason of the omission their health has been impaired. It may well be doubted whether the captain is not required to compel the crew to take the lime juice, which is recognized as one of the most efficacious antiscorbutics known to science. In the performance of the duty to serve the men this article, their wishes are not to be consulted. Ignorance and recklessness are the well-known characteristics of seamen, and the surgeon of the ship or hospital might as well consult the wishes of his patients as to their diet and medication, or the father of a family the inclinations of his children with regard to hygienic precautions to preserve their health, as the master of a ship consult or be governed by the wishes of his crew. Had he proposed to substitute grog for the lime juice or coffee, no doubt the proposition would have been gladly and unanimously accepted. That the libelants were afflicted with scurvy cannot be disputed. Out of a crew of 20 seamen, 17 were found stricken with scurvy more or less seriously. The legislation of congress of the United States and Great Britain seems to be founded on the idea that lime juice is a sure preventive of scurvy. This, however, is not acknowledged by any medical authorities. The latest word of science, on the subject, so far as I can discover, is that lime juice, though very efficacious, frequently proves inadequate to prevent the appearance of the disease. The surer method is to add to the diet a liberal supply of fresh vegetables, or their juices, preserved in cans. The preservation of meats and vegetables by canning them has grown to be an extensive industry. Canned vegetables are readily procured, and at very reasonable cost. It is possible, in view of this fact, the court may feel themselves at liberty to treat the failure to provide the seamen with fresh vegetables, in addition to the lime juice required by law, as a failure to provide them with suitable alimentation to preserve them from the attacks of this formidable disease. It would certainly not be unreasonable that, in the laying in of supplies for seamen on long voyages, the master and owners should keep abreast with the progress of science, and the facts ascertained by experience and observation. In providing for the protection of cargoes, as against sweat or other damages to which they may be exposed, this court has held that any system or systems of ventilation found to be efficacious in preventing damages by sweat, which have been generally recognized as such, and usually, if not universally, adopted, must be provided by the ship, in order that it may under its contract deliver the goods in like good order and condition as when received. Preventable sweat would in the case supposed cease to be a peril of the sea, because its effects can be obviated by reasonable and proper precautions. I am unable to see why, when

scurvy is found to be a disease preventable by serving to the men the lime juice which the law requires, supplemented by a diet of fresh vegetables, the ship should not, not merely on grounds of humanity, but in the interest of the owners and the freighters, be required to provide such nutriment, and serve it to the crew. However this may be, it is plain that where the statutory requirement is disregarded entirely, and scurvy makes its appearance among the crew, in the absence of any proof or any reason to suspect that the seeds of the scurvy were contracted by the men on a previous voyage, the ship should be held liable for the damage sustained by reason of the disease. An interlocutory decree will be entered, declaring the liability of the vessel for the cause of action sued on, and an order of reference to the commissioner will be entered, requiring him to ascertain and report upon the duration and severity of the disease in the case of each seaman; also, whether they were treated in the hospital or by private medication, and, in the latter case, whether they had the opportunity to obtain admission to the hospital; and the effect of the disease on the patients, if in any instance a permanent loss of health has ensued; and also a just compensation for the time during which, by reason of the disease, they were incapacitated from working or obtaining a living.

LAMBERT v. FREESE.

(District Court, N. D. California. January 22, 1890.)

COLLISION—EVIDENCE.

A barge built of four-inch planks, with the usual guard along the gunwale, collided with a dredger built of timbers 12 inches square, firmly fastened together with log-screws, and further strengthened by iron bands. The dredger afterwards sunk. *Held*, that the fact that the barge sustained no injury from the collision showed that the sinking of the dredger could not have been caused thereby.

In Admiralty.

E. P. Cole, for libellant.

Milton Andros, for respondent.

HOFFMAN, J. The libel in this case is filed to recover the value of a dredger alleged to have sunk at the Devil's Elbow, in the San Joaquin river, in consequence of being struck by a barge in tow of a tug-boat owned by the respondent. The testimony is very voluminous. It is unnecessary to examine it in detail. That the dredger was struck by the barge is, I think, clear. But whether through the fault of either the latter or of the tug may admit of doubt. The dredger was moored in a sharp bend of the stream within, as one of the libellant's witnesses states, 40 to 50 feet of the edge of the channel. It appears that in making a sharp turn at the Devil's Elbow tugs descending the river with barges in tow find great difficulty in preventing the latter from sheering towards

the left bank. Collisions from this cause are of very frequent occurrence, but usually attended by no serious consequences. The tug was going on "the slow bell," which would give her a velocity through the water not much more than was necessary for her to retain steerageway. The tow-line was of the usual and proper length. There seems to have been no want of diligence on the part of the persons in charge of either vessel. The dredger was moored in the part of the bend, which, perhaps, unnecessarily increased the difficulties and dangers of the navigation by tugs and tows coming down the river. Had her position been a little lower down, or, possibly, a little higher up, it seems to me that those difficulties and the chances of collision would have been appreciably diminished. But I do not insist on this point; for I have found it impossible to reconcile the libellant's contention, that the dredger sunk in consequence of the collision, with the fact that the barge sustained no injury whatever. The dredger appears to have been constructed of very heavy material. Its hull was formed of timber or logs laid one above another in a tier, five logs in height. These timbers were twelve inches square, and were firmly fastened together by log-screws. There was, on each side a spud case, also constructed of heavy timbers, while the strength of the structure was further increased by iron bands or straps, the position of which it is unnecessary to describe. The barge was built of four-inch planks, with the usual fender or guard running along the gunwale. It appears to me, that it was impossible for the barge to have struck the dredger with a force sufficient to cause the latter to sink, without herself sustaining damages which would have borne witness to the violence of the collision. That this was the view of the parties in interest, immediately after the occurrence, may be reasonably inferred from their conduct. A few days after the accident, the respondent, Mr. Freese, was called upon by a person supposed to be the owner, or agent of the owner, of the dredger. Mr. Freese represented to him that the dredger could not have been sunk by the barge, as the latter had sustained no injury whatever, and that the sinking of the dredger must have been caused by her leaking, or by carelessness and neglect of those in charge of her. Whether the owners of the dredger acquiesced in this view does not appear; but it is certain that the present libel was not filed until nearly two years afterwards. As to the condition of the dredger with respect to the leaking, the testimony is irreconcilably conflicting. There is much, however, in the evidence of Mr. Spurgeon, a witness for the libellant, that seems to indicate a singular want of care, or an indifference, on the part of the two persons in charge of the barge after the accident occurred; or, perhaps, their conduct may be explained by the absence of any expectation on their part that any serious consequences would result from the collision. On the whole, I am of opinion that the libellant has not satisfactorily shown that the sinking of the dredger was caused by the collision. Libel dismissed.

THE RAHWAY.¹MILLARD *et al.* v. THE RAHWAY.

JAYNE v. SAME.

WINNETT *et al.* v. SAME.

(District Court, E. D. New York. June 10, 1891.)

SALVAGE—FIRE ON COTTON VESSEL—PRESENCE OF TUGS BELONGING TO OWNER OF BURNING VESSEL.

A lighter loaded with cotton and flour caught fire about half past 1 o'clock in the morning, while lying at a pier. The tug A. immediately made fast to her, and towed her into the stream, at the same time pumping water on the fire. Shortly after being towed into the stream, the barge was surrounded by tugs belonging to the owner of the barge, and as able as the A. to do all that might thereafter be required. The tug T., belonging to other owners, also arrived at 2 o'clock, and the tug H. came at 7:30 in the morning, and was told that her services were not required, notwithstanding which she put on a stream of water. The barge was finally sunk, to extinguish the fire. The value of the property saved was \$21,587.50. The value of the A. was \$15,000. The time of her service was rather more than 24 hours. The risk to her was small. *Held*, that the A. should recover \$2,000 as salvage, the T. \$500, and the H. nothing at all.

In Admiralty. Consolidated suits to recover salvage compensation.

Wilcox, Adams & Macklin, for Millard & Winnett.

Peter S. Carter, for Jayne.

Robinson, Bright, Biddle & Ward, for claimant.

BENEDICT, J. These three actions consolidated are brought to recover salvage compensation for services rendered to the barge Rahway and cargo on the 13th of December, 1890. The material facts are as follows: On the morning of December 13, 1890, the barge Rahway, belonging to the Pennsylvania Railroad Company, and laden with a cargo consisting of 691 bales of cotton on deck and 43 bales of cotton and 300 bags and 150 barrels of flour in the hold, was lying moored at pier 39, East river. The weather was cold, and a strong wind was blowing. About half past 1 in the morning fire was discovered in the cotton on the barge by a watchman on the adjoining dock, and very shortly the whole barge was enveloped in flames. The tug Adelaide, observing the fire, proceeded immediately to render assistance. Upon arriving at the burning barge she made fast to her at once, and towed her away from the docks into the stream, meanwhile pumping water on the fire. It was about 1:45 in the morning when the barge was towed into the stream by the Adelaide. The two boats then drifted down the East river, the Adelaide pumping water on the fire. At 1:50 the city fire-boat Havemeyer came along-side the barge, and commenced to throw water. At 1:55 the tug Uncle Abe, owned by the Pennsylvania Railroad Company, came along-side, and began to throw water upon the fire. At 2 o'clock, and

¹Reported by Edward G. Benedict, Esq., of the New York bar.

when the burning barge was about entering the North river, the tug *Talisman* arrived along-side, and commenced to throw water upon the fire. At about the same time the *Lowell M. Palmer* arrived; but, upon seeing that it was a Pennsylvania Railroad barge, she forthwith departed. At 2:20 the Pennsylvania Railroad Company's tug *Belvidere* arrived. When the barge had drifted below Governor's island, the *Adelaide* made a line fast to her, and towed her into the Erie basin,—the tugs *Uncle Abe*, *Talisman*, and *Belvidere* being along-side at the time; and at that time the fire was supposed to have been extinguished. This was about 5 o'clock in the morning. The *Havemeyer* had left at about 3 o'clock, under the impression that the fire was extinguished. But after the barge was towed into the Erie Basin, the fire burst out again. At 3:20 the Pennsylvania Railroad Company's tug *Pittsburgh* arrived. At 7:20 the *Henry H. Hohen*. At 11:30 the Pennsylvania Railroad Company's steam lighter *Transit* arrived, and in the evening the Pennsylvania Railroad Company's steam lighter *Despatch* arrived. Although deluged by water from these tugs, the fire was not put out, and the appearance became so threatening that the agent of the Pennsylvania Railroad Company, who seems to have arrived and taken charge, determined to sink the barge in order to extinguish the fire. This was done by filling her with water, and in this way the fire was finally extinguished. The sound value of the cotton on board the barge was \$43,000; the sound value of the flour, \$1,300; the sound value of the barge, \$6,000,—making a total value of property at risk, \$50,300. The value of the property saved was, of the barge and machinery, \$2,050; of the cotton, \$18,888.11; flour, \$649.39,—making a total value of property saved, \$21,587.50. No salvage compensation is claimed in behalf of the vessels that came to the assistance of the barge except the tugs *Adelaide*, *Talisman*, and *Henry Hohen*. It is conceded that salvage services were rendered by the *Adelaide* and *Talisman*; the right of the *Hohen* to salvage is denied.

Upon the evidence I am of the opinion that, in all probability, if the *Adelaide* had not come to the assistance of the barge as she did, both the barge and cargo would have been substantially destroyed; for there were no appliances upon the dock for extinguishing the fire, the barge had no means whereby to extinguish fire, and was without locomotive power of her own, so that it would not have been possible for the fire to have been extinguished by any means there present. The *Adelaide* arrived promptly, and by her prompt service the barge was moved into the stream, where she and the other tugs that arrived could throw water upon the fire. The situation presents this peculiarity: that, shortly after the *Adelaide* had towed the barge into the stream, the barge was surrounded by tugs belonging to the owners of the barge, and as able as the *Adelaide* to throw water, and do all that might thereafter be required, so that, if the *Adelaide* had then surrendered the possession of the barge to the tugs belonging to the same owner there present, no increase of risk would have followed. Undoubtedly, the *Adelaide*, having taken possession of the tug as a salvor, and being able to tow and to

throw water, was entitled to retain her custody of the barge until the need of assistance ceased. But after the barge reached the stream, the assistance needed consisted for the most part in pumping water. The powerful pumps belonging to the Pennsylvania Railroad Company's tugs, which came to the assistance of the barge, supplied not only valuable, but necessary, assistance. The important part of the service rendered by the Adelaide was that rendered in promptly towing the barge out into the stream, away from the piers, and promptly pumping water at the beginning of the fire. Her services after the barge reached the stream were no more valuable than the services rendered by the other tugs then present; and, owing to the presence of these tugs, the services of the Adelaide from that time were not necessary to the salvation of the property. The circumstances to be considered, therefore, in determining the amount of salvage award to the Adelaide are the promptness of the service rendered by the Adelaide in the moment of greatest distress and peril, the efficiency of the services afterwards rendered by her, and the successful result attained. This service involved little risk to the Adelaide, and called for no great display of daring on her part. The value of the Adelaide was \$15,000, the time occupied was from 1:45 in the morning to about 3 o'clock in the afternoon; while, on the other hand, the fact is to be considered that other tugs belonging to the owner of the barge, and able to do all thereafter required to be done, were present, and acted with the Adelaide in saving the property.

Taking all the circumstances into consideration, I am of the opinion that justice will be done by awarding to the owners and crew of the Adelaide the sum of \$2,000, for the services rendered by the Adelaide on the occasion in question; the same to be divided, one-half to the owners of the Adelaide, and the other half to be divided among the officers and crew in proportion to their respective wages.

The Talisman is also entitled to salvage compensation. She arrived at the barge at 2 A. M., when the barge had drifted into the North river, and after not only the Adelaide, but also the fire-boat Havemeyer and the Pennsylvania Railroad boat Uncle Abe had come to the assistance of the barge. Notwithstanding the presence of these tugs, the aid of the Talisman was welcomed, and she threw water on the fire from the time of her arrival until 9:30 A. M. She applied her water directly to the fire, and some risk was assumed by her crew in remaining upon the burning cotton with the hose, as appears by the fact that one of the Talisman's deck-hands, named George Anderson, refused to go upon the cotton with the hose. His place was taken by another deck-hand named Halvorsen, who stayed upon the cotton during four hours, handling the Talisman's hose, and suffering considerably from the cold water, which froze upon his oil skins as he stood. To this man, Halvorsen, a double portion of the salvage awarded to the crew of the Talisman will be paid, and the man George Anderson is not permitted to share in the salvage award. For the services of the tug Talisman and her officers and crew the sum of \$500 is awarded, one-half to be paid to the owners of the tug,

and the remainder to be divided among the officers and crew present at rendition of the salvage service, in proportion to their wages.

I do not consider the Henry W. Hohen entitled to salvage compensation. She did not arrive until 7:30 A. M. Then her services were not required. The Uncle Abe had already left, and the Hohen was told that her services were not required. She did afterwards put on a stream, but cannot be held to have rendered any necessary or valuable service. Her libel is therefore dismissed, but without costs.

THE HALF MOON.¹

JONES v. THE HALF MOON.

(District Court, E. D. New York. June 15, 1891.)

MARITIME LIENS—ABANDONMENT—AGREEMENT.

J., holding liens on four lighters owned by H., entered into the following agreement: "In consideration of the payment of \$500, * * * we do hereby agree to release the said H., and also the lighters C., H., S., and A., from any such claim as we have on the above to date." Thereafter H. paid on account \$200. The lighters being afterwards libeled by various lienors, libellant filed this libel to enforce his lien. On objection by an intervenor, another lienor, *held*, that the above agreement was in legal effect an abandonment of libellant's lien.

In Admiralty. Suit to enforce a lien.

Alexander & Ash, for libellants.

D. D. McKoon, for mortgagee.

BENEDICT, J. This is an action to enforce a lien against the lighter Half Moon for supplies and repairs. The lighter was a foreign vessel, owned in the state of New Jersey. By the statute of the state of New Jersey a lien is given, which continues until the debt is paid. Prior to August, 1888, the libellants Jones and Whitmill had a lien upon four different lighters, owned by one Havens, for different bills, incurred at different times, and amounting in all to some \$700 or \$800. On the 8th of August, 1888, Havens and Jones and Whitmill entered into an agreement for the compromise of these debts, and accordingly Jones and Whitmill signed an agreement to Havens in the following words:

"NEW YORK, August 9, 1888.

"In consideration of the payment of \$500 as follows: \$100 in the months of August, September, October, November, and December,—we do hereby agree to release the said Silas F. Havens, and also the lighters Carrie, Half Moon, Success, and Alert, from any such claim we have on the above to date.

[Signed]

"GEORGE T. JONES.

Witnessed: "THOMAS T. COSTIGAN."

¹Reported by Edward G. Benedict, Esq., of the New York bar.

Thereafter Havens paid, on account of this agreement, on August 1st, \$50; on August 31st, \$50; on October 8th, \$50; October 10th, \$50,—making in all, \$200. In February, 1890, these lighters were libeled by various lienors, and then Jones and Whitmill filed a libel against the Half Moon, and also against the Carrie, to enforce lien for the amount of the repairs done by them, respectively. In this action of Jones and Whitmill one of the said lienors appeared to defend, and filed his answer denying that Jones and Whitmill had any lien by reason of the agreement of August 9, 1888, between Jones and Whitmill and Havens, above set forth. The contention of these intervenors is that Jones and Whitmill by that agreement accepted the personal responsibility of Havens for their debts, and waived any lien upon the vessels mentioned therein. The question thus raised for decision is whether the agreement of August 9th, as set forth, was an abandonment of any lien Jones and Whitmill may have then had against the lighter Half Moon. In my opinion, that agreement was, in legal effect, an abandonment of the lien, for the reason that after the execution of the agreement, and certainly after the receipt of \$200 on account of that agreement, it became impossible, by reason of the terms of the agreement, to designate any definite sum constituting a subsisting lien upon any particular one of the vessels named. The intention of the parties must have been to look to the personal responsibility of Havens, and not to the Half Moon, for they entered into an agreement which made it impossible thereafter to state any sum for which the lighter Half Moon was liable. This intention is confirmed by the acts of Jones and Whitmill subsequent to the agreement, for, although they made frequent demands upon Havens for payment of the debt after the agreement of 1888, they took no proceeding against the lighters until they were seized in other actions, some two years and eight months after the bill was incurred, and one year and six months after the agreement was signed, and eight months after the lighters had been transferred, with the knowledge of Jones, to Thomas T. Costigan, who witnessed the execution of the agreement of 1888. There must therefore be a decree dismissing the libel, with costs.

THE CHARLES RUNYON.

MORSE v. THE CHARLES RUNYON.

(District Court, E. D. New York. June 19, 1891.)

TOWAGE—DUTY OF TUG TO LEAVE TOW IN SAFE BERTH.

A tug left a sound canal-boat at a pier to which the master of the canal-boat objected as unsafe. At low water the canal-boat broke in two. The water was 3½ feet deep at the end of the pier. The evidence as to the depth of water at the bows of the canal-boat was conflicting. *Held*, that the evidence of the soundness of the boat, and the fact that she actually broke in two, together with the positive evi-

¹Reported by Edward G. Benedict, Esq., of the New York bar.

dence of libellant that the water was shallow, placed the weight of evidence as to the unsafe nature of the place with libellant, who was therefore *held* entitled to recover his damages.

In Admiralty. Suit to recover for loss of a canal-boat.

Anson Beebe Stewart, for libellant.

Wing, Shoudy & Putnam, for claimant.

BENEDICT, J. This is an action to recover of the steam-tug Charles Runyon damages for neglect in respect to the canal-boat Thomas Dobby. On the 13th day of March, 1889, a contract was made by the owners of the tug Charles Runyon to tow the canal-boat Thomas Dobby, loaded with a cargo of coal, from Port Johnson to Barren island. The tug started in the morning with the canal-boat, but after she passed Norton's Point the weather proved so heavy that the tug deemed it prudent to go no further. She accordingly turned back with the canal-boat, and, taking the canal-boat to the north side of the American cotton docks on Staten island, left her there, along-side of the north side of pier No. 1. The place where the canal-boat was left was not a regular slip. It had never been excavated for a slip, but was simply part of the land used by the light-house station at Staten island, which adjoins pier 1 of the cotton docks. At the time the canal-boat was left at that pier, the master of the canal-boat objected to the place as unsafe. The wind was then high. During the afternoon the master of the canal-boat proceeded to New York, and informed the owners of the tug that the boat was in danger, and requested them to move her to a safe place. They promised to do so in the morning. The master also made unsuccessful efforts to procure another tug to move him to a safe place. The bottom along-side pier 1, where the canal-boat was moored, was a shelving bank, the water being some 30 feet deep at the end of the pier, and shoaling towards the shore. During the night the canal-boat suddenly broke in two and sank, the captain and his wife barely escaping with their lives. For the damage thus resulting this action is brought by the owner of the canal-boat.

No doubt exists as to the obligation of the tug to put the canal-boat in a safe place, when it was found best to turn back, and the ground of the contention in behalf of the canal-boat is that the place where the canal-boat was left was an unsafe place, because of insufficient water under the bows of the canal-boat. Upon the question of the depth of water at that place much testimony has been taken on both sides, and the conflict of testimony is extraordinary. Many witnesses swear that the water was by actual measurement eight and one-half feet at the lowest depth, and on the other side, witnesses who have actually measured it declare that it is not more than three or four feet. In this conflict of testimony as to the depth of water at the place where the boat lay notice must be taken of the undisputed fact that the canal-boat did break in two while lying at this place at low water. The claimant attempted to meet this by testimony going to show a bad condition of the boat. No other explanation has been attempted of the fact that the boat actually broke in two at low water at this place. The weight of the evidence is that the boat was

sound and strong. The sound condition of the boat, the sinking of the boat at low water, taken in connection with the positive evidence on the part of the libelants as to the depth of water, places the weight of the evidence with the libelant. Accordingly, it must be held that the tug-boat left the canal-boat at a place where it was unsafe for her to lie, by reason of which neglect the canal-boat was sunk.

There will therefore be a decree for the libelants, with an order of reference.

THE CALVIN S. EDWARDS.¹

SHARPLEY *et al.* v. THE CALVIN S. EDWARDS.

(District Court, E. D. New York. July 1, 1891.)

SALVAGE—DERELICT.

Where a schooner was found by salvors off the New Jersey coast, derelict, with four or five feet of water in her, and held to an anchor by a single hawser nearly chafed off, and was brought into port in safety in the face of a threatened storm, it was held, that the cargo of lumber aboard the vessel, and which was valued at \$1,500, should pay a salvage of \$675.

In Admiralty. Suit to recover salvage.

Wing, Shoudy & Putnam, for libelant.

Robert S. Minturn, for the vessel.

Peter S. Carter, for cargo.

BENEDICT, J. This is a claim on the part of the owners of the schooner *Eleanora* and the owners of the steam-tug *Idlewild* to recover salvage compensation for services rendered to a derelict. The schooner *Calvin S. Edwards*, laden with lumber, was discovered by the schooner *Eleanora* below Absecomb, abandoned, with four or five feet of water in her; the gaff, foregaff, and forebeam broken; no boats, no water-barrels on board; all sails gone but the topmast staysail; held to an anchor by a single hawser fastened to her bitts, and nearly chafed off; her chains were overboard with no anchors attached. As she was situated, she would have held on but a very little while longer. The *Eleanora*, finding her abandoned, made a line to her, put three men on board of her, and commenced to tow her towards New York. This was about 9 o'clock in the morning, and the sea was calm. After a while the wind began to breeze up, and the line parted. Then another line was made fast to her. By the time the *Eleanora* had arrived with the derelict off Barnegat the weather was looking very ugly. About 9 o'clock in the evening, the tug-boat *Idlewild*, coming in sight, was signaled, and asked to assist the *Eleanora* to get the derelict into port. This she agreed to do upon an understanding that any salvage that might be realized would be divided equally between the tug and the schooner. By the combined efforts of these two vessels the derelict was brought safely into

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

port. After this libel for salvage had been filed against the derelict and her cargo, it was agreed between the owner of the derelict schooner and the libelants that the derelict schooner should pay a salvage of 45 per cent. of the sum realized at the sale of the derelict by the marshal. No agreement was made as to the cargo, and the question now to be determined is as to what salvage should be paid by the cargo. No owner of the vessel has appeared. The only person appearing to contest the demand of the salvors is the owner of the cargo. This intervenor, having been allowed to appear and defend for the cargo, contends that \$250 would be sufficient salvage for the whole service, and that \$100 would be sufficient for the cargo to pay. I cannot agree to this contention. The case is one of a derelict saved by the exertions of two vessels from a probable total loss. Upon the facts stated, I do not consider that it will be unjust to award the sum of \$675 for saving the cargo, the value of which has been agreed on at \$1,500.

THE SARAH THORP.

THAMES TOW-BOAT CO. v. THE SARAH THORP.

(District Court, D. Connecticut. June 11, 1891.)

COLLISION—DAMAGES—WAGES OF CREW OF INJURED VESSEL.

A tug was injured in a collision with a steamer, owing to the steamer's fault. *Held*, that the wages and provisions of the crew of the tug during the expected time she was undergoing repairs, a period of 21 days, should not be allowed as damages against the steamer.

In Admiralty. On exceptions to commissioner's report.

The steam-tug America, owned by the Thames Tow-Boat Company, was injured in a collision with the steamer Sarah Thorp. On a libel by the Thames Tow-Boat Company it was adjudged that the collision was owing to the steamer's fault, and a reference ordered to a commissioner on the question of damages. See 44 Fed. Rep. 637. The commissioner made his report, and both parties excepted.

James Parker, for claimant.

Samuel Park, for libelant.

SHIPMAN, J. The questions arise upon exceptions to the commissioner's report. Upon the first exception of the claimant \$224.07 are deducted from the commissioner's allowance of wages and provisions for the second engineer, steward, three firemen, and two deck-hands during the time of repairs. It does not seem to me that these seamen should have been kept in the employment of the libelant at the expense of the claimant during the 21 days' repairs, which, before the work was commenced, it was known would cost about \$3,000. The other exceptions of the claimant and the exception of the libelant are disallowed.

Let a decree be entered for \$4,231.20, and costs to be taxed.

McDOUGALL v. HAYES.

(Circuit Court, D. Washington, W. D. July 9, 1891.)

1. FEDERAL COURTS—JURISDICTION—PARTIES.

In a suit by one claiming ownership to land by conveyance from one who has made an entry thereon under the land laws of the United States, but who has not received a patent therefor, against one claiming the ownership by virtue of a subsequent entry, a petition of intervention filed by the United States alleging that plaintiff's entry was fraudulent does not make the United States a party, to give the federal courts jurisdiction, since courts have no jurisdiction to pass upon title to land to which the United States has not parted with its legal title, where there is a controversy between a person claiming title under the land laws of the United States as against the government itself.

2. SAME.

Since, under the law of Washington Territory, the territory was divided into four districts, and the legislature was given power to fix the time and places of holding courts within those districts, with the limitation that courts for the transaction of business in which the United States was interested or might be made a party could be held at no more than three places in each district, and since the legislature provided for courts in the second district for such business at three places other than Montesano, and provided that the court at Montesano should not have jurisdiction of suits in which the United States was interested or a party, such court could not allow to be made or make the United States a party to a suit.

At Law.

Junius Rochester, for plaintiff.

P. H. Winston, U. S. Atty., for the United States.

HANFORD, J. In the case of Malcolm McDougall against Green C. Hayes a demurrer to the complaint of intervention by the United States of America was interposed and submitted some time ago. I find from examining the record that this is a suit which was originally commenced in the territorial district court for the second judicial district of Washington Territory, holding terms at Montesano, in Chehalis county. Malcolm McDougall is the plaintiff and Green C. Hayes is the defendant named in the complaint. The suit is brought to recover possession of a tract of land in Chehalis county, the title to which is in the United States of America, no patent having been issued. The plaintiff claims ownership of the property by mesne conveyances from one William Campbell, who, it appears, made an entry of the land in the United States district land-office, paid the government price for it, and received from the receiver of the land-office a duplicate receipt, such as the land-office issues upon final proof being made, and which, if regularly issued, would be evidence of the entryman's right to a patent. The defendant, Hayes, never filed an answer or demurrer, or raised any issue; but, after the suit had been commenced, a complaint on the part of the United States of America as an intervenor in the action was presented by the United States attorney to the judge of that court, who indorsed upon it an order granting leave to file it. Subsequently there was a stipulation signed and filed in the case, made between the attorneys for the plaintiff and the attorney representing the United States, allowing the complaint of intervention to stand as the answer of the defendant, Green C. Hayes,

and upon that the court appears to have made an order allowing the complaint of intervention to stand as the answer of Green C. Hayes; yet I do not find in the record that Mr. Hayes ever has adopted this complaint of intervention as his answer in the case, and there is no issue in the record excepting that made between the plaintiff, by the allegations of his complaint, and the United States of America, by the allegations of its complaint of intervention. The complaint of intervention denies the facts as to the regularity or legality of the entry made by Campbell in the land-office, and affirmatively charges that the duplicate receipt was obtained by means of false and fraudulent representations made at the land-office; then goes on to allege that subsequently, after notice being given, and an opportunity for a contest afforded, the officers of the land department assumed to cancel that receipt, and for this reason the United States claims to be the owner of the property, and resists the action by the plaintiff to recover possession of it from the defendant, Green C. Hayes. After the complaint of intervention had been filed at Montesano, the court made an order transferring the cause for trial to the district court of the second judicial district of Washington Territory, holding terms at Tacoma, in Pierce county; and it was accordingly so transferred, and was pending upon the issues I have stated in the court at Tacoma when that court went out of existence by reason of the admission of the state of Washington into the Union. Since then the case has been brought into the United States circuit court of the district of Washington, upon the assumption that this court is the successor of the territorial court as to this case, by reason of the fact that the United States is a party to the action. I think this is error, and that this court has not, and never has had, jurisdiction of the case, for the reason that the United States never has been, and could not be, a party to the action.

In the first place, the court holding terms at Montesano never was a court which could have jurisdiction of any case in which the United States was a party, and could not, by any order which it had power to make, either bring the United States into court by any compulsory process, or permit any officer representing the government to submit a controversy in which the United States had an interest to the determination of that court. The organic law of the territory in force at that time divided the territory into four districts, and gave the legislature of the territory power to fix the times and places of holding courts within those districts, with the limitation, however, that courts for the transaction of business in which the United States was interested or might be a party could be held at no more than three places in each district. The legislature, under the authority thus given, provided for courts to be held in the second judicial district in several different places, including Montesano; but in the law providing for the holding of court at Montesano it was expressly provided that it should not have jurisdiction in any case in which the United States was interested or a party; and it provided for courts to be held at Tacoma, Olympia, and Vancouver, in the second judicial district, which should have jurisdiction of such cases. So, for that reason, if for no other, I should hold that any attempt to make the

United States a party to the suit was futile and ineffective, because the United States could not be a party to a suit in that court.

There is another reason why the United States could not be a party to this suit, and that is that the suit is one to establish the plaintiff's title to land of which the government has not yet parted with its legal title, and congress has never given the courts power or jurisdiction to pass upon questions of title where there is a controversy between a person claiming title under the land laws of the United States as against the government itself. In the case of *U. S. v. Jones*, 131 U. S. 1, 9 Sup. Ct. Rep. 669, it was decided by the supreme court that a suit against the government to determine questions of title under the land laws could not be maintained in the courts. If that is true, it seems to me that it follows necessarily that the United States attorney could not, by simply consenting on his part, confer authority or vest the power in a court to adjudicate any question as against the government, because to do so would be for the attorney to accomplish what the supreme court has said cannot be done without express sanction of law enacted by congress. Until congress gives the courts authority to try these questions, the ministerial officers of the government certainly cannot do so. I consider, therefore, all the proceedings relating to the intervention of the United States as being entirely void, and the case should be regarded as simply an action between Mr. McDougall, a private individual, and Mr. Hayes, a private individual; and there are no facts appearing in the record that would bring the case within the jurisdiction of this court without a written request of one of the parties to bring it here. No such request appears to have been made, and the record is improperly here. An order will therefore be entered, on motion of the court, that the papers filed in the case be immediately transferred by the clerk of this court to the clerk of the superior court of Pierce county, which is, as to cases of this character, the successor of the territorial district court formerly held in Tacoma.

SMITH v. CROSBY LUMBER Co., Limited.

(Circuit Court, W. D. Pennsylvania. June 24, 1891.)

1. REMOVAL OF CAUSES—MOTION TO REMAND—PRACTICE.

Upon motion to remand the court may hear affidavits controverting the allegations of the petition for removal. Following *Amy v. Manning*, 38 Fed. Rep. 868.

2. SAME—LOCAL PREJUDICE.

Where it appears that the defendant is a foreign corporation; that the plaintiff and his father live in the county in which the suit was brought; that the father is a very influential man in the county; and that there is in the county a great prejudice against the defendant, and a general desire that the plaintiff may win his case,—the action is removable on the ground of local prejudices.

3. SAME—EVIDENCE.

The fact that it is not shown that such prejudice exists in every county to which the case is removable by change of venue is no reason for remanding the case, where

it appears that, under the state law, the granting a change of venue in such cases is discretionary, and that the judge of the state court has stated that no grounds for removing the case exist.

At Law.

Mullen & McClure and *P. R. Cotter*, for plaintiff.

Sheridan Gorten and *Simon Fleischman*, for defendant.

REED, J. On the 17th of April, 1891, the defendant company presented its petition to this court, setting forth that the plaintiff was a citizen of the state of Pennsylvania, and the defendant was a corporation organized and existing under the laws of the state of New York, and having its principal place of business in the city of Buffalo; that a suit brought by said plaintiff against said defendant, involving over \$2,000, and not yet tried was pending in the common pleas of McKean county, Pa.; that, on account of prejudice and local influence, the defendant would not be able to obtain justice in the state court, or any other state court to which, under the laws of the state, the defendant might have the right, on account of local prejudice, to remove said cause. Service of notice of the application to this court was proven to have been made upon the attorneys for the plaintiff, but no appearance was made at the hearing by any one for the plaintiff. The defendant's attorney presented with its petition an affidavit of the president of the company, stating that, from prejudice and local influence, the defendant could not obtain justice in the state court. It appeared that, before the application to this court was made, an application, based on similar grounds, had been made to the common pleas of McKean county, for an order to remove the case to this court, and several affidavits were presented in support of that application, and an exemplification of the record in that court was presented to me, containing copies of those affidavits, which counsel read in support of his petition filed here. These affidavits averred, substantially, the existence of a widespread prejudice among the citizens of the county against the defendant, a general sympathy for the plaintiff, and particularly for his father, both of whom had many friends throughout the county, and had been well-known business men, and were generally supposed to have been ruined financially through their relations with the defendant company; that the case was frequently talked about, opinions expressed in favor of the plaintiff and against the defendant; and that a desire existed that the plaintiff should win his case. These affidavits also expressed the opinion that the defendant could not, under the circumstances, obtain a fair and impartial trial in the county.

The proofs offered, in my judgment, justified a removal of the case to this court, and an order was accordingly made to that effect on April 17, 1891. On June 20, 1891, the plaintiff filed a petition, praying that the case be remanded to the state court; and, in support of his petition, filed a large number of affidavits. The petition denied the existence of any prejudice against the defendant, except in the vicinity of its property; but it did not deny the existence of a general sympathy for the plaintiff, and a desire that he should win his case. The affidavits presented were

substantially similar, and contain the averment that the affiant is acquainted with the parties to the action, and with the people generally throughout the county; that from his knowledge of the parties, and of the people of the county, he believes there is no prejudice existing against said defendant, and knows no reason why a fair trial could not be had in the county. Defendant's counsel contended on the argument upon plaintiff's petition that his application to remand should be denied, because he had had notice of the application for removal, and had not opposed it, and because there was no power in the court to order the remanding of the case; its power being exhausted, under the statutes now governing removals, when the order was made for removal. He also contended that the defendant's affidavits could not, under the law, be controverted; and, finally, without waiving these positions, presented some additional affidavits, and argued the case upon the merits.

As to the first ground, Judge WALLACE has said, in the case of *Amy v. Manning*, 38 Fed. Rep. 868, that "whether the proper case for removal exists is to be determined by the court, and, primarily, when the petition and affidavit for removal are presented. It may be reconsidered upon a motion to remand, and, if such a motion is made, and the court is satisfied, by further argument, or by controverting affidavits, that the petition ought not to have been allowed, it has the same power to vacate the allowance that it has to vacate any interlocutory order made *ex parte*, which has been improperly or improvidently granted." And this seems to be in accord with the opinion of the supreme court in *Re Pennsylvania Co.*, 137 U. S. 451, 11 Sup. Ct. Rep. 141, where Justice BRADLEY says:

"Our opinion is that the circuit court must be legally, not morally, satisfied of the truth of the allegation that from prejudice or local influence the defendant will not be able to obtain justice in the state court. Legal satisfaction requires some proof suitable to the nature of the case; at least an affidavit of a credible person, and a statement of facts in such affidavit which sufficiently evince the truth of the allegation. The amount and manner of proof required in each case must be left to the discretion of the court itself. A perfunctory showing by a formal affidavit of mere belief will not be sufficient. If the petition for removal states the facts upon which the allegation is founded, and that petition be verified by affidavit of person or persons in whom the court has confidence, this may be regarded as *prima facie* proof sufficient to satisfy the conscience of the court. If more should be required by the court, more should be offered."

That the affidavit may be regarded as *prima facie* proof would seem to imply a right in the other party to controvert it. But, whatever may be finally settled as the proper practice, I think the present case should be considered on its merits.

The additional affidavits filed by the defendant upon the hearing of the motion to remand are those of residents of McKean county, to the effect that the father of the plaintiff has long been a resident of the county, and has resided, and now resides, within a short distance of the county-seat, and is an influential man, and has a large acquaintance through the county; that there is, as a fact, a great prejudice existing in the county against the defendant, and that, in the opinion of the affiants, such prej-

udice and the local influence in favor of the plaintiff will have such effect as to prevent a fair trial in the county. One affiant, a justice of the peace, residing at the county-seat, states that he has lived there over 50 years, and has an extensive acquaintance throughout the county; that he knows, as a fact, there is a very great prejudice against the defendant at the county-seat and in several townships in the neighborhood, and nearly every one seems anxious that the plaintiff should win his case. Other affiants say that they have heard the case talked over, and have talked with numerous citizens of the county about it; that, almost without exception, these persons have expressed themselves as desirous that the plaintiff should win, without regard to the facts of the case,—some for the reason that the defendant is a foreign corporation, and the plaintiff and his father are old residents of the county; and others because they do not like the defendant, and that, with the exception of a few persons directly interested in the company, affiants have heard no one express an opinion in its favor.

The plaintiff's affidavits do not controvert the statements of fact in defendant's affidavits, and, taking defendant's affidavits as true, I adhere to my original opinion that this case ought to be removed. It may be theoretically possible that the same people who have expressed these adverse opinions might, if sworn as jurors, divest themselves of their prejudices, and it may be possible that a jury could be obtained at the home of the plaintiff which would disregard all prejudice and local influence; but it is a fact that, as the affidavits show, prejudice against the defendant, and local influence in favor of the plaintiff, exists; that the case is one of importance, and public interest in it will undoubtedly increase as the time of trial draws nigh; that jurors are but human, and that even the most ardent admirer of the jury system will have to admit that juries are sometimes influenced by prejudice and outside influences, and without any idea of the existence of improper motives, or that they may disregard their oaths. In my judgment, it may be fairly presumed, from the facts and circumstances, that the defendant will not be able to obtain justice in the state court. The words of Judge DEADY in *Neale v. Foster*, 31 Fed. Rep. 53, are exactly in point. He says:

"There may be a prejudice in favor of his adversary that may be as much in his way of obtaining justice as a prejudice against himself. The prejudice and local influence mentioned in the statute is not merely a prejudice or influence primarily existing against a party seeking a removal. It includes as well that prejudice in favor of his adversary which may arise from the fact that he is long resident and favorably known in the community."

One other question must be considered. The act of 1888 provides, not only that it be made to appear to the circuit court that from prejudice and local influence the defendant cannot obtain justice in the state court where the suit is pending, but also that from such causes he cannot obtain justice "in any other state court to which the said defendant may, under the laws of the state, have the right, on account of such prejudice or local influence, to remove the said cause." When the application of the defendant for removal was originally heard, its affidavits

contained an averment, in the words of the act, that it could not obtain justice in any other state court to which it had a right to remove the case; but there were no such facts set forth as would legally satisfy the court, if it were a question of fact. The question is directly raised by the petition of the plaintiff, which denies that any such prejudice or local influence exists as to prevent a fair trial in any other court of the state. I see no reason to change the conclusion to which I came when the petition for removal was presented. An examination, then and now, failed to discover any authority upon this clause of the statute except the case of *Robison v. Hardy*, 38 Fed. Rep. 49. In that case it appeared that there was a statute in Illinois providing that, when the party feared that he would not receive a fair trial on account of prejudice or influence, the court might order the removal to some other convenient county; and the court held that there was no satisfactory evidence that the defendant could not receive a fair trial in some other state court, and refused to make the order of removal. Apparently, under the Illinois statute the party, upon expressing his fear or belief that he could not obtain a fair trial, possibly substantiating his belief by some statements of fact, was entitled as of right to a removal; the court having the power to determine the county to which the case should be sent. But in Pennsylvania, removal on the ground of prejudice or local influence is not a matter of right. By statute two classes of removals are provided for,—one as a matter of right, which class includes disqualification of a judge from interest or relationship; the fact that the county, any municipality therein, or officers thereof, are parties to the suit; the interest of a large number of the inhabitants in the question involved in the case; and certain suits for the recovery of purchase money for real estate bought in other counties than that in which the real estate is located. In these cases the statutes provide that the order of removal shall be made as a matter of right. As distinguished from the former is a second class, which the statutes provide may be removed if it appear to the satisfaction of the court that local influence or prejudice exists, or that a fair and impartial trial cannot be had, in the county in which a cause is pending. In providing a mode of procedure, the statutes require, in reference to the first class, that the court be satisfied of the truth of the statements made by the petitioner, in which case it shall award a change of venue; but in reference to the second class the provision is that the court shall hear the parties, and may refuse or award such change of venue as in its discretion it shall see fit. This case is not one which the defendant has the right to remove to any other state court, and is not within the condition imposed by the act of 1888. But should it be held that “a right to remove” was satisfied by the statute, which provided a means to remove to another county, (because the state court must be presumed to exercise its discretion in a legal way, and properly,) then an examination of the record shows that the court has already passed upon the merits of that question. When the application was made to the state court to order the removal to this court, that court refused to make the order, properly holding it had no power to do so. Counsel for defendant then applied

for a temporary stay of proceedings, until he could apply to this court for an order of removal. The same statement of facts was before that court which was subsequently made in this court. That court refused his application for stay, and, in an opinion filed, said:

"Moreover, I am not satisfied of the necessity of removing this cause. In my opinion, the defendant can have a fair trial in this county, notwithstanding the *ex parte* affidavits this day filed by the defendant. Judges and lawyers know that it is not difficult to procure such affidavits."

This conclusion by the state court rendered it apparent to me that there was no prospect that the defendant could obtain a change of venue, and that the only question to be considered was that of a fair and impartial trial in the county in which the case was pending, and not in other counties to which it could not obtain a removal.

The motion to remand must be refused.

DOW v. BRADSTREET Co. *et al.*

(Circuit Court S. D. Iowa, W. D. June 15, 1891.)

1. REMOVAL OF CAUSES—SEPARABLE CONTROVERSY.

A petition by a citizen of Iowa jointly against a mercantile agency, a resident of Connecticut, and its alleged correspondent, a citizen of Iowa, which alleges that the latter sent to the former a false statement as to plaintiff's financial condition, and that the former published it to its subscribers, does not present a separable controversy, to entitle defendant mercantile agency to remove the case to the federal court.

2. SAME—JOINDER OF SHAM PARTY—PRACTICE.

In such case the mercantile agency may show by proper allegations in a petition for removal from the state to the federal court, and by proof, that its co-defendant was joined with it merely for the fraudulent purpose of defeating the jurisdiction of the federal court.

At Law. Motion to remand.

Berryhill & Henry, Kauffman & Guernsey, and *J. C. Connor*, for plaintiff.
Cole, McVey & Cheshire, for defendants.

SHIRAS, J. In the petition, filed in this case in the district court of Crawford county, Iowa, it is averred that the Bradstreet Company is a corporation created under the laws of the state of Connecticut, engaged in carrying on the business of a mercantile agency throughout the United States; that the defendant H. S. Green is an agent and correspondent of said company, located at Dow City, Crawford county, Iowa; that on or about the 21st of December, 1890, said Green sent to the office of the Bradstreet company at Des Moines, Iowa, a telegram stating that the plaintiff, who was engaged in business at Dow City, Iowa, had transferred a large quantity of real estate, and on the 24th of December, 1890, said Green sent or caused to be sent to the Bradstreet Company a further telegram to the effect that plaintiff had failed in business; that the Brad-

street Company caused to be published to all of its subscribers the information contained in the telegrams mentioned; that the statements thus forwarded by Green and published by the company were false, and worked great injury to plaintiff, causing him damages in the sum of \$100,000, for which amount judgment is prayed against the defendants. The defendant company in due season filed a petition for the removal of the case into this court, averring therein that the company was, when the suit was brought, and continues to be, a corporation created under the laws of the state of Connecticut; that the plaintiff was and is a citizen of the state of Iowa; that the defendant Green was and is a citizen of Iowa; that the action involved two controversies,—one against the defendant Green for sending the alleged false information by telegram to the company, and the other against the company for communicating or publishing the same to its subscribers,—and that the controversies are separable, and for that reason the case is a removable one, and further, that the defendant Green is joined as a defendant to prevent a removal of the case; that he is a sham defendant, has no interest in the controversy, never was the agent of the company, never sent any telegram to the company touching the plaintiff, and has no connection with the matter, and is simply joined as a defendant for the purpose of defeating the jurisdiction of this court. In support of the petition for removal the affidavits of the agent of the company at Des Moines and of the defendant Green are filed, in which it is averred that Green was not the agent or correspondent of the company at Dow City or elsewhere; that he did not furnish any information, by telegram or otherwise, to the company in regard to the plaintiff, and had no connection, direct or indirect, therewith. A transcript of the record having been filed in this court, the plaintiff now moves for an order remanding the case to the state court, and thus the question of the jurisdiction of this court is presented for determination. In support of the right of removal it is urged on behalf of the defendant company that the case presents separable controversies, within the meaning of the statute,—one against Green for sending the telegrams to the company, and thereby publishing the same to the company; and another against the company, for publishing these telegrams to its subscribers. The able argument submitted by counsel for the company clearly demonstrates that the plaintiff might have brought two separate actions against the respective parties upon the facts alleged in the petition, but the question is, has the plaintiff in fact done so, or has he chosen to declare jointly against the defendants? As stated in Cooley on Torts, 194:

“In general, all persons in any manner instrumental in making or procuring to be made the defamatory publication are jointly and severally responsible therefor.”

In determining whether the case presents separable controversies, the allegations of the declaration or petition are held to be true, and the question is to be solved by the issues thereby presented. *Railroad Co. v. Grayson*, 119 U. S. 240, 7 Sup. Ct. Rep. 190. In *Pirie v. Tvedt*, 115

U. S. 41, 5 Sup. Ct. Rep. 1034, 1161, which was an action for a malicious prosecution, it is said:

"There is here, according to the complaint, but a single cause of action, and that is the alleged malicious prosecution of the plaintiffs by all the defendants acting in concert. The cause of action is several as well as joint, and the plaintiffs might have sued each defendant or all jointly. It was for the plaintiffs to elect which course to pursue. They did elect to proceed against all jointly, and to this the defendants are not permitted to object. The fact that a judgment in the action may be rendered against a part of the defendants only, does not divide a joint action in tort into separate parts, any more than it does a joint action on contract."

See, also, *Sloane v. Anderson*, 117 U. S. 275, 6 Sup. Ct. Rep. 730.

In the petition filed herein the publications complained of as causing damage to the plaintiff were those made by the defendant company to their subscribers, and the defendants are declared against for these publications, as being jointly instrumental in bringing them about; and hence the petition must be construed as a joint declaration against the defendants. As the plaintiff and the defendant Green are both citizens of the state of Iowa, and as the petition does not present or include a separable controversy between the plaintiff and the defendant corporation, the jurisdiction of this court cannot be sustained upon that ground.

The next question for determination is that arising upon the averment of the petition for removal, that Green is but a sham party, having been joined as a defendant for the purpose of defeating the jurisdiction of this court. The first point for consideration is whether, if true, such fact can be shown in aid of a petition for removal filed by the real defendant. The principle has always been recognized that the joinder of purely nominal parties in an action cannot defeat the removal of the cause by the real party in interest if the jurisdictional facts exist as to him. *Wood v. Davis*, 18 How. 467; *Sewing-Machine Cases*, 18 Wall. 553; *Bacon v. Rives*, 106 U. S. 99, 1 Sup. Ct. Rep. 3. If, then, in determining the question of jurisdiction, either original or by removal, it is permissible to ignore the presence of parties who, upon the record, appear to be purely nominal parties, having no real interest in or relation to the cause of action, should not the same rule apply in case it appears that a given party has been made such, solely for the purpose of defeating the right of removal to the federal court, without such party having any interest in the subject of litigation? In the case of *Society v. Ford*, 114 U. S. 635, 5 Sup. Ct. Rep. 1104, it was held that the colorable or fraudulent assignment of a cause of action from A. to B., the latter being a citizen of the same state as the defendant, and the suit being brought in the name of B., could not be availed of as ground for removal, which right would have existed had the suit been in the name of A. It was held that the colorable or fraudulent nature of the assignment would be a defense to the action as brought, but that proof of the fraudulent purpose of the assignment would not have the effect of changing the action from one between citizens of the same state to one between citizens of different states. To the same effect was the ruling in *Oakley v. Goodnow*, 118 U.

S. 43, 6 Sup. Ct. Rep. 944. In those cases there was but a single plaintiff, and therefore the question of the joinder of nominal, immaterial, or sham parties with the real parties in interest was not presented. In *Arapahoe Co. v. Railway Co.*, 4 Dill. 277, Justice MILLER ruled that—

“It would be a very dangerous doctrine,—one utterly destructive of the rights which a man has to go into the federal courts on account of his citizenship,—if the plaintiff in the case, in instituting his suit, can, without any right or reason or just cause, join persons who have not the requisite citizenship, and thereby destroy the rights of parties in federal courts. We must therefore be astute not to permit devices to become successful which are used for the very purpose of destroying that right.”

The ruling of Justice MILLER in this case was cited approvingly by the supreme court in *Walden v. Skinner*, 101 U. S. 577. The reasoning which sustains the doctrine, which is now too firmly established to be called in question, that in determining the jurisdiction of the circuit court of the United States regard will be had only to the citizenship of the real parties in interest, disregarding wholly all nominal or immaterial parties upon the record, seems to me to be equally applicable to cases wherein it is made to appear that a party, having in fact no interest in or actual connection with the subject of litigation, has been joined as a party with those actually interested, for the sole purpose of defeating the jurisdiction of the federal court. A fraud of this nature, if successful, deprives the citizen of a right conferred upon him by the constitution and laws of the United States, and it certainly must be true that it cannot be perpetrated without a remedy existing for its correction. Unless this be so, then it is possible to defeat in every instance the right of removal, when the same depends upon the citizenship of the adversary parties, by the easy device of joining as a party one who has no interest in the case, but who is a citizen of the same state as the plaintiff. In *Plymouth Min. Co. v. Amador Canal Co.*, 118 U. S. 264, 6 Sup. Ct. Rep. 1034, it was said:

“Under these circumstances, the averments in the petition that the defendants were wrongfully made to avoid a removal can be of no avail to the circuit court upon a motion to remand, until they are proven; and that, so far as the present record discloses, was not attempted. The affirmative of the issue was on petitioning defendant. That corporation was the moving party, and was bound to make out its case.”

In *Railroad Co. v. Wangelin*, 132 U. S. 599, 10 Sup. Ct. Rep. 203, is found the following:

“As to the suggestion, made in argument, that the Southeast and St. Louis Ry. Company was fraudulently joined as a defendant in the state court for the purpose of depriving the Louisville and Nashville R. R. Company of the right to remove the case into the circuit court of the United States, it is enough to say that no fraud was alleged in the petition for removal, or pleaded or offered to be proved in the circuit court.”

Although not, perhaps, express adjudications upon the question, these intimations of the views of the supreme court support the doctrine that it is open to a party who desires to remove a case brought against him to show upon proper allegations and proof that a co-defendant has been

wrongfully joined with him for the fraudulent purpose of defeating the actual right of removal to the federal court, and this is the conclusion reached in the present case. To properly present the question, the allegations of fact relied upon as showing the fraudulent joinder of the party should be made in the petition for removal, unless they otherwise appear upon the face of the record. If the facts alleged, if true, make out the charge of fraudulent misjoinder of parties for the purpose named, and the other party desires to take issue upon the truth thereof, then the trial thereof must be had in the federal court, for, as is said by the supreme court in *Railroad Co. v. Daughtry*, 138 U. S. 298, 11 Sup. Ct. Rep. 306, "it is thoroughly settled that issues of fact raised upon petitions for removal must be tried in the circuit court of the United States." See, also, *Carson v. Hyatt*, 118 U. S. 279, 6 Sup. Ct. Rep. 1050; *Railroad Co. v. Dunn*, 122 U. S. 513, 7 Sup. Ct. Rep. 1262; *Crehore v. Railroad Co.*, 131 U. S. 240, 9 Sup. Ct. Rep. 692. As already stated, in the petition for removal filed in this cause, the same being under oath, the allegation is expressly made that the defendant Green never was the agent of the Bradstreet Company, did not send the telegrams referred to in plaintiff's petition, had no connection therewith, and that he is joined as a co-defendant without reason therefor, and for the express purpose of defeating the jurisdiction of this court, and in support of the petition the affidavits of the agent of the defendant company and of H. L. Green are filed. The motion to remand does not raise an issue upon the facts thus alleged and sustained, but presents the legal questions already discussed, and upon these the ruling must be adverse to the motion to remand. We are as yet without precedents to guide us in determining the proper practice to be followed in cases of this character. No objection is now seen to the course pursued in the present case. By setting forth fully in the petition for removal filed in the state court the facts relied on as the basis for the charge that the joinder of a sham defendant has been made for the fraudulent purpose of defeating thereby the right of removal to the federal court, the state court is enabled to determine whether, upon the face of the record, the case is a removable one, assuming the facts alleged to be true; and by filing affidavits in support of the facts averred in the petition for removal formal evidence is submitted for the consideration of the federal court, and, if the facts set forth in the affidavits are deemed sufficient, no further evidence need be submitted unless issue is taken in some form upon the allegations of fact, when such issue will stand for trial in the federal court upon the evidence to be introduced by both parties thereon. Treating the present motion to remand as being intended to present only the legal questions arising upon the face of the record, and as not presenting an issue of fact upon the allegations of the petition for removal, the same is overruled.

DE LA VERGNE REFRIGERATING MACH. CO. v. MONTGOMERY BREWING Co. *et al.*

(Circuit Court, M. D. Alabama. May Term, 1891.)

1. FEDERAL COURTS—EQUITY JURISDICTION—ENFORCEMENT OF MECHANICS' LIENS.

The fact that the right to enforce a mechanic's lien is given by a state statute, and that it confers an adequate and complete remedy at law in the state courts, does not take away the equitable jurisdiction of a federal circuit court, where the parties are residents of different states, and the amount in controversy exceeds \$2,000.

2. SAME.

Where the remedy given by a state statute for the enforcement of mechanic's liens is essentially equitable in its nature, the fact that jurisdiction over such cases has been given to courts of law within the state does not deprive the equity side of a federal circuit court of jurisdiction over an action to enforce such a lien.

In Equity. Heard on demurrers to bill.

J. M. Falkner, J. M. White, and John M. Chilton, for complainant.
Tompkins & Troy, for defendants.

BRUCE, J. The complainant company claims of the defendants the sum of \$20,539.45, and interest thereon since June 26, 1890, balance due on a contract for the sale of machine and apparatus for the manufacture of ice, which complainant alleges it sold and delivered to the defendants in Montgomery, Ala., according to the terms of their contract, and claims the enforcement of a lien upon the building, machinery, and land upon which the same is situate, under the law of Alabama which is known as the "Mechanic's Lien Law," or the "Lien of Material-Men," the provisions of which complainant alleges it has fully complied with, and is therefore entitled to the enforcement of the lien for the balance due and unpaid on the contract. To this bill demurrers are interposed by the defendants, and several grounds are named and relied on against the maintenance of the bill.

It is claimed that the circuit court of the United States in equity has no jurisdiction to enforce the lien here claimed, and that the complainant has a plain, adequate, and complete remedy at law. The complainant is a resident citizen of the state of New York, and the defendants are resident citizens of the state of Alabama; the amount in controversy is over \$2,000; and, that being so, the complainant, at its election, is entitled to his remedy in the courts of the United States, in so far, at least, as the United States courts can give the remedy, and under the circumstances the court will not refuse to entertain the suit of complainant, unless it clearly appears, under well-settled rules, that the relief sought is not within the power and jurisdiction of the court. The lien claimed is statutory, created by the law of Alabama. It is a general rule that when new rights are created by law, and a remedy is given to enforce them, the party invoking the enforcement of the right must pursue the remedy given by the statute. Up to a recent period the remedy given by the law of Alabama to enforce the mechanic's and material-man's lien was at law, and not on the equity side of the court; and

the supreme court of Alabama, in the case of *Chandler v. Hanna*, 73 Ala. 390, held the right to enforce the lien to be exclusive on the law side of the court. Now, however, and since 1886, the law of Alabama gives the courts of equity of the state concurrent jurisdiction with the courts of law to enforce this character of lien. It may be conceded, however, that it is not important for us to inquire particularly as to the remedy or remedies given by the laws of Alabama to enforce the right in question; for in this court, while the rights of parties, whether they arise under the common law or the law of the state, are recognized and enforced, yet the remedies to be applied are not those provided under state statutes, but are such as obtain in this jurisdiction. It is well settled that state statutes cannot add to or take from the jurisdiction of the United States courts. In *Payne v. Hook*, 7 Wall. 430, it is said:

"We have repeatedly held that the jurisdiction of the courts of the United States over controversies between citizens of different states cannot be impaired by the laws of the states which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power. * * * The equity jurisdiction conferred on the federal courts is the same that the high court of chancery in England possesses, is subject to neither limitation nor restraint by state legislation, and is uniform throughout the different states of the Union."

The case made is for the enforcement of a lien upon machinery, and the real estate upon which it is situated, in the city of Montgomery, Ala.; and the complainant comes into equity in the circuit court of the United States, and asks, not simply that the amount due shall be judicially determined, but also that the lien which it claims upon the property shall be enforced by a decree for the sale of the property, and the satisfaction of the decree from the proceeds of sale. The defendants, by their demurrers, say the remedy at law is plain, adequate, and complete. Why, therefore, come into equity? It is to be borne in mind that the complainant elects to seek its remedy in the circuit court of the United States; and certainly this court will not remit it to the remedy at law in a state court, however full and complete that may be. In the case of *Ex parte McNiel*, 13 Wall. 243, the court says:

"It is urged, further, that a state law could not give jurisdiction to the district court. That is true. A state law cannot give jurisdiction to any federal court; but that is not a question in this case. A state law may give a substantial right of such a character that, where there is no impediment arising from the residence of the parties, the right may be enforced in the proper federal tribunal, whether it be a court of equity, of admiralty, or of common law. The statute in such cases does not confer the jurisdiction. That exists already, and it is invoked to give effect to the right by applying the appropriate remedy. This principle may be laid down as axiomatic in our national jurisprudence. A party forfeits nothing by going into a federal tribunal. Jurisdiction having attached, his case is tried there upon the same principles, and its determination is governed by the same considerations, as if it had been brought in the proper state tribunal of the same locality."

To same effect is the case of *Dennick v. Railroad Co.*, 103 U. S. 11; also, *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. Rep. 495; *Guines v. Puentes*, 92 U. S. 20.

It is clear, then, that there must be a remedy in this court; and the question is, on which side shall it be, at law or equity? It is claimed that being a statutory lien that is sought to be enforced, and not an equitable lien, it is therefore not the subject of equity jurisdiction. The mere fact that it is a lien that is sought to be enforced does not indicate, perhaps, that its enforcement falls on the equity side of the court. Common-law liens and liens by attachment may be said to be strictly legal in their nature, and not the subjects of equity cognizance; but the lien here in question, though the creation of the statute of the state, is upon real estate, upon which there may exist prior or subsequent liens held by persons who are proper parties to a suit affecting the title to the property; and is such a lien in its nature more properly one of cognizance of a law or equity court? In *Payne v. Hook*, cited *supra*, it is said:

"It is not enough that there is a remedy at law. It must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity."

The lien in the case at bar is in its very nature such as that equity, with its flexible modes and powers, can more fully mete out justice to the parties to the suit than is possible to be done in a court of law, with its more strict and unbending rules. On this subject we have the authority of the supreme court of Alabama, to which we look for the authoritative exposition of her own laws. In the case of *Trammell v. Hudmon*, 78 Ala. 224, the court say, in the case of the enforcement of a mechanic's lien:

"The whole proceeding is in the nature of a bill in equity for the enforcement of a lien on land, all persons interested in the matter in controversy or in the property sought to be subjected to the lien being authorized to be made parties." Citing Code, § 3447.

An examination of chapter 6 of the Code, which creates the lien of mechanics, employes, and material-men, shows that the remedy there given is essentially equitable in its nature, rather than legal. The law-making power of the state can distribute the judicial power, and give the law courts powers, and prescribe modes of proceeding, which are equitable in their nature; but, however much this may be done in state systems of jurisprudence, though they may be blended and the distinction between law and equity done away with, that cannot obtain in the United States courts so long as the constitution, art. 3, § 2, provides: "The judicial power shall extend to all cases in law and equity arising under this constitution." It is a matter of more than doubt if the circuit court of the United States, on the law side of the court, could give the remedy the complainant here seeks. There is no scope here for the operation of the state statute in so far as it furnishes a mode of proceeding, and a remedy to enforce a mechanic's lien. This court, in law or in equity, can proceed only upon well-recognized rules and principles applicable to the administration of the law in the United States courts. To undertake here to carry out the state statute, and apply the equitable rules provided in chapter 6 of the Code of Alabama, on the subject of mechanics' liens, would be to ignore the distinction

between equity and law which the courts of the United States have maintained for more than 100 years. The conclusion is inevitable that the complainant's remedy here is upon the equity side of the court. I do not find where this precise point has been discussed by the supreme court of the United States, but there are cases where that court has maintained suits in equity to enforce mechanics' and material-men's liens created by state legislation. They are the cases of *Davis v. Alword*, 94 U. S. 545; *Canal Co. v. Gordon*, 6 Wall. 561. While in neither of these cases is the question discussed, and the record does not show the question made here was there made, still, in a matter touching the power and jurisdiction of the court to render its decree, these cases must be recognized as authority for the exercise of the jurisdiction of the court. Upon this question I note that the counsel on the respective sides both cite from Pomeroy's Equity and Jones on Liens, both writers of accepted authority; and yet the fact that both sides find support from these authors shows that the law may not on this question be regarded as well settled. The view taken seems to be supported in 3 Pom. Eq. Jur. § 1269, and in 1 Jones, Liens, § 1042. It results from this examination of the question that the demurrers are overruled, and it is so ordered.

INEZ MIN. Co. v. KINNEY *et al.*

(Circuit Court, D. Idaho. June 30, 1891.)

1. JURISDICTION—MINING CASES—CONSTRUCTION OF UNITED STATES LAWS.

The question of the discovery of a mining claim within the limits of another valid mining claim involves the construction of a congressional act, but, having already been construed by the supreme court of the United States, cannot be reconsidered by the inferior national courts.

SAME—ABANDONMENT OF CLAIM.

Abandonment of a mining claim is not dependent upon any law of congress. In determining any question of abandonment, the construction of no act of congress is involved, and its consideration does not give the United States courts jurisdiction.

(Syllabus by the Court.)

In Equity.

Albert Hagan and *Frank Ganahl*, for plaintiff.

W. B. Heyburn, for defendants.

BEATTY, J. This action was commenced in a district court of Idaho territory for the purpose of quieting the title to the plaintiff's mining claim, known as the "Oakland," and to restrain the defendants from interfering with plaintiff's possession thereof; while the defendants justify their action upon the ground that they own the premises in question as the "Colonel Sellers" mining claim. The action is in the form indicated by statutes of said territory, then in force. It appears from the record that after the cause had been tried, and while under consideration by

said territorial court, the defendants on the 9th day of July, 1890, filed in said court their request for the transfer of the cause, and their affidavit alleging "that the adjudication of the issues involves the construction of the acts of congress," and "that the sum and value involved in said action exceeds the sum of two thousand dollars, exclusive of costs;" that on the 12th day of said month the defendants filed in said court another affidavit, in which it is alleged: (1) That the plaintiff's Oakland claim includes all of defendants' Colonel Sellers claim. (2) That the original location of the Oakland mining claim was made within the limits of, and upon the discovery of, a valid mining claim called the "Mutual Benefit Fraction;" "that, at the time of such attempted location of the Oakland, the Mutual Benefit Fraction was a valid and subsisting claim, and that said Oakland location was void under said act of congress." (3) "That the plaintiff amended the location of its said Oakland claim, and defendants claim that said amended location was and is void under said act of congress, because the discovery point of the amended location of said Oakland was knowingly included within the staked boundaries of an adjacent legal mining claim, called the 'Sierra Nevada Lode.'" And (4) "that in said action plaintiff claims under said act of congress a right to abandon a mining claim for the benefit of parties, to be chosen by the parties so abandoning, and that it can acquire title by such acts of abandonment;" which defendants dispute, and say "that all these questions necessarily involve the construction of said act of congress;" that on the 17th day of October, 1890, the defendants file in this court, as the record of the cause, what purports to be copies of the original papers and files in the case. On April 9, 1891, the plaintiff files its motion in this court to dismiss such record, for the reason, among others, that it is a transcript of and not the original files; and on the succeeding day the defendants file their motion for an order upon the state court to transmit to this court such original files; and they therein allege that the sum and value in controversy exceeded, when the suit was commenced, the sum of \$2,000, exclusive of interest and costs, and that the mining property involved was at the time worth \$5,000. Both motions were considered together, and in harmony with the ruling of this court, in the case of *Burke v. Mining Co.*, 46 Fed. Rep. 644, the plaintiff's motion, in so far as it is based upon the reason above specified, and the defendants' motion, are denied.

As disclosed by the record and arguments in the cause, but two questions remain for determination. What was the value at the commencement of the action of the matter in dispute? And is the construction of any law of the United States involved? The matter in dispute must be that particular tract of mining ground claimed by each party. While it does not appear just what that is, it may be inferred, from some statements in the record that it is the whole of defendants' claim, being a piece of ground 320 feet long by about 190 feet wide. But there is not in any part of the record, prior to the papers moving the transfer of the cause, any statement whatever of the value of any ground or of any matter in dispute. As has been frequently held, the allegation in defend-

ants' affidavit of July 9th is only an assertion of value at that date, and not at the time the action was commenced. However, if the statements of value made in defendants' said motion for an order on the state court may still be considered, notwithstanding the overruling of the motion itself, they are amply sufficient to show the necessary value at the institution of the action to give this court jurisdiction.

What issue herein involves the construction of any congressional law is the remaining question for solution. It is not now disputed that when any question, arising under the laws of the United States, has been once clearly and unequivocally adjudicated by the supreme court, it is no longer a proposition for judicial inquiry by the inferior national courts. No issue growing out of any statute, which has been once so adjudicated, can be said to involve in its determination the construction of such statute. It has been construed; there is nothing left to construe. All there is left is to follow the construction given. Neither is it sufficient, in any case, only that a right is involved which is granted by some act of congress, but there must be an actual contest as to the proper construction of such act, in the adjudication of the right, the same having never been authoritatively construed. The rule is well stated in *Starin v. City of New York*, 115 U. S. 257, 6 Sup. Ct. Rep. 28, that if "it appears that some title, right, privilege, or immunity, on which the recovery depends will be defeated by one construction of the constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the constitution and laws of the United States, within the meaning of that term as used in the act of 1875; otherwise not."

Turning, now, to the pleadings, it will be found they constitute an action framed in pursuance of the statutes of Idaho for the quieting of the title to a piece of mining ground, which is no different in form from an action to quiet the title to any other land, the title to which depends upon some act of congress. The laws of congress are the basis of title to both mineral and agricultural lands, but that the title is involved is not alone sufficient to give a federal court jurisdiction. The question of jurisdiction in any such case is governed by the fact that such laws must or must not be construed in reaching a conclusion. The action based upon an adverse claim to an application for patent to mining ground is an apparent exception to this rule, but jurisdiction in that action is not based alone upon a question of construction of the law. That action is especially contemplated by the statute; the government has instituted it as one of the means to the primary disposal of its domain. To determine some questions, it substitutes a court for its land-office, and to some extent the government is interested that the just conclusion shall be reached. The form of this action is not based upon any law of the United States. Does the adjudication of the right involved depend upon the construction of any such law? In defendants' affidavit of July 12th it is stated that the discovery of plaintiff's said Oakland claim, as well as of the amended location thereof, was within the limits of another valid mining claim, and it is alleged this involves

the construction of the mining acts of congress. This would be true, but for the fact that this question has already been distinctly determined in *Gwiltim v. Donnellan*, 115 U. S. 45, 5 Sup. Ct. Rep. 1110. Such affidavit further recites "that in said action plaintiff claims under said act of congress a right to abandon a mining claim for the benefit of parties to be chosen by the parties so abandoning, and that it can acquire title by such acts of abandonment." As the plaintiff makes no such direct allegation, it is presumed such was defendants' deduction from the complaint, which shows that the claimants of the Mutual Benefit Fraction located substantially the same premises as the Oakland, and afterwards amended the notice and location of said Oakland. Adopting, however, the defendants' view that the pleadings show such abandonment, it becomes pertinent to inquire what act of congress must be construed to determine the rights based upon any abandonment of a mining claim. The mining act itself makes no provision for or reference to the abandonment of a claim. It does provide for its forfeiture on failure to perform the annual work required. Forfeiture can occur only at the termination of the prescribed period, and is the creature of a positive statute. What is abandonment? No statute, at least not our mining statute, defines it. The common law of the land defines it as the relinquishment, the absolute forsaking, of a right. It is a question of intention, and occurs the instant the intention is formed. It is a law recognized and existing everywhere, and long before the enactment of our mining statutes, before their existence, it had been directly applied to mining interests and rights to which it was claimed to be especially applicable. Its first recognition in such interest in the west was, I believe, in 1856, in the case of *Davis v. Butler*, 6 Cal. 510, which was followed by many subsequent cases in California, Nevada, and elsewhere, both before and since the enactment of our mining statute. It was, in 1850, (*McGoon v. Ankeny*, 11 Ill. 558,) applied to slag which had been cast away, and it has long been applied to most rights which have been voluntarily surrendered and abandoned. It is in no sense provided for or prescribed by our mining laws. It is simply a general rule of property applied to mining rights. To determine its effect in any mining action, a construction of the United States mining laws cannot be involved. The conclusion being that this court has not jurisdiction of this cause, it is ordered that it be dismissed, and remanded to the proper state court.

McDONALD *et al.* v. YUNGBLUTH *et al.*

(Circuit Court, S. D. Ohio, W. D. July 11, 1891.)

1. SPECIFIC PERFORMANCE—VENDOR AND VENDEE—TRUST

It is no objection to a specific enforcement of a contract to convey land that the legal title is held by one not a party to the contract, where such person is a party to the suit, and it appears that he holds the title in trust for the vendors.

2. SAME—STATUTE OF FRAUDS.

Where one who has agreed to sell certain land receives the full consideration therefor, and then fraudulently gives a deed conveying only part of the land, a specific enforcement of the contract may be had in equity, even though the contract was oral.

3. SAME—LACHES.

Where the relations between vendor and vendee are so intimate and friendly that the vendee has every confidence in the vendor, the vendee's failure to examine the deed before accepting it does not prevent him from seeking equitable relief, where the deed does not conform to the contract of sale.

In Equity.

Ramsey, Maxwell & Ramsey and *Stephens, Lincoln & Smith*, for complainants.

Archer & McNeil and *Follett & Kelley*, for respondents.

SAGE, J. The testimony in this cause sustains the averments of the bill that, shortly prior to the date of the deed hereinafter mentioned, the respondents, John Yungbluth and Stephen Yungbluth, Jr., entered into an oral agreement with the complainants to convey to them, by general warranty deed, a tract of land lying in the city of Cincinnati, Hamilton county, Ohio, and in that part of the city known as "Columbia," the same being on the bank of the Ohio river, and known as the "Yungbluth Bros.' Coal Elevator Property," containing in all about 3.26 acres; in consideration whereof complainants were to assume and pay \$18,000 indebtedness of said John and Stephen Yungbluth, evidenced by their promissory notes, upon which complainants were indorsers, and, in addition, to furnish to said respondents \$5,000 worth of coal; the total consideration being \$23,000.

The deed, which was executed January 25, 1890, conveyed only a portion of said tract, containing 1.74 acres of land. The bill charges that said respondents fraudulently, knowingly, and willfully conveyed the 1.74-acre tract instead of the entire tract aforesaid. It is further averred that complainants were ignorant of the fraud practiced upon them, and of the fact that the deed conveyed only a portion of the property contracted for, until it was left for record on the day of its execution, and the consideration had passed; and that, relying upon the good faith of the respondents, they believed that the deed correctly described the entire tract known as the "Elevator Property." Upon discovering that it did not describe the entire tract, they demanded of respondents a further conveyance, according to the terms of the oral agreement, which they refused, and still refuse, to execute.

These charges are made out by the evidence, and the complainants are entitled to a decree for a further conveyance as prayed, unless the

points made upon the law of the case for the respondents are well taken. These are as follows:

1. It appears from the evidence that the title to the portion of the tract not conveyed was not in said respondents, but in their mother, Johanna Yungbluth, who was no party to the deed executed, nor to the agreement claimed. That is all true, but it is also true, as is established by the evidence, that the legal title was and is in Johanna Yungbluth, in trust for her sons, said John and Stephen, Jr., and subject to their direction and control, and that by the terms of the agreement they undertook to secure a transfer from her, and convey the entire tract to complainants. Johanna Yungbluth is a party respondent, and, if the equity of the cause is with the complainants, there can be no doubt of the power of the court to make a decree compelling her to convey, either directly to complainants or to her sons, and that they then convey to complainants, as they agreed to do.

2. It is argued that the relief prayed for cannot be granted, for the reason that it would be the enforcement of a contract relating to real estate which was never reduced to writing, and that there has been no such part performance as to take the case out of the statute of frauds; citing *Glass v. Hulbert*, 102 Mass. 24, which directly sustains the proposition stated, as do *Elder v. Elder*, 10 Me. 80; *Osborn v. Phelps*, 19 Conn. 63; *Westbrook v. Harbeson*, 2 McCord, Eq. 112, and *Best v. Slow*, 2 Sandf. Ch. 298, and the English cases therein cited.

It does not appear from the bill that the agreement was oral, but that fact is fully developed in the testimony. The statute is not pleaded by the respondents, but they rely upon *May v. Sloan*, 101 U. S. 231, and *Dunphy v. Ryan*, 116 U. S. 491, 6 Sup. Ct. Rep. 486, which hold that, where an agreement for the sale of lands, alleged in a bill in equity praying for specific performance, is denied by the answer, the defendant, where there is no written evidence of such agreement, may, at the hearing, insist on the statute of frauds as effectually as if it had been pleaded. That is no new rule. It is to be found in the text of Sugden on Vendors and Purchasers, and it is supported by a long list of authorities cited in a foot-note to section 511 of Browne on Frauds. But the respondents in this cause do not deny making an agreement to convey to complainants their coal-elevator property. On the contrary, they expressly admit that they did make such an agreement, and then deny that that property embraced or included any more than was conveyed by them to complainants, and they go on to aver that they have fully performed their agreement. The court finds that, as a matter of fact, they have not performed their agreement, and that they have dealt fraudulently with the complainants. In this state of pleading and of fact, how can it avail them to appeal to the statute of frauds?

But, aside from this, let us look at the matter, treating the cases in 101 U. S. and in 116 U. S. and 6 Sup. Ct. Rep. and in 102 Mass. as in point, and we shall find that the overwhelming weight of authority is against the ruling in *Glass v. Hulbert*. The complainants in this case have not been put in possession under the deed delivered to them. They have paid the

\$18,000, which they agreed to assume, and for which they were, prior to the agreement, liable as indorsers. But that was not part performance. The question is, where the contract for a conveyance of land must be in writing to be enforceable, and the contract is oral, and the deed fraudulently so made as to omit part of the tract included in the contract, has a court of equity the power, notwithstanding the statute of frauds, to afford relief by a decree for a conveyance in accordance with the oral contract? The supreme court of Massachusetts in *Glass v. Hulbert*, says, "No." Chancellor KENT, in *Gillespie v. Moon*, 2 Johns. Ch. 596, says that it would be a great defect in what Lord ELDON terms the "moral jurisdiction" of the court if there were no relief for such a case. Justice STORY also was of the opinion that the relief could be granted. See STORY, Eq. Jur. § 161, and cases cited. POMEROY, in his work on Contracts, (Specific Performance,) at section 264, declares that the preponderance of judicial authority in this country, by courts and jurists of the highest character, is that where, by reason of fraud, the written instrument fails to express the actual agreement, whether the variation consists in limiting the scope of the writing or in enlarging it so as to embrace land omitted through mistake or fraud, relief may be granted by making the writing conform to the agreement, although the agreement was oral, and of the class required by the statute of frauds to be in writing. Numerous authorities are cited in a foot-note in support of this view. To the same effect see *Murray v. Dake*, 46 Cal. 648, and cases there cited, and *Hitchins v. Pettingill*, 58 N. H. 386, reviewing *Glass v. Hulbert*, and citing a large number of cases to the contrary. See, also, cases cited in note 4 to section 85, ADAMS, Eq., (8th Ed.,) and *Beardsley v. Duntley*, 69 N. Y. 580, which also comments upon and disapproves *Glass v. Hulbert*. See *Flagler v. Pleiss*, 3 Rawle, 345; *Blodgett v. Hobart*, 18 Vt. 414; *Moale v. Buchanan*, 11 Gill & J. 314; *Worley v. Tuggle*, 4 Bush, 182; *Provost v. Rebman*, 21 Iowa, 419; *Hunter v. Bilyeu*, 30 Ill. 228; *Durant v. Bacot*, 13 N. J. Eq. 201, and *Wyche v. Greene*, 16 Ga. 49. So in Ohio. *Davenport v. Scovil*, 6 Ohio St. 459; *Ormsby v. Longworth*, 11 Ohio St. 653. The weight of authority clearly determines this question in favor of the complainants.

3. It is contended that complainants are not in a position to seek relief, because, if deceived, it was by reason of their own negligence and default in failing to examine their deed before accepting it. The insurance cases cited recognize this rule, and apply it to the case of one signing an application for a policy, but it has no application here. Such were the relations of the parties, so close the friendship of the complainants for the respondents, and so entire their confidence and trust in them, as disclosed by the evidence, that the respondents ought not now to be allowed to plead that the complainants were not on their guard, watching to prevent a fraud which they should have suspected.

Let there be a decree for the complainants, with costs.

SHAINWALD v. LEWIS.

(District Court, N. D. California. April 8, 1889.)

1. JUDGMENT—SATISFACTION—JOINT PARTIES.

Separate judgments were rendered against two joint tort-feasors, and suit begun against the third. Two of the three paid the plaintiff \$50,000, whereupon the judgment against one of them was vacated, and the suits against both of them dismissed. They signed a statement to the effect that the payment was made to reimburse the plaintiff for his costs, expenses, and attorney fees, and not in satisfaction of the cause of action sued on. *Held* that, notwithstanding this statement, the third tort-feasor was entitled to have such payment credited on the judgment against him.

2. SAME—REVIVAL—PAYMENT.

In an action to revive a judgment, money collected by a receiver appointed in a creditor's bill brought on the judgment should be credited on the judgment.

3. EQUITY PRACTICE—*NE EXEAT*.

Under Rev. St. U. S. § 717, which declares that no writ of *ne exeat* shall be granted unless satisfactory proof is made that the defendant designs quickly to depart from the United States, such writ should not be granted in a suit to revive a judgment, where no writ was granted in the action in which the judgment was rendered, but one was granted in a creditor's bill brought on such judgment, under which the defendant was held under bond for more than seven years, especially where the allegation that defendant intends to depart is denied by answer, and is not supported by proof.

At Law.

James L. Crittenden, for complainant.

Walter J. Tuska, for defendant.

HOFFMAN, J. This is an action brought by Herman Shainwald, assignee in bankruptcy on a judgment recovered in this court against Harris Lewis, November 5, 1880, (in case No. 221.) The execution in that case having been returned unsatisfied, a creditor's bill was filed, and a receiver appointed, to whom Lewis was compelled to make a general assignment of his property, choses in action, etc. On the 6th of April, 1881, a suit was commenced by the assignee against Joseph Naphtaly and Edward Hyams to recover damages from them as co-conspirators with Lewis in the frauds for which judgment had been rendered against him. The defendants in these suits severed in pleading. In the suit against Hyams two trials were had, in the second of which a verdict was found against him, and judgment entered October 13, 1883, for the sum of \$78,400 and costs, taxed at \$328. The suit against Naphtaly was not brought to trial. The execution against Hyams was returned *nulla bona*. On the 31st of October, 1883, a stipulation was signed by the attorney for the assignee, agreeing that the verdict and judgment rendered and entered as against Hyams should be vacated and set aside, and that the action as against him should be dismissed. An order to that effect was entered on the same day. On the 10th of November, 1883, the attorney for the assignee filed a consent that the suit against Naphtaly should be dismissed, and an order to that effect was duly entered. On the same day the assignee, or his attorney, received from Hyams the sum of \$30,650, and from Naphtaly the sum of \$20,000. Contemporaneously with the filing of the stipulation and entry of the

order in the *Hyams Case*, (viz., October 31, 1883,) but, it would seem, after the payment of the money by him, an agreement was entered into between him and the assignee, or his attorney, as follows:

"Herman Shainwald, Assignee, etc., v. Joseph Naphtaly and Edward Hyams.

"It is understood and agreed by us, and each of us, that the money paid to the plaintiff in the above-entitled case is paid on behalf of the defendant Hyams to reimburse the plaintiff for the costs, expenses, disbursements, and attorney and counsel fees paid and incurred by him in the above-entitled action, and that none of it is paid or received in payment or satisfaction or on account of any claim, demand, or cause of action set forth or alleged in the plaintiff's complaint in the above-entitled action; and that the parties paying said moneys hereby renounce all claims, right, and interest of, in, and to all of the same, and forever renounce and disclaim all rights and causes of action for the same, and hereby acknowledge, admit, confess, and declare that they, and each of them, have received not only a good and sufficient, but adequate and full, consideration for said moneys, and all of the same, from the plaintiff in the above-entitled action.

[Signed] HYAMS BROS.

"WILLIAM HYAMS."

On the 10th of November, 1883, the date of the order discontinuing the suit against Naphtaly, a similar agreement or declaration was signed by him, as follows:

"Herman Shainwald, as Assignee, etc., v. Joseph Naphtaly and Edward Hyams.

"It is understood and agreed by me that all the money paid to the plaintiff in the above-entitled action is paid on behalf of the defendant Naphtaly to reimburse the plaintiff for costs, expenses, disbursements, and attorney and counsel fees paid and incurred by him in the above-entitled action, and that none of it is paid or received in payment or satisfaction or on account of any cause of action set forth or alleged in the plaintiff's complaint in the above-entitled action; and that the said Joseph Naphtaly, the party paying said moneys, hereby renounces all claim, right, and interest of, in, and to all of the same, and forever renounces and disclaims all rights and causes of action for the same, and hereby acknowledges, admits, confesses, and declares that he has received not only a good and sufficient, but adequate and full, consideration for said moneys, and all of the same, from the plaintiff in the above-entitled cause.

"San Francisco, Nov. 10, 1883.

[Signed]

"J. NAPHTALY."

On the 19th of December, 1883, the counsel for Harris Lewis made a motion to the court for an order directing the clerk to enter satisfaction of the judgment obtained against Lewis on the ground that the payments by Hyams and Naphtaly, co-conspirators with Lewis, constituted a satisfaction of the whole tort for which the plaintiff had obtained judgment against Lewis. This motion the court, after hearing elaborate arguments, denied.

The same point is relied on as a defense in the present suit, brought upon the original judgment against Lewis. It is urged by the attorney for the plaintiff that the question was finally passed upon by the court on the hearing of the motion to enter satisfaction of the original judg-

ment; that it is, therefore, *res adjudicata*, and final and conclusive upon the court, and upon the parties to this suit. This question it is not material to consider, for I am still of opinion that my decision denying the motion was correct; but I may observe that, if I were satisfied that it was incorrect, I should not hesitate so to declare in deciding this suit, and that I should not feel bound, on the ground of a previous ruling, which I recognized as erroneous, to repeat the same error in this suit, and to enter a judgment which I believe should be reversed on appeal. Assuming, therefore, that the payments in question did not amount in law to a satisfaction of the judgment obtained against Lewis, or an absolute release to them from further liability under it, the question arises, for what sum should judgment be entered against him in the present suit? In ordinary cases the payment by one or more of several tortfeasors and co-conspirators in the commission of a wrong, after suit brought and judgment rendered, is a payment on account of and in satisfaction, in whole or in part, of the cause of action on which the suit is founded, unless otherwise intended or agreed. This inference the attorney for the assignee has attempted to repel by obtaining from the parties a declaration that the moneys were paid by them to reimburse the assignee for costs, disbursements, expenses, and counsel fees in the suit brought against them, and not on account or satisfaction of the cause of action on which it was brought; and that they have received full, adequate, and good consideration for the moneys so paid. But are these declarations and agreements on the part of Hyams and Naphtaly to be received by the court as final and conclusive, and as precluding any inquiry into the true nature and effect of the transaction? It is true that the declarations and agreements state that no part of the money was paid in satisfaction or on account of the claim, demand, or cause of action on which suit had been brought. If this be true, the judgment against Hyams remained unsatisfied, in whole or in part, and the cause of action against Naphtaly continued intact and unimpaired. And yet, on the very day these declarations and payments were made, the judgment against Hyams was vacated and set aside by consent, and the case dismissed, and the suit against Naphtaly discontinued. Hyams and Naphtaly admit that they have received full and adequate consideration for the moneys paid by them. It is obvious that that consideration was the abandonment and dismissal of the proceedings against them, and no other. I hardly think the attorney for the assignee would have felt himself at liberty, under the circumstances, to commence new suits upon the old cause of action, (even if the statute of limitations had not run against them,) and to aver that the moneys received by the assignee had been paid as a kind of gratuity to reimburse the assignee for expenses and counsel fees, and that the original cause of action remained unsatisfied in whole or in part. The statements, therefore, of Hyams and Naphtaly, that the large sums of money paid by them were paid to reimburse the assignee for expenses, etc., and not on account of the cause of action sued on, must be wholly disregarded. They were paid in consideration of the abandonment of the suits brought against them and their discharge

from further liability. They were received by the assignee, not as a personal gratuity to him, but as representing the creditors, and in part satisfaction of the damages sustained by them by reason of the fraudulent conspiracy into which Hyams and Naphtaly, with Lewis and others, had entered. The sums thus collected were assets of the estate belonging to the creditors whom he represented, and distributable among them, after deducting the amount of reasonable and necessary expenses, disbursements, and counsel fees, which might be allowed by the court. It may incidentally be observed that no accounts were filed by the assignee until April 17, 1888, and then upon the order of the court, and on motion of one of the bankrupts; nor has any sum whatever been distributed among the creditors.

In actions on torts the plaintiff may have several judgments, but only one satisfaction. The amounts paid by Hyams and Naphtaly were in part satisfaction of the tort committed by all the conspirators. They should, therefore, be deducted from the original judgment entered against Lewis. It appears that the receiver of the estate of Harris Lewis, appointed by the court, has also collected and received on account of the judgment recovered against Lewis the sum of \$11,919.63, and that \$150 has been allowed as counsel fees. Whether this sum remains in the hands of the receiver is not shown. As it was collected under the judgment against Lewis or the assignment by him made to the receiver, it seems clear that the net amount paid to the receiver, after deducting the counsel fee allowed by the courts, and other reasonable and necessary expenses incurred in collecting it, should be credited on the judgment against Lewis. What the total amounts collected by the receiver have been, and what the net amounts to be applied in part satisfaction of the judgment should be, the court cannot now say, as the receiver has not made any report or rendered any account to the court since December 15, 1885.

In the bill filed in the present case a writ of *ne exeat republica* is prayed for. This cannot be granted, for many reasons. Among others may be mentioned: *First.* The object and scope of the bill is to keep alive and renew the judgment heretofore rendered against Lewis in suit numbered 221, and to prevent the statute of limitations from becoming a bar to its enforcement. The practical operation of the decree to be rendered is to give new vitality for a period of five years to the former judgment, which is about to become inoperative by lapse of time. In the present suit no additional or affirmative relief can be granted beyond that afforded and adjudged in the judgment on which suit is brought. In that suit a writ of *ne exeat republica* was not awarded. *Second.* The bill alleges upon information and belief that the defendant, unless restrained, will and intends to leave and depart from and out of the state of California, and from out of the jurisdiction of this court. This averment is denied by the answer. No proofs in support of it are produced. Section 717, Rev. St., provides "that no writ of *ne exeat* shall be granted unless a suit in equity is commenced, and satisfactory proof is made to the court or judge granting the same that the defendant designs quickly to depart from

the United States." *Third.* A writ of *ne exeat* was granted in the suit numbered 231, which was a creditor's bill, filed in aid of the original judgment in suit No. 221. The decree in suit No. 231 was rendered May 20, 1881. The defendant gave bonds, and the writ was discharged, and the defendant released from custody on December 9, 1881. The defendant has thus been under bonds not to leave this state for more than seven years. During all that time he has remained within the jurisdiction of this court. The writ of *ne exeat* is in its nature a temporary and provisional remedy. It is not intended to operate as a perpetual and life-long restraint upon the defendant's freedom of movement. To grant it in this suit (if the court had power to do so) for an indefinite period would be equivalent to committing the defendant to jail, the jail limits being the boundaries of the northern district of California. An injunction may issue, not as prayed for in the bill, but as granted in the original judgment on which this suit is founded. The counsel for defendant may draft and submit a decree in accordance with this opinion. He may also take such steps as he may be advised to compel the receiver to report the sums collected by him from the estate of Harris Lewis under the judgment rendered against him or the assignment executed by him to the receiver, and also the sums paid out by him for expenses, etc., for collection, to the end that the amount to be credited to Lewis on the judgment against him may be ascertained and liquidated. These accounts, as well as those of the assignee, should be closely scrutinized. The court cannot avoid noticing that the total amount of debts in the bankrupt's schedule is stated to be about \$44,257.25. The amount of debts proved is \$29,770.73. The sums received by the assignee and receiver amount to at least \$62,419.63, no part of which has been distributed to creditors.

RICHARDSON v. TRAVELERS' INS. CO.

(Circuit Court, N. D. Illinois. June 22, 1891.)

LIFE INSURANCE—LIABILITY—DEATH FROM INHALING GAS.

Under an insurance policy which exempts the company from liability in case of death caused by inhaling gas, recovery cannot be had in case of death caused by the inhalation of illuminating gas, where it is uncertain whether the death was result of an accident or of suicide.

At Law.

Runyan & Runyan, for plaintiff.

C. C. Bonney and Lyman M. Paine, for defendant.

BLODGETT, J. This is a suit on a policy issued by defendant, whereby it assured the life of Frederick Richardson, the husband of plaintiff, against death by accident, in the sum of \$6,000, payable to plaintiff. The proof shows that Mr. Richardson died at the Hotel Grace, in the

city of Chicago, on the 12th day of September, 1889, and while the policy was in full force, and that his death was caused by inhaling illuminating gas. The proof shows that he was a guest of the hotel, was assigned a room to which he retired during the evening, and the next morning was found dead in his room, with illuminating gas escaping freely from one of the gas burners in the room; and it is conceded that he died from the inhalation of this escaping gas, and that there was no visible mark of violence or injury upon his body. It is also conceded that due notice and proof of his death was given defendant in apt time, as required by the terms of the policy. Defendant denies liability, on the ground that the death of the assured did not occur from a cause which makes it liable under its contract of assurance. The policy, in terms, insures against death resulting alone from external, violent, and accidental means, and making the liability of defendant subject to certain exceptions and conditions, among which are the following:

"(4) This insurance does not cover disappearances; nor suicides, sane or insane; nor injuries of which there is no visible mark upon the body; nor accident, nor death, nor loss of limb or of sight, nor disability, resulting wholly or partly, directly or indirectly, from any of the following causes, or while so engaged or affected: * * * Taking poison; contact with poisonous substances; inhaling gas."

It seems very clear to me that, on the admitted facts in this case, defendant cannot be held liable. It is admitted that the death of the assured was caused by the inhalation of illuminating gas. There was no visible sign of violence or external injury on his body. The proof shows that, when found dead, he was lying upon his side in his bed, as if asleep, with no distortion of limb or features, or other evidence of violence, pain, or suffering. Plaintiff relies for recovery entirely on *Paul v. Insurance Co.*, 112 N. Y. 472, 20 N. E. Rep. 347, where, under a policy precisely like this in its terms, the court held that the defendant, "in expressing its intention not to be liable for death from inhaling of gas, can only be understood to mean a voluntary and intelligent act by the insured, and not an involuntary and unconscious act. Read in that sense, and in the light of the context, these words may be interpreted as having reference to medical or surgical treatment in which, *ex vi termini*, would be included the dentist's work, or to a suicidal purpose." The reasoning by which that court reached its conclusion is not satisfactory to my mind. The language of the policy is so clear as to require no construction. The words are unequivocal that the defendant does not insure against death caused by inhaling gas. There is nothing in the terms of the policy intimating or suggesting that the inhalation of gas must be voluntary or involuntary in order to exempt defendant from liability. That the defendant had the right to so limit its liability there can be no doubt. All the plaintiff's rights in this action arise under the policy. It constitutes the only relation between the parties. If the policy does not, by the fair and natural import of its words, give a right of action under the facts, then the plaintiff has no right of action. It seems to me, and that, too, without regard to the testimony which de-

fendant has put into the case, that the clause under which defendant claims exemption from liability was expressly adopted because of the impossibility, in most cases of death by the inhalation of gas, to decide whether the death was occasioned by the inhalation of gas with suicidal intent or whether it occurred accidentally. What I mean is, that a suggestion from the attorney of the defendant that this was the reason for inserting this clause in the policy is as persuasive to the mind as the sworn testimony which defendant has offered as to such reason, because it suggests a reasonable explanation why the clause is there. This case can also, as I think, be differentiated from the case cited by plaintiff, in this: that in that case it was found as one of the facts that the death of the assured was occasioned by accidental means. Here the proof will allow no such finding. It leaves the fact wholly unsettled as to whether the death of Mr. Richardson was the result of accident, or whether it was occasioned by his suicidal act and intent. The issue is found for the defendant.

FARRIS *et al.* v. MAGONE.

(Circuit Court, S. D. New York. April, 1891.)

CUSTOMS DUTIES—CLASSIFICATION—REMELTING STEEL.

A metal imported from Sweden, being in the form of cakes or slabs from 24 to 36 inches in length by 12 to 14 inches in width, and from an inch to an inch and a half thick, with the upper surface nicked into rectangular or oblique angular "caramels," about an inch and a quarter square, invoiced as "remelting steel in cakes," was classified for duty by the collector of the port of New York as "steel in slabs, forty-five per cent. *ad valorem*," under Schedule C of the tariff act of March 3, 1883. (Heyl's Tariff Ind., New, 177, 183.) which classification was sustained in this case by the jury finding a verdict in favor of the defendant, collector.

At Law.

Action by the plaintiffs, importers, to recover duties alleged to have been illegally exacted by the defendant, collector of the port of New York. The merchandise involved in the present suit was imported by the plaintiffs from Sandviken, Sweden, and entered at the port of New York, February 10, 1888. The invoice described the metal as "remelting steel in cakes; nicked rectangular; nicked oblique angular;" and the defendant, then the collector of customs at said port, classified the same for duty as "steel in slabs, #23, forty-five per cent. *ad valorem*," under the provision in Schedule C of the tariff act of March 3, 1883, (Tariff Ind., New, par. 177,) for "steel ingots, cogged ingots, blooms and slabs, by whatever process made." Against this classification the plaintiffs duly protested, claiming that the merchandise was a metal compounded of iron, carbon, and other elements, and was dutiable under Schedule C of said tariff act—"First, as unwrought metal at twenty per cent. *ad valorem*; or, second, at three-tenths cent per pound by similitude to pig-iron, spiegeleisen, wrought and cast scrap-iron, and scrap-steel; or, third, it should not pay above thirty-five per cent. under the provision for iron in slabs,

blooms, loops, etc.; it is used only for making steel; it is not malleable, nor wrought." The importers duly appealed to the secretary of the treasury, who affirmed the decision of the collector; and this action was brought, within the time prescribed by law, to recover the alleged overpayment of duties.

On the trial the plaintiffs offered testimony showing that the metal was a product made in Sandviken, Sweden, from six or seven kinds of Swedish iron ores, which were charged in a furnace in alternate layers with charcoal mixed with coke; that gas fuel was introduced into the furnace through a conduit; that to the compound were added other elements, which were a secret with the manufacturers; that when the metal was in a semi-molten state it was run out upon an iron floor; that when partially cooled it was removed in irregular masses, and placed under a steel "former," an instrument resembling a waffle-iron, and operated by hydraulic press, which stamped the upper surface into rectangular or oblique-angular "caramels" about an inch and a quarter square; that the product was then in cakes 24 to 30 inches in length by 12 or 14 inches in breadth, and from an inch to an inch and a half thick, in which condition it was imported; that it was sold in this country as "remelting steel" or cake metal. Plaintiffs further introduced testimony that the metal was used for remelting in the manufacture of crucible steel,—35 pounds of it in a crucible with other materials to produce 90 pounds of steel,—and that it was suitable for no other purpose than to be broken up and remelted. Samples were produced in court by plaintiffs' witnesses, indicating that the metal was incapable of being forged; that it appeared to burn up in the fire; that, subjected to the process of rolling in a rolling-mill, the metal flattened out, but did not strictly roll. The witness offering this testimony admitted, on cross-examination, that the metal was not hammered before being put into the rolls, which was the usual process in rolling high carbon steels. Plaintiffs' witnesses also admitted that no chemical analysis of the metal had been made by or furnished to them, and that the specimens were treated without reference to the chemical characteristics of the metal operated upon. In behalf of the defendant, the testimony of an expert chemist was introduced showing that analyses of two samples of the plaintiffs' importation gave the following results:

	First Sample.	Second Sample.
Combined carbon, - - - - -	1.095%	1.261%
Silicon, - - - - -	0.059	0.049
Sulphur, - - - - -	0.038	0.011
Phosphorus, - - - - -	0.053	0.034
Manganese, - - - - -	0.454	0.469
Iron, (by difference,) - - - - -	98.301	98.176
	<hr/>	<hr/>
	100.000	100.000

A practical expert and mechanical engineer testified in behalf of the defendant that in cast-irons the carbon, in a free or graphitic condition, ranged between 3 and 5 per cent. and even higher; that, in steels pro-

duced from ores by a direct process, the carbon was found in a combined form, running in the case of hard steels as high as 2 per cent., and in very mild steels as low as two-tenths of 1 per cent.; that there was a middle ground covered by the "steely irons," which ran from about seven-tenths of 1 per cent. in carbon down to two-tenths; that below two-tenths of 1 per cent of carbon, the metal, under the action of heat, assumed a fibrous structure, and became wrought-iron; that certain grades of cast iron would permit of "hardening" or "chilling," but would not take the different colors, nor the different degrees of hardness, indicated by the "temper" of steel; that some wrought-irons would take the temper colors, but would not assume the different degrees of hardness indicated by these colors, and that steel alone was capable of assuming all the various colors of temper and degrees of hardness; that the term "cast" signified a metal run out in a molten or semi-molten state, and that the plaintiffs' metal showed every evidence of having been cast; that this Swedish product was of a coarse granular structure, and in the process of forging and working attained a very fine granular structure, as shown by high carbon steels. This witness also proved by test pieces produced from a sample of plaintiffs' merchandise, and offered in evidence, that the metal forged well into a bar; that this bar, when fractured, showed the fine granular structure of steel; that the temper test of this bar by the usual method in such cases showed all the degrees of temper by color and the various degrees of hardness; that a so-called "side-tool" was made by the witness out of one of the test pieces of the metal, and that this "side-tool" cut a piece of hard tool steel in a lathe, the tool not even turning its edge. It was also shown by this witness that the chemical analysis (of second sample, as above given) made of the metal before his forging tests indicated a high carbon hard steel, and that an analysis made after the forging showed that the metal had not changed its character by the heat and working, except to lose a small fraction percentage of carbon, and was, both before and after the forging tests, of the quality of high tool steel. The defendant also produced the testimony of a practical blacksmith from one of the leading iron and steel works in New York city, formerly employed in the United States navy-yard at Brooklyn, who testified that he heated a sample of plaintiffs' metal (being first sample of which the analysis is given above) in an ordinary blacksmith's forge; that it was malleable, and forged easily and well; that the piece so forged was tempered by him in the usual manner, by plunging into water, and then drawing the temper by a slow fire, showing all the temper colors; and that, in the opinion of the witness, the metal was steel suitable for tools. A number of experts in the manufacture of steel, in answer to a hypothetical question by defendant's counsel covering the facts as proved by defendant's other witnesses, testified that the metal was steel. At the close of the testimony, both sides having rested, the assistant United States attorney, on behalf of the defendant, moved the court to direct a verdict in favor of the defendant, upon the ground that the metal imported was either steel, according to the tests and evidence produced by the defendant, or it was iron in

the manufacture of which charcoal was used as fuel, and the duty provided by paragraph 148 of Schedule C of the tariff act of March 3, 1883, upon such iron, was \$22 per ton, which duty was higher than the 45 per cent. rate imposed by the defendant collector in this case, and could therefore be availed of by him as a defense to this suit. This motion was denied by the court, and the defendant's counsel duly excepted.

Hartley & Coleman, for plaintiffs.

Edward Mitchell, U. S. Atty., and *James T. Van Rensselaer*, Asst. U. S. Atty., for defendant.

LACOMBE, Circuit Judge, (*charging jury*.) The first question for you to determine is whether charcoal was used as fuel in the manufacture of the imported product which is the subject of this suit; and, if so, whether this product, thus manufactured with charcoal, is iron. If it is, your verdict must be for the defendant; for there is a special rate of duty provided for all iron, of any shape or form, manufactured by the use of charcoal as a fuel, and the rate of duty fixed for such iron is higher even than the rate of duty which the plaintiffs paid here. If you come to the conclusion that charcoal was not used as a fuel in the manufacture of this article, the next question for you to answer is this: What is it,—iron or steel?

The collector classed it as steel, and charged it with 45 per cent. duty. It is the presumption of law that the acts of a public officer are done in accordance with his duty. That is the presumption with which you begin this case,—that the collector's classification is the right one; and it is for the plaintiffs to satisfy you by fair preponderance of proof that the collector was mistaken. That is a burden which the law throws upon the plaintiffs. We start, then, with the presumption that the collector correctly classed it as steel.

In the tariff act congress has very carefully provided for a duty on all varieties of steel,—for steel in all its various shapes and forms. In the first place, in one paragraph, (177,) it enumerates a very great many varieties of steel. I will not repeat the list. I included nearly all the articles named in it in the question which I put to Mr. Parsons, when I asked him if all the articles enumerated in that question were malleable; among them appear "steel ingots," "steel blooms," and "steel slabs, by whatever process made." Having thus provided for a great number of named varieties of steel, congress then, in order that no steel might escape, by paragraph 183 provided that "steel, not specially enumerated or provided for in this act," should pay 45 per centum *ad valorem*. That is the same rate which was laid upon steel blooms, ingots, slabs, and the other varieties of steel enumerated in the former paragraph, (No. 177.) Congress has also been very considerate towards the collectors and the jurymen who have to answer the question, "What is steel?" (which to you, gentlemen, in view of the testimony we have had here, may perhaps seem no easy task.) It has given a definition of "steel" in the very paragraph which provides for a duty on all steel not specially enumerated. It there defines steel as all metal produced from iron or its ores, of whatever de-

scription or form, without regard to the percentage of carbon contained therein, or the particular process of manufacture, either granular or fibrous in structure, which is cast, and which is malleable. All such metal, congress declares by the tariff act, shall be classed, for duty purposes, as steel.

Now, let us look again at this definition, bearing in mind the question we have to answer,—whether this article is iron or steel,—and see how much of it is established by the proof without any dispute, and how much of it is to be settled by you on the testimony. “All metal produced from iron or its ores:” Concededly this article is a metal which was produced from iron or its ore. “Of whatever description or form, without regard to the percentage of carbon contained therein, or the process of manufacture:” That eliminates from your consideration any concern as to the particular variety, or the process by which it is made, or as to the particular amount of carbon which it may contain. “Granular or fibrous in structure:” I do not understand that there is practically any contradictory testimony as to the fact that this article is granular in structure. The plaintiff himself testified that it was partly granular, partly fibrous, and partly nodular; one, certainly, and I think two, of his witnesses testified that it was coarsely granular; while each witness for the defense to whom the question was put testified, I think without exception, that it was granular. That it is either granular or fibrous, I think, under the testimony, admits of no doubt. Thus far in the definition, then, you will see that there is no particular dispute; that it is a metal produced from iron or its ores; of proper shape; granular or fibrous in structure. “Which is cast and which is malleable:” You are to determine, from the testimony of the plaintiff as to the way in which this article is produced from the ores, and from what you have heard from the other witnesses as to what the word “casting” means in the steel and iron trade, whether or not this metal has been “cast.” You are also to determine from the testimony whether this article is practically, commercially, “malleable,” under the testimony that has been given to you. “Malleable” is defined as “capable of being drawn out and extended by beating; capable of extension by hammering; reducible to laminated form by beating.” If, under the testimony, you reach the conclusion that this article is “cast,” and that it is practically and commercially “malleable” it is then, under the definition which congress has given, “steel,” and your verdict must be for the defendant. Should you reach the conclusion, however, either that it is not “cast,” or that it is not practically and commercially “malleable,” then, under the testimony, there seems no escape from the proposition that it is “iron;” and, if so, it would be dutiable under paragraph 148, as “iron in slabs,” at not less than 35 per cent., in which case your verdict would be for the plaintiffs for \$293.27.

Mr. Hartley. I except to the refusal to give my charge with regard to wrought-iron; and I also ask the court to charge that the use of charcoal as a carbonizer—to furnish carbon to the ores—is not its use as a fuel.

Lacombe, J. Yes; if the charcoal which was put in the furnace was put in for the purpose and accomplished the object of combining itself with the other materials, and thus forming the ultimate product, then the charcoal was not used as a fuel. If, however, it was put in simply with the object, by its own combustion, to promote the liquefaction and union of the other elements which were put in, then it was used as fuel.

The jury rendered a verdict for the defendant.

In re CARRIER et al.

(District Court, W. D. Pennsylvania. June 4, 1891.)

ASSIGNMENT OF JUDGMENT—NOTICE—BANKRUPTCY.

A bankrupt, after his adjudication in bankruptcy, transferred a check and the transferee sued upon it, and obtained judgment. Afterwards the transferee, while drunk, sold and assigned the judgment, which amounted to \$492, for \$5. *Held*, that the purchaser of the judgment was chargeable with notice of the title, and that he could not hold the judgment against the assignee in bankruptcy.

In Bankruptcy. Exceptions to register's report.

Cohen & Israel, for exceptant.

L. B. D. Reese, for report.

REED, J. Charles Ross, the plaintiff in the judgment, had no title to the check upon which he sued, as against the assignee in bankruptcy. It was transferred to him by Baum after his adjudication in bankruptcy, when it belonged to the assignee. If the respondent, Aaron, can hold the judgment obtained upon this check as against the assignee in bankruptcy, he must show (and the burden is upon him) that he is a *bona fide* purchaser for value without notice. An examination of the testimony shows that he has failed in this respect. A drunken man whom he does not know is brought to him, after business hours, by another drunken man, whom he knows to be an adjudicated bankrupt, and he gives the latter \$5, and receives from the former a paper purporting to be an assignment, written across a scrap of foolscap, of a judgment for \$492, with interest from July 17, 1875, against Henry Metzgar. The paper is neither dated, under seal, nor witnessed; nor does it state the court, nor the county or state, in which the judgment was recovered. Ross testifies that the \$5 was only borrowed, and the judgment assigned as security, although the assignment is absolute on its face. The transaction was so trifling that Mr. Aaron failed to remember it when his attention was first called to the matter, and he could not remember the details of the transaction when called to the witness stand. It is idle to characterize this as a business transaction. It was evidently a case, with which every one is familiar, of an application by an old acquaintance for a trifling loan, and the assignment was probably prepared by the bor-

rowers to give dignity to the application, as well as to get the money, and was to be used wherever the application was successful. That it was prepared beforehand is evident, as the name of Mr. Aaron is inserted in different ink from that used in the body of the paper. But, whether a *bona fide* business transaction or not, there was enough in the whole proceeding to arouse suspicion in the mind of a cautious, prudent man, and to put him on inquiry, and inquiry from the defendant Metzgar would have disclosed at once the fact that Ross had no title to the judgment; and, it being Mr. Aaron's duty to inquire, he is chargeable with notice of the real facts, and stands in no better position, as against the assignee, than the original plaintiff in the judgment. He has failed to make out such a case as is requisite to enable him to hold the judgment as against the rightful owner. The parties have submitted their case both before the register and in court upon the merits, raising no question as to the form of the proceeding, and in my judgment the findings of the register and his conclusions are correct, and the exceptions to his report must be overruled, and the report confirmed, and the said Aaron directed to execute an assignment of the said judgment to the assignee in bankruptcy. Counsel will prepare an order accordingly.

STONEMETZ PRINTERS' MACHINERY Co. v. BROWN FOLDING-MACH. Co.

(Circuit Court, W. D. Pennsylvania. July 17, 1891.)

1. PATENTS FOR INVENTIONS—ACTION FOR INFRINGEMENT—CROSS-BILL.

In a suit for relief on account of interference and infringement, a cross-bill seeking relief for an alleged infringement of defendant's patent by the complainant cannot be filed, not being germane to the original suit.

2. EQUITY PRACTICE—CROSS-BILL.

The fact that a complainant is beyond the jurisdiction of the court, so that the defendant cannot sue him in that forum in an original action, does not enlarge defendant's right to file a cross-bill in the suit brought by complainant.

In Equity. For former report, see 46 Fed. Rep. 72.

John K. Hallock, for cross-bill.

John C. Sturgeon, *contra*.

REED, J. The bill in this case alleged interference, and prayed relief under section 4918. It also alleged infringement by defendant, and prayed relief upon that ground as well. A demurrer was filed to the bill because, as claimed by the defendant, there was a misjoinder of causes of action, which, following the decisions of other circuit courts, this court overruled. The defendant then filed its answer, and subsequently filed a cross-bill, alleging infringement by the plaintiff of defendant's patents, and praying for appropriate relief. By arrangement between counsel, the cross-bill was permitted to be filed, and a motion immediately made by plaintiff to strike it from the record, so that the practical effect is to bring the matter before the court, as though upon a motion to file the cross-bill. Plaintiff's contention is substantially set

forth in its second reason filed with its motion, namely, that the only material matter set forth and alleged in the cross-bill is foreign to the issue involved in this case, and not cognizable therein. As the decision upon the demurrer to the bill in favor of the plaintiff's right to join the two causes of action has opened for him a wide field, my inclination has been, if possible, under the rules relating to cross-bills, to insure to the defendant the same liberality in its defense. A cross-bill *ex vi terminorum* implies a bill brought by a defendant against the plaintiff in the same suit, or against both, touching the matter in question in the original bill. Story, Eq. Pl. § 389. It is brought either to obtain a discovery of facts in aid of the defense to the original bill, or to obtain full and complete relief to all parties as to the matter charged in the original bill. It should not introduce new and distinct matters not embraced in the original bill, as they cannot be properly examined in that suit, but constitute the subject-matter of an original independent suit. The cross-bill is auxiliary to the proceeding in the original suit, and a dependency upon it. It is said by Lord HARDWICKE that both the original and cross-bill constitute but one suit, so intimately are they connected together. *Ayres v. Carver*, 17 How. 591; *Cross v. De Valle*, 1 Wall. 1. It should not introduce any distinct matter. It is auxiliary to the original suit, and a graft and dependency upon it. If its purpose be different from this, it is not a cross-bill, though it may have a connection with the same general subject. *Rubber Co. v. Goodyear*, 9 Wall. 807. In the last-cited case the bill was filed for infringement of a patent. The defenses were invalidity of the patent and a license. By the cross-bill the defendant sought to set off a judgment against plaintiff against the damages he might recover in the infringement suit. The court held the cross-bill improperly filed. A cross-bill must grow out of the matters alleged in the original bill, and is used to bring the whole dispute before the court, so that there may be a complete decree touching the subject-matter of the action. *Ex parte Railroad Co.*, 95 U. S. 221. A cross-bill must be confined to the subject-matter of the original bill, and cannot introduce new matters not embraced in the original bill. If it does so, the cross-bill becomes itself an original bill, and there cannot be two original bills in the same cause. *Dotz v. Phillips*, 24 Wkly. Notes Cas. 382. A cross-bill is like an original bill, except that it must rest on what is necessary to the defense of an original bill. *Brandon Manuf'g Co. v. Prime*, 14 Blatchf. 371. In the case of *Johnson R. S. Co. v. Union S. & S. Co.*, 43 Fed. Rep. 331, permission was refused to file a cross-bill in an infringement suit, wherein the defendant set up the claim of right to a trade mark or name for an electrical system, which included the use of the patentee's name, as going beyond the case of the plaintiff in the original bill, not necessary as a defense to that bill, and matter entirely foreign to the primary controversy. In *Young v. Colt*, 2 Blatchf. 373, the court say:

"A cross-bill, as its name imports, goes no further than to give the party filing it the reciprocal right enjoyed by the complainant in the original bill in respect to their mutual title or interest in the subject-matter of the suit."

Where a cross-bill to a bill of foreclosure brought by a party representing the British government set up an independent claim of the respondents against the British government, it was held, in *Rowan v. Manufacturing Co.*, 33 Conn. 1, to be matter which, upon general principles, could not be set up by a cross-bill, the court saying:

"If it is true that the matter set up in this cross-bill is wholly independent of the matter set up in the bill, and does not touch or relate to that matter, either for the purpose of defense to it or for any disclosure relating to it, but is merely set up for the purpose of laying the foundation for some independent relief, it seems quite obvious, upon authority and principle, that for the purpose of any such independent relief as is asked for the cross-bill should be dismissed."

In *Dotz v. Phillips*, *supra*, a bill was filed for the specific performance of one agreement, and the cross-bill alleged violation of another independent agreement, and prayed relief against the plaintiffs. The court held that the cross-bill was improperly filed, saying:

"The plaintiffs seek a specific performance, and that only. It is no answer to that to say that the plaintiffs have broken another agreement relating to another subject."

In *Galatian v. Erwin*, Hopk. Ch. 48, the original suit was for foreclosing two mortgages. By cross-bill one of the defendants in her defense sought to impeach for fraud the title of the mortgagor, not only to the mortgaged premises, but to other lands. It was held that as a defense to the original suit the cross-bill was entirely proper, but that it could not introduce a distinct suit relative to the other lands, or become the foundation of a decree concerning matters not embraced in the original suit; and that no decree beyond the subjects of controversy in the original suit could be made in the cause. In the present case the subject-matter of the original bill is the interference between plaintiff's and defendant's patents, and also the alleged infringement of plaintiff's patent by defendant. The defendant's cross-bill is based solely upon an alleged infringement by plaintiff of defendant's patents. If plaintiff's bill was solely for interference between the patents, that would be the only question that could be considered, and a cross-bill would clearly be improper based upon an alleged infringement by plaintiff. An infringement of a patent is a tort, (Rob. Pat. § 931;) and, if the original bill were filed for that alone, the defendant could only attack the rights of the plaintiff under his alleged patent, the validity of the patent, or deny the infringement. He could not set up, by way of defense, another tort, alleged to have been committed by the plaintiff. The joinder of two causes of action in the original bill necessarily involves the joinder of the defenses appropriate in each case, but they are two separate causes of action, although joined, and not a new cause of action, formed by amalgamation, permitting new questions to be raised by defendant different from those relevant to each separate cause of action. The cross-bill does not seek to defeat plaintiff's causes of action, and the matters alleged in it are not essential to the complete disposition of plaintiff's case, or of defendant's rights in relation to the plaintiff's causes of action.

Defendant's counsel has argued that, as plaintiff is a foreign corporation, and defendant will be compelled to follow it into another jurisdiction in order to file a bill for infringement, and as plaintiff has come into this court with a matter relating to defendant's patent, that circumstance should be considered, and relief given defendant in the court of plaintiff's own choice. That question was considered in the case of *Rowan v. Manufacturing Co.*, *supra*, but was held not to authorize the cross-bill based on a counter-claim by defendant. In my judgment the cross-bill cannot be sustained, and, agreeably to the mode pursued by counsel in raising the question of its validity, it should be stricken from the record. Let an order be made accordingly.

ENTERPRISE MANUF'G CO. v. DEISLER.

ENTERPRISE MANUF'G CO. v. WANAMAKER.

(Circuit Court, E. D. Pennsylvania. June 2, 1891.)

1. PATENTS FOR INVENTIONS—ANTICIPATION—MEAT-CUTTER.

Letters patent No. 271,398, issued to John G. Baker, January 30, 1883, for improvements in mechanism to cut up plastic or yielding substances, consisting of a machine in which the sole reliance for cutting is upon a knife or other cutting device operating in conjunction with a perforated plate at the points of discharge from the casing, and in which there is no intentional disturbance of the substance to be cut, other than to force it forward, before it reaches the plate, is not invalid on account of anticipation. Following *Manufacturing Co. v. Sargent*, 34 Fed. Rep. 134.

2. SAME—INFRINGEMENT.

The first claim of said patent for the combination of a casing for containing the substance to be cut, a perforated plate at the end of the casing, a device for forcing the substance forward in the casing and against the plate without otherwise disturbing it, and a knife operating against the inner face of the plate, is infringed by a device containing all the elements specified, though there is some unintentional disturbance caused by the forcing apparatus in the substance to be cut before it reaches the plate.

3. SAME.

The second claim of said patent for the combination of a casing, a perforated plate, a rotating knife, and a forcing screw is not infringed by a device in which a cylinder with fingers is substituted for the forcing screw.

4. SAME—RES ADJUDICATA.

A decision in the circuit court on the validity of a patent should be followed by the courts of other circuits, except where its validity is afterwards challenged by evidence that was not introduced at the former hearing.

Bills in equity by the Enterprise Manufacturing Company v. Deisler, manufacturer, and John Wanamaker, seller, of a meat-cutting device, to enjoin the infringement of patent No. 271,398.

Charles Howson, for complainant.

Horace Pettit, for respondents.

BUTLER, J. The suits are for infringement of claims 1 and 2 of letters patent No. 271,398, issued to John G. Baker, January 30, 1883, for "Improvements in mechanism to cut up plastic or yielding substances." The facts in each are the same; and they are, therefore, considered to-

gether. The defense, as set up in the answer, is twofold: *First*, that the patent is invalid; and, *second*, that it is not infringed. The first was involved and fully considered, in a suit by this plaintiff against Sargeant & Co., by the circuit court for Connecticut, in 1883, and the patent sustained. The question was examined and an opinion filed, on motion for preliminary injunction; and again more fully and elaborately considered on final hearing. The first of these opinions is found in 28 Fed. Rep. 185, and the second in 34 Fed. Rep. 134. We are asked to reconsider the question, on the grounds that the decision is not binding upon us, and that further anticipatory evidence is produced. As respects the first it is only necessary to say that a proper regard for the interests of suitors requires that the decisions shall be given controlling effect. The importance of uniformity in the law, as administered in the several circuits, is too great to be disregarded, even where the judges may differ in opinion. Conflicting decisions on the same patent would be an intolerable evil. The rule in this circuit is well settled. *Manufacturing Co. v. City of Philadelphia*, 30 Fed. Rep. 625; *Mayo v. The Chelmsford*, 34 Fed. Rep. 399; *Hammerschlag v. Garrett*, 9 Fed. Rep. 43; *Zinsser v. Krueger*, 45 Fed. Rep. 574; *Cary v. Manufacturing Co.*, 31 Fed. Rep. 344. The question of validity, therefore, is open only so far as respects the additional evidence introduced; and this does not require extended discussion.

In the suit against Sargeant & Co. the court decided that John G. Baker was the first to invent a machine for cutting plastic or yielding substances, in which all preliminary cutting devices were eliminated and the sole reliance for cutting was upon a knife or other cutting device, operating in conjunction with a perforated plate, at the points of discharge from the casing, and in which there was no intentional disturbance of the substance, (other than to force it forward,) before reaching the plate. Upon these characteristics the court distinguished the Baker machine from all others in previous use. We do not find anything in the additional evidence to justify a different conclusion. Other devices are shown; but they add nothing to the force of the defense made in that case. What was there said in distinguishing Baker's cutter from the devices set up may justly be applied to the additional devices shown here. The Dollman and the Miles machines, which were before Judge SHIPMAN, seem quite as much like the complainant's as are any of the additional devices set up. The Baker machine of patent 220,112, first introduced here, is not intended to cut "yielding substances," nor anything else; and is not adapted to such a purpose. It is a "press" designed for extracting juice from fruits alone. Resemblances may be found in some of its parts and combinations, to the complainant's machine. It has a casing, a forcing screw, and what may be called a perforated plate or sieve. These elements are not, however, combined as in the complainant's machine; and the complainant's knife operating in conjunction with the perforated plate, is wanting. Intended for different purposes the organization of the two machines is dissimilar, and neither is capable of doing the work for which the other is designed.

The Brethon machine of the English patent of 1887, is intended for "grinding, mingling, melaxating, and freeing clay" from hard substances, in preparing it for the manufacture of tile, brick, and so forth. It, also, is unsuited for the use to which the complainant's is applied; and is hardly more like it than the "press" referred to. It, also, has a casing, a screw with blades or arms above, and a perforated plate below, connected with a scraper which operates upon its under surface. It has not, however, the screw or other forcing mechanism, described in the complainant's patent, and operating in conjunction with the casing, as shown in his machine. Neither the screw, nor the blades or arms above, bear such relation to the casing, as would render them effective for the purposes of the complainant's forcing device. Nor has it the complainant's knife, operating in conjunction with the perforated plate. The machine was not intended for cutting purposes; and such a device, would, therefore, be out of place in it. The perforated plate is employed simply to afford means of escape for the softened clay, while the scraper is employed to remove hard substances that may be deposited on its surface. Mr. Brethon calls the latter instrument, indiscriminately, a "knife," a "blade," and a "scraper." It is, however, a scraper, and nothing more. While resemblances may be found in Brethon's machine also, to the complainant's, no one observing the former without knowledge of the latter would receive a hint of its possible applicability to the use of cutting meat, or other yielding substance.

Simpson's machine, of the English patent of 1873, for cutting peat, tan, and other fibrous substances, bears little if any, greater resemblance to the complainant's. The language of his specifications (which is general, and apparently indefinite) must be read in connection with the drawings intended to illustrate its meaning. Neither of the figures shown exhibit anything like the complainant's machine. If it were true that the latter might be formed, substantially, by combining parts of the several structures exhibited, (as the respondent urges,) this would not show anticipation; but rather the construction of a new device. Here again, it may be justly said that no one looking at the machine, in either of the forms of construction exhibited, would receive a suggestion of the complainant's invention. This machine, as well as Brethon's, is intended to, and does, operate upon the material fed during the process of feeding, and both, therefore, seem to belong to the class of which the Miles device is an example.

The Jones patent of 1858, reissued in 1865, is for a meat-cutter; but it, also, is essentially unlike the complainant's. Its material parts are a cylindrical casing, around a fluted roller with spiral, flat, sharpened ribs, with an opening at the bottom, in which a serrated knife is fixed, to co-operate with the sharpened edges of the ribs in cutting meat. It has no forcing apparatus properly considered, and the cutting virtually ceases when the operator's hand is withdrawn; nor has it a perforated plate. In construction, operation, and effect the machine is essentially unlike the complainant's. Nothing further need be said on the first branch of the defense.

Does the respondent infringe? The claims involved read as follows:

"(1) The combination, in a machine for cutting up plastic or yielding substances, of the following instrumentalities, namely: *First*, a casing for containing the substances to be cut up; *second*, a perforated plate at or near the end of the casing; *third*, a device for forcing the crude mass forward in the casing and against the said plate without otherwise disturbing the integrity of the said mass; and, *fourth*, a knife operating against the inner face of the plate, and serving as the sole means, in connection with the said plate, of cutting up the mass by severing therefrom the portions which enter the perforations, all substantially as set forth. (2) The combination of a casing, *E*, having at or near one end a perforated plate, a rotating knife acting against the inner face of the said plate, and a forcing screw, the continuous thread of which extends to or nearly to the knife, and which rotates with the latter, substantially as specified."

The first claim is clearly and precisely stated. Its essential elements are the casing; the perforated plate; the forcing device, which drives the mass forward "without otherwise disturbing its integrity;" and the knife operating against the inner surface of the plate, and serving as the sole means, in connection with the plate, of cutting the mass. The respondent insists that the claim if sustained, must, in view of the prior art be narrowly construed. It cannot however, be limited beyond the plain import of its terms. It must have this effect, or be disallowed. The defendant's machine is accurately described by these terms. It contains each of the elements named. It has in combination the cylinder or casing; a forcing device; a perforated plate, and a knife operating against its inner side, serving as the sole means, in conjunction with the plate, of cutting up the mass. The fingers and cylinder are so constructed that their co-action operates to force the mass forward, while the sharpened edges or flat sides of the former act as knives, and sever the particles of meat or other plastic substance, as they enter the perforations in the plate. In principle, operation, and effect, it answers the descriptive terms of the claim. It shows marked structural differences; but they are unimportant.

The respondent seeks a distinction in the fact that there is some disturbance in the integrity of the mass, by the fingers of his device, before it reaches the plate; that particles of the meat or other substance, force their way back between the fingers and casing and are thus mangled and torn. This however, is accidental, and unavoidable; and occurs in all similar machines. It does so, though to a smaller extent in the complainant's. Judge SHIPMAN remarked upon it, in the suit before him:

"It does not follow that the patentee meant, or that his patent is to be fairly construed as meaning, that the meat was to come to the plate in a condition in which no rubbing or no abrasion or no disintegration had taken place; he simply meant that in contrast with the Miles machine, there was no cutting action in this device; that no reliance was placed, for cutting the meat, upon anything else than the plate and the knife, and that the mass was forced to the plate without any other disturbance of its integrity than was incident to the forcing process."

This preliminary tearing or mangling in which the respondent now seems to see advantage is, as before stated, purely accidental and would

doubtless be avoided were it practicable. The respondent does not claim it as a merit in his patent, nor allude to it in his specifications. We must, therefore, hold that the first claim is infringed.

Is the second infringed also? Its only distinguishing feature is the forcing screw. This we do not find in the respondent's machine. To hold that the fingers and cylinder constitute the complainant's screw is not justifiable; nor is it justifiable to say they are its equivalent because they do its work. To say that they are, would obliterate the distinction between the first and second claims; for if any forcing device that may be adopted—capable of performing the office of the screw—is its equivalent, it follows that the two claims are for the same thing. A decree may be entered in the usual form, for infringement of the first claim.

ACHESON, J., concurs.

POPE *et al.* v. SECKWORTH *et al.*

(District Court, W. D. Pennsylvania. July 2, 1891.)

ADMIRALTY PRACTICE—RELEASE OF ATTACHED PROPERTY.

Under the fourth admiralty rule, which provides that an attachment may be dissolved upon defendant giving bond to abide by all orders of the court, and pay the amount awarded by final decree, attached property cannot be released on bond conditioned for payment of the value of the property released, where the value of such property is less than the debt sued for.

In Admiralty.

Noah W. Shafer and Stephen C. McCandless, for libelants.

John Scott Ferguson and E. G. Ferguson, for respondents.

REED, J. The respondent Seckworth, whose goods have been attached upon mesne process issued upon a libel *in personam* under the second admiralty rule, has applied for an order to direct the marshal to deliver to him two flat-boats so attached, upon his giving security that, in the event of a decree against him, he will pay the libelants on account of said decree the value of the said boats; and the respondents J. B. Hahn and Martin Hahn apply for a similar order as to the cargo of said flats, likewise attached as their property. The value of the flats and cargo is conceded to be much less than the claim of libelants. Proctors for libelants object to the application, and insist that the stipulation or bond must be to pay the amount awarded by final decree. I am not able to find any authority upon the subject, but an examination of the fourth admiralty rule satisfies me that the stipulation or bond must be as contended by libelants' proctors. That rule provides that the attachment may be dissolved by order of the court, upon the defendant, whose property is so attached, giving a bond or stipulation, with sufficient sureties, to abide by all orders of the court, and pay the amount awarded by

the final decree; and upon such bond summary process may be issued against the principal and sureties to enforce the final decree. The same language is used in the third admiralty rule relative to warrants of arrest in suits *in personam*, which has been held to require a stipulation or bond, not for the appearance of the defendants alone, but also for the payment of the decree. 2 Conk. Adm. p. 88 *et seq.*; *Gardner v. Isaacson*, 1 Abb. Adm. 141; *Gaines v. Travis*, Id. 297; Ben. Adm. § 496. The language of the fourth rule is plain, and leaves no room for the construction claimed by defendants' proctor. Provision is made by the tenth admiralty rule for relief in cases where the property attached is of less value than the claim of libelants, which is an additional reason, in my judgment, for the construction I have put upon the fourth rule.

THE TIMOR.

NORDLINGER *et al.* v. NELSON *et al.*

(District Court, S. D. New York. June 25, 1891.)

CARRIERS BY SEA—DAMAGE BY RATS—BURDEN OF PROOF—BILL OF LADING—EXCEPTING VERMIN—NEGLIGENCE.

On discharge at New York of a cargo of beans from Fiume, Austria, after a voyage of 34 days, an extraordinary and almost unheard of amount of damage from rats appearing, *held*, (1) that the negligence of the ship to take reasonable and ordinary precautions against such a familiar cause of damage was to be presumed; (2) that, though an exception of liability by reason of "vermin" in the bill of lading included rats, neither that exception nor the exception of damage from negligence, even if valid, excuses the lack of preliminary precautions against rats through a proper previous examination of the ship, thorough washing out or fumigating, or a sufficient supply of cats; (3) that, the ship not having satisfactorily overcome the presumption against her, the libelants were entitled to recover their damages.

In Admiralty. Damage to cargo by rats.

Wing, Shoudy & Putnam, for libelants.

Convers & Kirlin, for respondents.

BROWN, J. On the voyage of the British ship Timor from Fiume, Austria, to New York, some 3,700 sacks of beans when discharged were found greatly damaged by rats. Upon the testimony I cannot doubt that this damage happened during the voyage. The voyage was a common one, between well-known ports. The cargo was not unusual. The special liability to damage by rats was well known, both as respects the cargo and the place of loading; yet the amount of damage was extraordinary, and almost unheard of. The inference seems to me irresistible and overwhelming, in the absence of any sufficient explanation why this extraordinary damage occurred, that it could only have arisen from some failure of the ship to take the usual precautions against rats, either in the examination and preparation of the ship beforehand, or in the number of cats taken on board, or the facilities afforded them

to keep down such an incursion of rats. The voyage was of only 34 days, only the customary stops were made, and no explanation has been suggested, or seems possible, excepting those very liabilities to incursions from rats which were well known, and which it was the business of the ship to make provisions against. The washing out appears to have been for the purpose of clearing the ship of coal-dust, and with no special reference to any examination for rats; and the neglect may have been in the want of proper attention to them at that time, or in only a partial washing out. In view of the extraordinary damage, the burden of proof to satisfy the court remains upon the respondents. Notwithstanding the considerable testimony on the part of the ship, I am not satisfied of the sufficiency of the defense; and it is not necessary to determine whether the extraordinary damage was from lack of suitable examination for rats beforehand, or because the washing out was but partial, *i. e.*, where the coal-dust was lodged, or from the omission to fumigate, or an insufficient number of cats. I am constrained to the conviction that the ship did not take the necessary and usual precautions, and for that reason should bear the loss, even though the exceptions in the bill of lading, both as to vermin and as regards negligence, were held valid. *The Isabella*, 8 Ben. 139; *Stevens v. Navigazione Generale Italiana*, 39 Fed. Rep. 562. Without referring to the other interesting points suggested by the respondents' brief, decree for the libelants, with costs.

THE EXPRESS. THE NIAGARA. THE N. B. STARBUCK. THE CHARM.
NEW YORK & C. MAIL S. S. CO. *v.* THE EXPRESS, THE N. B. STARBUCK, and THE CHARM.

NEW ENGLAND TERMINAL CO. *v.* THE NIAGARA, THE N. B. STARBUCK, and THE CHARM.

(District Court, S. D. New York. June 24, 1891.)

1. COLLISION—TUG AND TOW—JOINT RESPONSIBILITY.

It having been found (44 Fed. Rep. 392) that there was fault in the navigation of the ship and tow (1) in not straightening down river, as required by law, with reasonable promptness; (3) because shortly before collision, when the N.'s course was really clear, she ported, in order to follow the tug, and thereby unnecessarily ran into the E.; and it appearing that the N. had a master and crew on board in the performance of their duties, her quartermaster at the wheel, receiving orders from her master, and that the latter alone gave the final order which precipitated collision, the pilot or master of the assisting tug along-side being also on the bridge, and concurring in the navigation,—*held*, that the officers of both the tug and tow were joint participants both in the navigation of the N. and in the above specific faults; that both tug and tow were therefore answerable to the E.; and that the N. could recover but half her damages.

2. SAME.

What constitutes joint participation in the navigation of tug and tow considered, in reference to the language of BETTS, J., and of Mr. Justice CLIFFORD, in *Sturgis v. Boyer*, 24 How. 110; (opinion of BETTS, J., in note.)

In Admiralty. Collision; tug and tow participating.

Carter & Ledyard, for the Niagara.

Wing, Shoudy & Putnam, for the Express.

Robert D. Benedict, for the Starbuck and the Charm.

BROWN, J. In the former decision of the above causes, the Express was held without fault, (44 Fed. Rep. 392,) and the tugs Starbuck and Charm, which had the Niagara in tow, were held to blame. It did not seem necessary at that time to determine whether the Niagara, which was in tow of those tugs, and came in collision with the Express, should also be held to blame; but, it appearing that there is no community of interest between the tugs and the Niagara, and that the value of the tugs is insufficient to pay the damage caused to the two vessels by the collision, it is necessary to determine the question whether the Niagara is also chargeable with fault; for, if she is blamable as between her and the Express, she is liable to the Express, and cannot diminish to the latter's prejudice the fund derivable from the stipulation given by the tugs.

Most of the facts are stated in the former opinion. The navigation of the Niagara was held to be in fault (1) for unnecessarily going to the left-hand side of the East river channel, near Corlear's Hook, and continuing her heading towards the left, though bound for the New York shore; (2) not signaling or answering signals in time; and (3) for turning shortly before collision to the right, across the bows of the Express. For these faults, save the want of signals, I think the Niagara was at least jointly to blame with the tugs. As respects the giving of signals, it was held in the case of *The Einar*, 45 Fed. Rep. 497, 500, that on the failure of the tug to give signals, it was the duty of the tow to direct them to be given; and in *The City of Alexandria*, 31 Fed. Rep. 427, it was held the duty of the tow having whistles to sound them. By the first fault the Express was embarrassed as to the Niagara's intentions; by the last, after the danger was over if the Niagara had kept her course, collision became unavoidable. In both these faults the officers of the Niagara were active participants. The final order, "hard a-port," which precipitated collision, was given by the master alone, and the previous slow turning of the Niagara in straightening down river arose, at least in part, through not hard a-porting long before; and as to that the master had and exercised such control as he saw fit.

This case has no resemblance to that of *Sturgis v. Boyer*, 24 How. 110, because there the master and crew were not on board, and had no participation in the faulty navigation. It was the same as to want of participation in the fault in the case of *The John Fraser*, 21 How. 184. In the former case CLIFFORD, J., says expressly that—

"Both tug and tow are jointly liable when those in charge of the respective vessels jointly participate in their control and management, and the master or crew of both are deficient in skill, omit to take due care, or are guilty of negligence in their navigation." *The Mabey*, 14 Wall. 204, 211; *The Maria Martin*, 12 Wall. 44; *The Virginia Ehrman*, 97 U. S. 309, 313.

If any doubt could exist as to what was meant in *Sturgis v. Boyer*, by "jointly participating in the control and management," it would seem to

be removed by reference to the opinion of BETTS, J., in the court below,¹ in which he had held the tow and tug jointly in fault, because, upon the facts in proof before him, he found that neither "vessel was strictly passive in the course pursued in its navigation, but, on the contrary, the officers of both took active and efficient part in directing and controlling the movements of the tug." * * * "The ship's company," he says, "had sole charge of her helm and sails; and the master of the tug gave directions from her deck concurrently for her navigation. * * * It cannot be said for the ship * * * that she did not participate with the tug in any voluntary action producing a collision. * * * The true doctrine subjects both tug and tow to responsibility to another vessel for injuries inflicted upon it by the joint action of the tow by means of their common fault." The facts were found otherwise in the circuit court and in the supreme court, viz.; that "the ship was under the exclusive command and direction of the master of the tug, and that the ship's master was not on board, nor any crew, and that the mate did not in any way interfere with her navigation, but was otherwise employed." *The Scranton*, 5 Blatchf. 400; 24 How. 120, 121. The reversal was because the facts were otherwise than found by BETTS, J., and the almost identical language used by Mr. Justice CLIFFORD in the passage above cited in regard to a joint liability would seem to be drawn from the opinion of Judge BETTS, and to be designed to express concurrence with his views, in this respect, upon the facts as he had supposed and found them.

Stronger even than the facts assumed by Judge BETTS are the facts here, which show a joint participation in the navigation of the tow; and, if this were not to be held such a case, I hardly perceive how any case ever likely to arise could be construed as one of joint navigation; for the officers and crew of the Niagara were not only on board, but actively participating in her navigation. Her master was on the bridge, her quartermaster at the wheel, receiving his orders; and the very order that precipitated collision came from her master only. The pilot of the Charm was by his side, concurring in all his acts. It is plain, moreover, that the active co-operation of the officers and crew of the Niagara was necessary to the navigation of the ship, and that their help was expected and counted on by the tugs in her navigation. Besides those mentioned, others of the crew were stationed forward, as the master says, for any necessary emergencies. Without them, the ship would have been unseaworthy, for want of suitable equipment for safe navigation. *The Galatea*, 92 U. S. 439. It is manifest that the tugs neither had nor exercised exclusive management or control. This is plainly not a case like that of the towage of canal-boats, in which the tugs take, and are expected to take, the whole management of the tow into their own hands; but one of joint participation and direction. The captain, indeed, states that he considered the ship to be under the direction of the tugs and of the pilot of the Charm, who was on the bridge with him; but such an opinion, given after collision, for the purpose of exonerating himself and

¹See note at end of case.

his ship, is outweighed by the circumstances and by his acts at the time. The evidence shows that the master and crew were all the time exercising their functions, and were no more relieved of them by the presence of the master of the *Charm* than if he had been a pilot taken on board, in which case the liability of the ship is well settled. *The China*, 7 Wall. 53. It was the duty of the master, as well as of the pilot of the *Charm*, to observe the statutory regulations made for the avoidance of collision, to straighten down river as soon as practicable, and not, in violation of the statute, to embarrass other vessels, nor run across their bows into evident collision. When the *Starbuck* made a move plainly leading to sure collision, it was the duty of the master to cut the hawser, and not port hard, as he did, in order to follow the *Starbuck*. A large steamer like the *Niagara*, nearly 300 feet long, with her master and crew on board, prosecuting and participating in her navigation for her own benefit and her owners', though in tow of a tug, is bound to take all needful precautions to avoid injury to others. This obligation is wholly independent of the question which is master and which is servant. This rule was recognized and enforced by the supreme court in the case of *The Civilla*, 103 U. S. 699. Both are bound to be vigilant, and to do all that prudence and skill can do to avoid the destruction of life and property by collision in navigation. Large vessels, by reason of their size, moreover, have practical control, in a large degree, of the tugs attached to them. *The Niobe*, 13 Prob. Div. 55; *The Doris Eckhoff*, 32 Fed. Rep. 555. They are rarely without their full complement of officers and crew, who continue their ordinary duties of navigation, as was evidently expected and done in this case. In maritime countries generally the tug is in such cases almost universally treated as the servant of the larger ship, which can direct and control her movements; and so Mr. Justice GRIFER held in the case of *The Creole*, 2 Wall. Jr., 485, 512. But, whether this view be adopted here or not, the *Niagara* seems to me to be jointly answerable for this collision, within the strict line of cases from *Sturgis v. Boyer* downwards, because her master and crew participated, not only in her navigation, but in the two specific faults that directly brought about the collision.

Without commenting, therefore, upon the arguments submitted in regard to what was said in the case of *The Doris Eckhoff*, 32 Fed. Rep. 555, and without considering to what extent the principle on which *Sturgis v. Boyer* was decided, as respects the remedy against the ship *in rem*, has been modified by subsequent cases in the supreme court, or supplemented by many of its justices, including Mr. Justice CLIFFORD himself; to what extent its application to cases like the present would work injustice by absolving from liability the vessel that inflicts the injury; or to what extent it is incompatible with the general design of the act of 1851, (Rev. St. §§ 4283-4286,) which, since that case was decided, has been developed and expounded by the supreme court as an adoption, in a large degree, of the general maritime law of Europe, which, in the navigation of chartered ships by the owner's consent, though the owner does not stand in the relation of principal, or incur any personal liability, nev-

ertheless looks to the ship in case of her faulty navigation as the offending thing, which is at once the source of the wrong, the sponsor for indemnity, and the limit of liability; or to what extent that case is in principle specially incompatible with the fifth section of the act of 1851, (Id. § 4286,) which, as expressly making the ship liable for her navigation for her whole voyage, independent of the owner's control, might seem to include by implication towage under a tug's control for a small portion of a voyage, at the beginning or end of it, as the greater includes the less; or to what extent it is compatible with the principle or policy of any maritime law that an owner by any form of contract, whether of towage or otherwise, should be allowed to procure the navigation of his vessel to be effected without liability on her part for the injuries she inflicts on innocent third parties by her faulty navigation, or to substitute the liability of another man's tug of much inferior value for the liability of his own vessel for such damages, to the prejudice of others, thus abolishing, at his mere volition, *pro tanto*, the general law of maritime liens allowed for the security of third persons; and leaving the discussion of these questions to a time when they are necessarily involved,—I apportion the damages between the Niagara and the tugs, and allow judgment for the Express against both the tugs and the Niagara, with costs.

NOTE.

The following is the opinion of BETTS, J., in the case of *Sturgis v. Boyer*, above referred to, (*The Wisconsin* and *The Hector*,) in the district court.

After reviewing the facts, and finding the libellant's lighter not in fault, the opinion proceeds, (volume 23, notes of BETTS, J., 127:)

"BETTS, J. The second inquiry demands a consideration of the proceedings by the ship and steam-boat, and whether they are chargeable with culpable acts of omission or commission of a character to render them jointly responsible to the libellant for the injuries sustained from them. In my opinion, the balance of testimony proves that the tow was approaching the lighter further out in the river from the New York piers than the lighter, she and the tow aiming to come to nearly at the same point. It was mid-day, and there was no impediment in the river to a clear view of the position and course of the lighter by those navigating the tow, and warning was given the tow from the lighter time enough to enable the tow to have stopped her way, or diverged from it sufficiently to secure the safety of the other vessel. The differing opinions of the witnesses as to the motion of the tide at the time of collision, and also as to the headway of the respective vessels, seem to be controlled by the fact that the barrels of flour thrown into the river by the upsetting of the lighter floated down the stream. Upon that condition of things, it is manifest that the exercise of reasonable diligence and caution on the part of the managers of the tow, when they ought to have been aware they could not prudently attempt to make her berth by going ahead of the lighter, throws upon the tow the responsibility for all damages inflicted upon the lighter by reason of continuing that movement. The injured party, in case of collision, has, as a general principle, a right to hold the vessel which is the direct and immediate cause of the wrong answerable to him for it, (*The Neptune*, 1 *Dod.* 467,) and this without regard to the question of the personal participation of the owner of a colliding vessel in the culpable acts. When she is in motion in the pursuit of her lawful calling, she carries with her the responsibility of her owner for the acts of his agents, to whom she is intrusted, to the same extent as if she was under his personal direction. *Abb. Shipp.* pt. 3, c. 1. Nor does it matter whether the propulsion is by the agency of sails or sweeps, or that of steam-tugs fastened to her, and used to the same end, because the steam-power thus applied may be justly regarded only as a substitute for other physical means of navigation. *Keeves v. The Constitution*, 1 *Gilp.* 579; *The Express*, *Olcott*, 258. A ship under towage by a steamer lashed to her side is chargeable for damages wrongly occasioned another vessel by striking while under way against her. *The Carolus*, 2 *Curt.* 69. The answers filed, respectively, by the owner of the ship and the tug are in direct conflict upon the question whether the navigation of the tow was under the control of the officers of the one vessel or the other; it being averred for the ship that she was exclusively in the hands and under the command of the officers of the tug at the time of collision, and asserted on the part of the tug, with equal positiveness,

that she was placed under the exclusive orders and control of the ship, and was employed solely for the purpose of supplying the motive power for transporting the ship from one pier to the other, and the tug and her crew were therein subject to and obeyed the orders of the master and officers of the ship alone. It is unnecessary to speculate upon the consequences that would legally follow the establishment of that defense, because, in my opinion, the testimony does not show that either vessel was strictly passive in the course pursued in its navigation, but, on the contrary, the officers of both took active and efficient part in directing and controlling the movements of the tow. I am inclined to consider the primary responsibility rested upon the ship, she being the vessel actually colliding upon the lighter; but I also hold the tug was responsible for the direction given the ship, through the agency of her officers, concurring with those of the ship.

"This court decided in the case of *The Express*, Olcott, 258, that the tow, being separate from the tug, and coming in contact with another vessel by her own fault, was liable for the damages thus inflicted in a suit against her alone; and, although the decree was reversed on appeal upon a new state of facts proved in the circuit court fixing the fault wholly upon the tug, (1 Blatchf. 365,) yet that doctrine was explicitly adopted by Judge NELSON, who says: 'In all such cases, at least, there exists a common obligation by the tug and tow to make every reasonable effort to avoid the danger and a common responsibility in case of neglect.' In that case the appellate court corrected the decision below, because the liability was imposed by its judgment on the tow, when the culpable acts were committed by the tug solely, without any faulty concurrence on the part of the tow, upon the declared principle that both vessels were under a common obligation in their respective positions to employ every reasonable effort to avoid damage, and under a common responsibility for it in case of faulty omission to do so. 1 Blatchf. 367. The contingency anticipated in that decision arises in this case. The ship and the tug were united together, and were moved as one body. The ship's company had sole charge of her helm and sails, and the master of the tug gave directions from her deck concurrently for her navigation and that of the tug, and the helm of the ship was employed in a common navigation of the two vessels. Neither of the two, as they were connected and conducted, had any movement or action separate from the other, but employed concurrently the means at their command to a common end; and it cannot be said, therefore, for the ship, if the fact be of any moment in this case, that she did not participate with the tug in any voluntary action producing a collision. The admiralty court in Lower Canada (*The John Counter*, 18 Law Reports, L. C. 553,) held the steam-tug exclusively responsible for a collision of her tow with another vessel when the tow was hauling by a line clear of the tug, and the damage was caused by the sole fault of the tug, although she did not come in contact with the injured vessel. In *The Carolus*, 2 Curt. 69, Judge CURTIS adjudged the colliding ship, propelled by a tug, answerable for a collision caused by her, when the tug was not joined in the suit, without raising a question as to the liability of the ship.

"In the circuit court of Pennsylvania a distinction is taken which I do not meet with in any other adjudication between the responsibilities for collision when small steam-tugs are employed to tow large vessels, and large tugs are engaged in towing small craft, barges, etc. In the first class of cases, when injuries arose to other vessels by collision with a large tow through the misfeasance or culpable inattention of the tug, the consequences are made chargeable exclusively upon the ship, the tug being regarded as her servant or agent, acting under her authority; and that no suit for collision can be sustained against the tug for damages so accruing from collision by her tow. *Smith v. The Creole*, 2 Wall. Jr., 485, 511, 512. *The Sampson*, 3 Amer. Law Reg. 337. The entire navigation and movements of the two vessels is held to be at the risk of the ship. The principle of these rulings would apply to the present case, and would fasten on the ship the liability for damages inflicted upon the lighter. I am impressed with the persuasion that the true doctrine subjects both tug and tow to responsibility to another vessel for injuries inflicted upon it by the joint action of the two by means of their common fault. I am in no way convinced that the marine law dispenses either from liability to others for their mutual acts of misfeasance or omission upon navigable waters, as upon that area it is most important to the safe transportation of persons and property that every vessel propelling herself or another by motive powers within herself, or invoking or using such motive powers supplied by another, should be accountable for the consequences of the injurious misuse of such locomotion to the same extent as when she is acting separately and alone. It inures to the general security that the risk of that connection with such extraneous agency shall be imposed upon the parties so employing it, and that those suffering from its use should be entitled to indemnity therefrom against all the actors concerned in the wrong.

"A case decided in this court in June term, 1855, by Judge INGERSOLL, is cited as establishing a different ruling, and exonerating the tug, and imposing the loss upon the party in tow on her side, when a collision was caused in their movements. I have obtained a clearer statement of that case from the files of the court, and find that the question mooted in this case could not have appropriately arisen in that. The owners of a lake boat in tow along-side of the tug (the Catherine) was met and run against on the East river by another small boat or barge in tow along-side a tug, (the Birkback,)

and a collision ensued between the lake boat and the barge, and a joint action *in personam* was prosecuted by the libelants against the owners of the Birkback and of the tug Catherine, to recover the damages so incurred. The court dismissed the libel as to the tug Catherine, and awarded damages as against the owners of the Birkback. If the points involved in the present case were brought in discussion on the hearing or decision of that case, it could have been argumentatively only, and the decision necessarily would not affect the question in issue here. In my judgment, upon the facts and proof before the court, both the ship and tug were jointly actors in the tort committed upon the lighter, and the libelants are entitled to their recompense from the joint tortfeasors to the amount of loss so sustained."

THE CIAMPA EMILIA.

THE F. W. VOSBURGH.

SOMERS *v.* THE CIAMPA EMILIA *et al.*

CIAMPA *v.* THE F. W. VOSBURGH.

(District Court, D. New Jersey. July 13, 1891.)

COLLISION—VESSEL AT ANCHOR—TUG.

A dredge was anchored in the middle of the channel of the Delaware river, with proper lights burning. A ship towed by a tug came up the river. The tug, at a distance of a mile and a half of the dredge, shaped its course so as to pass to westward of the dredge, and steadily maintained that course. The ship in charge of its own master and crew was so carelessly steered that it did not follow the course of the tug, but collided with the dredge. *Held*, that the ship, and not the tug, was responsible for the collision.

In Admiralty.

Henry R. Edmunds, for libellant.

Wing, Shoudy & Putnam, for the Ciampa Emilia.

Hyland & Zabriskie, for the Vosburgh.

GREEN, J. This suit is brought to recover damages sustained by the dredge Arizona, owned by the libellant, in a collision with the ship Ciampa Emilia. On November 2, 1888, the dredge Arizona was engaged in dredging out the channel of the Delaware river, at Mifflin bar, a few miles below Philadelphia. About 10 o'clock on the evening of that day she was run into by the ship Ciampa Emilia, and sustained considerable damage. The ship was being towed by the Vosburgh on a hawser from 40 to 45 fathoms in length. The night was clear starlight, the wind fresh from the south-east, and the tide strong flood. The dredge was anchored about in the middle of the channel, with the proper lights set, and was so placed that on either side there were at least 250 feet of water, averaging in depth 20 feet, in which deeply laden-vessels could be safely navigated.

The only question involved in this case is one of fact. The legal principles applicable are perfectly well settled. It was plainly the duty of the Vosburgh to tow the ship in such careful manner that she would clear any obstruction in the course taken, if carefully and promptly man-

aged at the helm, and vigilantly guarded by her lookout. In an equal degree was it the duty of the ship to exercise all reasonable care, prudence, and skill to avoid doing any damage to herself or to any other vessel. The fact that the motive power which communicated impetus to the ship was furnished by the tug, to which she was connected by the hawser of more or less length, does not relieve her from her duty in this respect. She was still, to a very considerable degree, controlled by her own rudder. Her master, her lookout, her helmsman, were all fully in charge. They were under the obligation of vigilance and thorough performance of their varied and respective duties, and failure to perform such duties would, inevitably, deprive the ship of her right to complain, if she received or caused injury while being towed. *The Brundow*, 39 Fed. Rep. 831; *The Herald*, 8 Ben. 263.

The libel in this cause was filed November 5, 1888, by the owner of the dredge against the ship Ciampa Emilia only. After reciting the facts of the collision, it charged the cause as follows: "The said collision was wholly caused by the negligent and careless management of those in charge of the ship, which had or might have had abundant and timely warning of the presence of the dredge, and could and should have seen her lights, and avoided her, there being plenty of room for that purpose;" and more especially particularizing the negligence so charged. The libel then sets out that such negligence was clearly evidenced by (1) not having a sufficient lookout; (2) by having an incompetent man at the wheel, inattentive to his duty; (3) in not exercising prudence and skill in the management of the ship; (4) in general incompetence and want of watchfulness and care in the management of the ship. It will be noticed that this libel was filed within three days after the collision, and when all the facts and circumstances were fresh and vivid in the recollection of those who were present, and saw the occurrence. At that time no one connected with the injured dredge cast aught of blame upon the tug Vosburgh. Afterwards, upon the petition of the claimants of the ship, the Vosburgh was brought into court, under the provisions of the fifty-ninth rule in admiralty, to the end that she might be proceeded against for the damage alleged to have been sustained by the dredge. The charge made against the Vosburgh by the claimants of the ship is that, in approaching the dredge, she directed her course so as to pass to the eastward of the Arizona, and, had she kept on such course, she would have towed the ship by the dredge in safety. Instead of so doing the Vosburgh, when very near the Arizona, took a rank sheer to port, and undertook to pass to the westward of the dredge. The ship, however, was so near the dredge, at that time, that she fetched up on one of the lines by which the dredge was anchored. This stopped her swing to port, and made her swing to starboard. The tug kept on her way, and so dragged the ship into violent collision with the dredge. To this charge the Vosburgh answers, in effect, that when, at a distance of two miles below the dredge, she shaped her course to pass to the westward of the dredge, whose lights were plainly in view; that such course was not deviated from thereafter; that when the Vosburgh was about opposite the dredge, and from

180 to 200 feet to the westward the ship took a sudden sheer to the eastward, breaking the towing hawser, and almost immediately striking the dredge at the lower easterly corner, thereby inflicting the damage complained of.

The testimony in the cause is quite conflicting, but, upon careful consideration, in my opinion the decided weight of evidence fairly establishes these facts: First, as to the ship: The Ciampa Emilia was in charge of a master who was wholly ignorant of the navigation of the Delaware; who did not understand the usual and customary signals which are prescribed for steam-vessels when approaching each other; nor did he know what such signals meant. The lookout on duty was so incompetent or inattentive that he failed utterly to see the lights of the dredge, or the dredge itself, nor did he report its presence or call the attention of the master or the helmsman to it, in any way. The helmsman steered the ship so carelessly and negligently that, just previously to the collision, the agent of the ship, who had come down the river to meet her, and had boarded her, noticed the deviation, and, although possessing no authority in the premises, peremptorily ordered the helmsman to change his course, and follow the course of the tug. That in obeying this order, and in attempting to change the course of the ship, the helmsman directed her in such a way that she struck on her port bow the chain by which the dredge was anchored, breaking the towing hawser, and being cast by the force of the blow upon the chain, over to the starboard, striking the easterly lower corner of the dredge. That the ship was not following the course of the tug is clearly established by the fact that the tug drew two feet more water than the ship, and could not have passed over the anchor chain of the dredge, where the ship attempted to pass, without coming in contact with it. Then, as to the tug, it seems proven, satisfactorily, that prior to the collision, and for the distance of at least two miles, she had been running on the Tinicum island range of lights. That it is customary for vessels running up the Delaware river to change from the Tinicum range of lights to the Ft. Mifflin range at a point about one and a half miles below the place where the dredge was anchored. Such change is about two points and half to port. That such change was duly and properly made by the tug, and her course was then shaped to pass to the westward of the dredge, whose lights were plainly visible. Such course was not afterwards changed or varied in any material degree. That, as a result of keeping on such course, the tug, just previous to the collision, was opposite the dredge, and about 150 feet west of her. Had the ship been properly navigated, had she followed closely and truly the course of the tug, this collision could not have occurred.

Upon these facts, which seem to be sustained by the weight of the evidence, no negligence can be imputed to the tug; and the libel, as far as the Vosburgh is concerned, must be dismissed, with costs against the ship. So far as the ship is concerned, there must be a decree for the libellant with costs. Let the usual order of reference be made to ascertain the amount of damages. In coming to this conclusion, I have not

been unmindful that in the case of *Ciampa v. The F. W. Vosburgh*, 41 Fed. Rep. 57, the learned judge for the eastern district of New York has, upon consideration of a portion of the testimony presented to this court, based upon the same collision, adjudged the Vosburgh guilty of negligence in suddenly changing her course from the eastward to the westward when too near the dredge safely to make such change. The opinion and judgment of so able a judge should receive the most careful consideration, and are justly entitled to the greatest weight. Had the evidence presented in this court been substantially the same as that considered in the court in New York,—although its weight might not have been as impressive to me as it seemed to the learned judge there,—I should unhesitatingly have adopted his conclusions. But in addition to the testimony there submitted, is now for the first time presented the testimony of two witnesses, whose statements under oath I cannot reject. This new testimony, if received as true, clearly proves, as it seems to me, the very important fact that the Vosburgh made no variation or change in her course after she shaped it in taking the Mifflin range lights to go to the westward of the dredge. If this is so, the theory of the claimants that it was the sudden change of course by the tug when near the dredge, that caused the ship to strike the dredge, falls to pieces. There is nothing to sustain it. This testimony was not before the court in New York. Had it been, the result might have been different. At any rate, the introduction of such new testimony makes the present case a different one from the one referred to, and it is therefore entitled to a thorough and independent consideration.

THE NORA COSTELLO.¹

MORRISSEY *v.* THE NORA COSTELLO.

(*District Court, S. D. New York. May 30, 1891.*)

ADMIRALTY—MAKING FAST TO WHARF—INSUFFICIENT FASTENING—BREAKING ADRIFT.

Libellant's boat was lying off the end of pier 2, near Wallabout canal, in the East river. Twenty-five feet away, and at pier 1, lay a tier of 6 boats, among them the *Nora Costello*. One hundred feet above these lay another tier of 8 or 10 boats. On the turn of the tide, the wind blowing fresh at the time, the whole last-named tier broke loose, and was carried down upon the second tier of boats, which in turn gave way, and swung around upon the boats off pier 2, the *Costello* striking libellant's boat, and doing damage, to recover for which this libel was filed. The libel charged that the *Costello* was not properly made fast to the pier. The evidence showed that she was fastened in the customary manner. *Held*, that vessels, in making fast to piers, are bound to provide only against ordinary contingencies, such as they can anticipate; that they are not bound to make fast by lines so strong or numerous as to resist the impact of such a fleet of vessels as got adrift in this case; and that, as there was no negligence in the *Costello* as to her mode of fastening, the libel against her should be dismissed.

In Admiralty. Suit to recover damages caused by collision.

¹Reported by Edward G. Benedict, Esq., of the New York bar

Alexander & Ash, for libellant.

Hyland & Zabriskie, for respondent.

BROWN, J. On the morning of July 9, 1890, the libellant's canal-boat John Kelly was lying off the end of pier 2, bow down, to the southward of Wallabout canal, outside of a lighter, which was fastened at the end of the dock. The canal-boat had one line run to the dock, and two lines were made fast to her and the lighter. A space of about 25 feet separated these boats from another tier of six boats that lay in a similar manner off the end of pier 1; among them the Nora Costello, which had arrived there that morning with a cargo of ice, and was directed to take her position as the fourth boat off from the pier. Afterwards another boat came, and made fast outside of her. About 100 feet above the boats off pier 1, was another tier of 8 or 10 boats, all along-side and off the bulk-head immediately north of the canal, fastened to one another; and the inside boat, at least, had her northerly end made fast to a ring bolt in the string piece of the bulk-head. When the tide became flood, running south at that point, and the wind fresh from the north-west, the whole last-named tier gave way at the northerly end and swung off from the wharf, and were carried down upon the tier of boats off pier 1. The impact broke the northerly line that held the latter boats to pier 1, so that they swung around and came down upon the boats off pier 2; the Costello striking against the stern of the Kelly, and breaking her taffrail, and doing other damage, to recover for which the above libel is filed.

The faults charged upon the Costello are that she was not sufficiently made fast to pier 2, nor properly manned. There is no evidence to sustain the latter charge, and the controversy has turned mainly upon the obligations that attach to boats moored outside of others in the manner above stated. There is some evidence indicating that the pressure of boats for room there is so great that not infrequently in the crowding together some get loose, or break away; one tug finding its business in keeping them in place. The result of the evidence given on both sides as to the usual practice of boatmen in fastening their boats, and as to what is usually deemed safe and prudent, is that boats fastened outside of others should run at least one line to the shore, if that can be readily done; but it is not considered necessary, nor is there any uniform custom to do so, where the boat next to the dock is securely fastened by an abundance of strong lines, and where the cargo of intervening boats makes it difficult or improper to run lines across. I do not think it is any part of the legal obligation of boats mooring along-side of the wharf to make fast by lines so strong or so numerous, or by such attachments, as to resist the impact of such a fleet of vessels as got adrift in this case and came down upon them. The weight and force of such impacts are wholly beyond the calculation of ordinary boatmen. It is enough, in my judgment, that each boat secures itself properly against all the ordinary forces of wind, tide, or other causes to be looked for in the position taken for mooring. The tier in which the Costello lay received the force

of 8 or 10 boats that had broken loose from the bulk-head above by the giving way of the string piece. No such accident had occurred before, or was likely to be anticipated. It was a vast weight that came down with the wind and tide, and such as must inevitably carry away the boats below that were only secured by fastenings sufficient for ordinary navigation. The Costello's tier was in like manner carried down from her own pier to the tier below, in which the libelant's boat lay; and, although she was secured by a line to the dock, it was parted by the impact. And that tier also would probably have gone below had it not been bound in against the wharf by the wider tier from above. The claimant's witnesses testify that they could not carry a line to pier 1, because the boat next inside of her had a deck-load, which prevented; nor could they lawfully have carried a line across the canal to the bulk-head above, the only leading line that could have done any good. The harbor master testified that the claimant's boat was moored in the customary way, and that the two boats nearest the pier were both made fast to it. The claimant's captain also testifies that, before making fast to the third boat, he examined the lines of the inside boat, and found that they were new, strong, and secure.

Upon these facts I cannot find that there was any negligence in the claimant's boat in her mode of fastening. It was evidently, it seems to me, sufficient for all ordinary contingencies, such as she was bound to anticipate; nor is there any reason to suppose that, if an additional line had been run to the pier, it would have made any difference when the tier of 8 or 10 boats from above came down upon the tier off pier 1. Such a line would have been snapped at once, as was that of the libelant's boat. In substance, the present case, it seems to me, does not differ from those that have arisen from time to time, in which one boat is injured by another that is driven upon her, without the fault of either, by the impact of a third boat upon the second, through the fault of the third. In such cases the latter boat alone is held responsible. *The Moxey*, 1 Abb. Adm. 73; *The Grapeshot*, 38 Fed. Rep. 156; *The W. J. McCaldin*, 35 Fed. Rep. 330; *The Northam*, 37 Fed. Rep. 238. In the present case it does not appear what or whose was the original fault in consequence of which the tier of 8 or 10 boats off the bulk-head got adrift. That, it seems to me, is the true and necessary inquiry in fixing the responsibility for the libelant's damages. No fault or negligence being proved in the claimant's vessel, she must be acquitted.

Libel dismissed, with costs.

THE EMMA KATE ROSS *et al.*MYERS EXCURSION & NAVIGATION CO. *v.* THE EMMA KATE ROSS *et al.*

(Circuit Court, D. New Jersey. May 8, 1891.)

1. COLLISION—CROSSING COURSES UNDER STEAM.

A steam-tug and a steam-boat approached each other on crossing courses in the Hudson river, when the tide was about slack water, on a bright moonlight night. Each vessel was seen from the other a considerable time before the collision. The red light of the tug was first seen from the steam-boat, which was going down stream, and a little later the green light also, when she gave a signal by one blast of her steam-whistle, and held on her course. The steam-tug answered with one blast, and did not change her course either until too late to avoid collision. *Held* that, under the provision of Rule 19, Rev. St. U. S. § 4233, that if two steam-vessels are crossing so as to involve the risk of collision, the one which has the other on her own starboard side shall keep out of the way, the steam-tug should have passed under the stern of the steam-boat, and was at fault in persistently attempting to cross her bows.

2. SAME—DEMURRAGE—NET VALUE OF CHARTERS.

An excursion steamer was so injured in a collision as to be necessarily delayed for repairs 21 days, during all but one of which she was under charter. Her engagements were filled by other vessels of the libellant, on all but eight days, when another steamer was hired to take her place. *Held*, that an allowance of the net value of her charters for the days on which her place was taken by other vessels of libellant was proper.

Affirming 41 Fed. Rep. 826.

In Admiralty. Appeal from district court.

Wing, Shoudy & Putnam, for appellants.

Robert D. Benedict, for appellee.

FINDINGS OF FACT.

ACHESON, J. The court finds the following facts:

First. On the 23d day of June, 1888, at about 11 o'clock P. M., a collision occurred on the Hudson river, a short distance south of the ferry of the Pennsylvania Railroad Company, between the claimants' steam-tug, the Emma Kate Ross, bound from pier No. 1, North river, New York city, to the Red Star Steam-Ship Company's docks, Jersey City, and the libellant's side-wheel steam-boat Crystal Stream, bound from the foot of Thirty-Fifth street, New York city, to the Communipaw Coal Company's docks, Jersey City. It was a bright, moonlight night. The tide was about slack water, running ebb on the New Jersey shore. There was no wind.

Second. Both vessels were in plain sight of each other, and each was actually seen from the other some considerable time before the collision.

Third. The two vessels were on crossing courses, and from the time they came in sight of each other until the moment of collision the Emma Kate Ross had the Crystal Stream on her own starboard side.

Fourth. The Crystal Stream was proceeding down the river on a southerly course, parallel with the New Jersey shore, and about 300 yards distant easterly from the exterior line of the piers. When about opposite the Pennsylvania Railroad Company's ferry, the pilot of the Crystal Stream sighted the red light of the Emma Kate Ross. A little later her

green light also came in sight of the pilot of the Crystal Stream. Then the Crystal Stream signaled by one blast of her steam-whistle, and the Emma Kate Ross immediately replied with one blast of her whistle. The vessels were then not far apart; probably they were from 300 to 400 yards distant from each other. The Crystal Stream kept on her course down the river without change. Upon the interchange of signals the Emma Kate Ross did not immediately change her course, which was towards the Crystal Stream, and she continued her approach until a collision was unavoidable.

Fifth. The acting pilot (who was the mate) of the Emma Kate Ross, from the time he sighted the Crystal Stream, determined to cross her bow, and he unwisely persisted in that intention until the two vessels had come into close proximity, and a collision was imminent. He then put his wheel hard-a-port and had the engine backed at full speed. But this attempt to avoid a collision was too late. The Emma Kate Ross ran her stem with great force into the port side of the Crystal Stream, about 50 feet from her stern, breaking her wheel-beam and crank, the holding-down bolts in the main deck, and the eccentric rod, carrying away the A frame, and doing other damage.

Sixth. The necessary repairs to the Crystal Stream cost the sum of \$2,682.41, and while undergoing repairs she was necessarily delayed 21 days. She was used by the libelant in the excursion business, and every day but one during the time she was undergoing repairs she was under charter. To fulfill her contracts the libelant used in place of the injured vessel other steamers which the libelant owned, except on eight days, when the libelant hired the steamer Moran. The net value of the charters of the Crystal Stream on the days when her contracts were filled by other boats of the libelant was \$1,776.48. The amount paid for the Moran when she was substituted for the Crystal Stream was \$880.

CONCLUSIONS OF LAW.

1. Undoubtedly the two steamers were subject to Statutory Rule 19, § 4233, Rev. St. U. S.: "If two vessels under steam are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other." It was then the plain duty of the Emma Kate Ross to keep out of the way of the Crystal Stream. *The Corsica*, 9 Wall. 630; *The Cayuga*, 14 Wall. 270. There was nothing to prevent the steam-tug complying with the rule by going under the stern of the Crystal Stream, or otherwise avoiding her.

2. In persisting up until the collision became imminent, in his purpose to cross the bow of the Crystal Stream, the officer in charge of the steam-tug was highly culpable; and it was this rash attempt to cross the bow of the Crystal Stream which brought about the catastrophe.

3. In keeping her course the Crystal Stream performed her statutory duty. Rule 23, § 4233, Rev. St.; *The Corsica*, *supra*. No special circumstances existed calling for a departure from the rule which required her to "keep her course." Her signal imported that she intended to do what the law required her to do; that is, to keep on her course, and not

change it. *The John Taylor*, 6 Ben. 227, 230; *The E. H. Coffin*, 9 Ben. 20.

4. In my judgment the Crystal Stream was free from fault, and the Emma Kate Ross is altogether responsible for the collision.

5. In allowing demurrage on the days when other vessels of the libellant took the place of the Crystal Stream, the commissioner and the court followed the rule laid down by the supreme court. *The Cayuga*, 14 Wall. 270; *The Favorita*, 18 Wall. 598. Nor have the appellants any good ground of complaint that the allowance was for the net value of the charters of the Crystal Stream during those days. The libellant had proposed to show "what was the average charter price of the boat," but on the part of the claimants it was objected "that the charters for the days intervening would be the best evidence," and thereupon the latter line of proof was pursued. The position now insisted on that the proof should have been of "the fair market value" of the Crystal Stream does not seem to me to be well taken. It is only when there is no fixed charter rate that resort is properly had to the opinions and estimates of witnesses to fix a *per diem* value. *The Cayuga*, 7 Blatchf. 391.

6. The decree of the district court must be affirmed, and a decree entered in this court in favor of the libellant for the sum of \$5,801.99, with interest thereon from January 2, 1891, and the further sum of \$316.08, costs of the district court, and the costs of this court to be taxed.

THE SENATOR D. C. CHASE.

THE COMMODORE PERRY.

LEHIGH VALLEY COAL CO. v. THE SENATOR D. C. CHASE and THE COMMODORE PERRY.

(District Court, S. D. New York. December 4, 1890.)

COLLISION—EAST RIVER—TOWAGE LIGHTS—NARROW PASSAGE—DISREGARDING SIGNALS—FALSE LIGHTS—PROXIMATE CAUSE.

The ferry-boat C. P., in going down the East river at night, undertook to go between a schooner and a tug coming up about 150 feet apart; the latter having 3 coal-boats lashed to her starboard side. The tow along-side the tug was not seen until very near, and, in passing, the paddle-wheel of the ferry-boat ran over and sunk the outside boat of the tow. The schooner and the tug were considerably on the New York side of the river, the latter about 350 feet from the docks, and two-thirds of the river to the eastward were free and unobstructed. The tug exhibited the usual colored lights, and the required two white vertical lights, indicating a tow. *Held*, that the ferry-boat was in fault for undertaking to pass unnecessarily through the narrow passage between the schooner and the tow; that no rule or settled usage required lights on the tow along-side; and that the alleged illegal practice of tugs to carry two vertical white lights without a tow was not proved, and would not justify the ferry-boat in assuming that there was no tow along-side because additional side lights were not seen; that the navigation of the tug near the piers was not a proximate cause of collision; and that the ferry-boat was solely to blame.

In Admiralty. Libel for collision.

Wing, Shoudy & Putnam and Mr. Burlingham, for libelants.
Wilcox, Adams & Macklin, for the Commodore Perry.
E. D. McCarthy, for the Senator D. C. Chase.

BROWN, J. A little before 7 o'clock in the evening of March 25, 1890, the libelants' boat, Chunker, No. 2,111, loaded with coal, in tow of the tug D. C. Chase, alongside, and being the third and outside boat on the tug's starboard side, while going up the East river came into collision with the paddle-box of the ferry-boat Commodore Perry, which was on her way from Grand street, Williamsburg, to Grand street, New York, and was thereby sunk. The cargo was afterwards raised, and the above libel was filed for the damage to the boat. There is considerable conflict in the testimony as to the precise place of the collision. The Chunker was found sunk immediately abreast of the Stanton-Street pier. From the other testimony in the case I am satisfied that the Chunker could not have run more than 500 or 600 feet after she was struck, so that the place of collision was probably a little above Rivington street, and at least 800 feet above the New York slip for which the Commodore Perry was bound. All the evidence concurs in placing the Chunker at the time of collision not over 350 feet outside of the New York docks; many of the witnesses place her much nearer. A schooner was at the same time coming up the East river with a free wind, and passing the tug on the easterly side of her. The ferry-boat undertook to go down between the schooner and the tug. In doing so she passed extremely near the booms of the schooner, and with her paddle-box struck the Chunker near her stern.

I am obliged to find that the blame for this collision rests upon the ferry-boat, for undertaking to go between the schooner and the tow. The evidence shows that there was no necessity for taking this course. The schooner was considerably upon the New York side of the river, estimated to be not over 150 feet outside of the tug, and coming straight up the river, and nearly parallel with the course of the tug. The course of the ferry-boat when some 300 yards distant was not straight down river, but somewhat angling towards the New York shore, being headed about for her slip, or a little below it. The schooner then showed both her colored lights to the ferry-boat, and she bore a little off the ferry-boat's port bow, because the ferry-boat was headed somewhat on the New York shore; and the ferry-boat must at that time have been at least as far from the New York shore as the schooner, and I think further. Two-thirds of the river on the Brooklyn side were clear, and there was nothing to prevent the ferry-boat's passing to the eastward of the schooner, as the ferry-boat Dakota did a few moments earlier. In so doing the situation was not one likely to involve any difficulty or embarrassment to the ferry-boat in entering her slip.

In behalf of the ferry-boat, it is urged that the loaded Chunker was so low in the water that she could not be seen until the ferry-boat had approached so near as to make collision unavoidable; and that it was the common practice, and the tug's duty, in the case of such wide tows, to

show lights on the outside of the tow, to indicate its position. Other evidence, however, proves that three boats on one side of the tug are not at all unusual, and that there is no general practice for tows to carry lights when along-side, but only when upon a hawser behind the tug. There are no rules or valid regulations that required any other lights than those exhibited by the tug in this case, namely, the usual colored lights and the two vertical mast-head lights, which the tug exhibited, and which are the special signal of a tow. Rev. St. § 4233, rules 2, 4; *U. S. v. Miller*, 26 Fed. Rep. 95, 100.

As against the inference that the ferry-boat should have drawn from this signal, it was urged that it is so common for tugs to carry such vertical lights about this harbor and in the East river without having any tow, that the ferry-boat was not required to act on the presumption that there was a tow along-side of the tug merely from observing her two vertical white lights, but only in case some lights were also seen on the tow itself, to indicate its presence. The evidence does show that two such vertical lights are not unfrequently seen on tugs without a tow. But I am not satisfied from the evidence that this occurs to any considerable extent, or otherwise than in immediate connection with towage, such as the previous fixing of the lights when the tug is about to take a tow, or from leaving them in place for a time through inadvertence, perhaps, after a tow has been discharged. If there is any such practice beyond this, or if this is carried to such an extent as to cause any embarrassment to other vessels, it is the plain duty of all interested to make complaint, and secure proper punishment for the carrying of false lights. In any event, it is impossible to admit such an unlawful practice to justify other vessels in disregarding the prescribed signals that indicate a tow, or in acting on the assumption that there is no tow when they are approaching near to a tug that displays the towage signals; and, if they do so, they take the risk of the fact as it may turn out to be.

I do not perceive any material fault in the tug. She was indeed proceeding along the New York shore, but that was here immaterial, for she was quite out of the way of the ferry-boat. *The F. M. Wilson*, 7 Ben. 367; *The Britannia*, 34 Fed. Rep. 558; *Cayzer v. Carron Co.*, L. R. 9 App. Cas. 873. Both were seen by each other, and their courses were perfectly understood. For a considerable distance before collision they were showing green to green. The starboard wheel was at first a proper movement by the tug to go nearer the New York shore, and to give the ferry-boat still more room, when she was seen approaching near; and the port wheel, when very near, was equally proper to swing the stern to port as much as possible. Neither of these maneuvers *in extremis* is to be regarded as the causes of the collision, even if they were not the best, which is by no means certain.

Decree for the libellant against the Perry, with costs, and dismissing the libel as to the Chase, with costs.

THE STATE OF CALIFORNIA.

SIMPSON *et al.* v. THE STATE OF CALIFORNIA.

THE BARKENTINE PORTLAND.

PACIFIC COAST S. S. CO. v. THE BARKENTINE PORTLAND.

(District Court, N. D. California. November 27, 1889.)

1. COLLISION—BETWEEN STEAM AND SAIL—EVIDENCE.

A steamer and barkentine collided on a clear night, either because of the failure of the steamer to see the barkentine's red light, or because of the absence of such light. The testimony as to whether such red light was burning brightly at the time was irreconcilably conflicting. It appears that the mate of the barkentine had taken down the red light to clean and trim it. He testified that this was done more than an hour before the collision, but he had previously stated that it was done within half an hour of the collision. There were three men on watch on the steamer, none of whom saw the red light until a minute before the collision. The steamer's lights were plainly visible from the barkentine. *Held*, that the preponderance of the evidence showed that the collision was caused by the barkentine's failure to keep her red light brightly burning.

2. SAME—EMERGENCY.

The fact that the steamer, after discovering the barkentine's red light, kept on her course in the attempt to cross the bow of the barkentine, which attempt very nearly succeeded, does not show negligence, since in such an emergency the captain of the steamer might use his judgment as to the best means of avoiding a collision.

3. SAME—DUTY OF STEAMER.

A steamer is not obliged to moderate her speed on sighting a vessel sailing on the starboard tack in the night, when such vessel's red light is not visible, since in such case the steamer may infer that the vessel's course is parallel to its own.

In Admiralty.

Edward W. McGraw, for A. M. Simpson *et al.**McAllister & Bergin*, for the State of California.

HOFFMAN, J. On the morning of April 7, 1886, a little after 4 o'clock A. M., a collision occurred between the steam-ship State of California and the barkentine Portland, a short distance from the entrance to this port. The night was dark but clear. The Point Bonita, Point Reyes, and Fort Point lights were plainly visible. Each vessel was perfectly apprised of her position. They were bound in. The steamer was pursuing her direct and usual course towards the entrance of the harbor. The barkentine had, some hours before the accident, tacked, and was standing off on a course to the westward of north, probably waiting for daylight before entering the harbor. The wind was N. E., or perhaps a little to the northward of that point. Her course was about N. by W. She was, therefore, close-hauled on her starboard tack. The course of the steamer was a little to the northward of E. by N. The vessels were thus approaching each other on courses which were not far from at right angles to one another. The steamer was struck by the barkentine on the starboard side abaft the beam, while endeavoring to cross the bows of the latter. It is obvious that, if the lights required by law had been displayed by the vessels, and if they had been navigated with ordinary skill and care, no collision could have taken place. One or both

of the vessels must, therefore, have been in fault. The proofs are very voluminous. I have examined and considered them with the more care, as the United States local inspectors and the supervising inspector appear to have differed in opinion as to the vessel to which responsibility for the accident should attach. I think the solution of this question will depend upon the answer to be given to a single inquiry: Did the barkentine display her red light in such a condition as to brightness, and at such a time before the collision, as would have enabled the steamer with proper diligence to have avoided the accident? As to the steamer's lights, there is no dispute. These were of more than ordinary size and brilliancy. Her white head-light was seen and recognized by the barkentine at least 15 minutes before the collision, and when she was several miles distant. A few minutes afterwards her green light was observed, and subsequently, and just before the collision, her red and even her saloon lights became visible. The witnesses on the part of the barkentine unanimously declare that the lights on board of her were burning brightly, but of these three men were below up to the moment of the collision. They were roused by the shouting of the men on deck, when the steamer was close upon them. If the barkentine's lights were properly constructed and set, and burning brightly, the steamer must have been guilty of gross and inexcusable negligence in failing to see the red light, and to alter her course accordingly. If, on the other hand, the barkentine's red light did not become visible until too late to avoid the collision, the steamer is blameless. The night was sufficiently clear to permit the harbor lights to be distinctly seen, and even the steamer's head-light, at a distance of three or four miles. If the barkentine's red light was not seen by the steamer in time to avoid the collision, it must have been because it was not set, or was dim, or else because the steamer failed to exercise proper diligence. The testimony being irreconcilably conflicting we are driven to attempt to arrive at the truth by an estimate of probabilities. It is the well-known, and, I believe, invariable, practice of the commanders of the large passenger steamers on this coast to station themselves on the bridges of these vessels when entering the harbor, and to remain there until extraordinary diligence becomes unnecessary. Capt. Dedney, the master of the State of California, a skillful and experienced officer, was accordingly on the bridge from the time Point Bonita light was made until the moment of collision. The second mate, the officer of the deck, was with him, and a lookout was duly stationed forward. That they were vigilant may be inferred from the fact that a sail on the starboard bow was discovered and reported; but no light could be detected. Capt. Dedney therefore concluded that the vessel was bound in on a course not far from parallel to his own. He therefore kept on his course. It was not, he says, until a minute before the collision, and when too late to avoid it, that he saw a dim red light, which apprised him that the vessels were steering on converging courses. On board of the barkentine, the only persons on deck were the mate, Peterson, and three men,—two of them Russian Fins, and a third named Mullane. It may seem a little singular and inconsistent with the habitual heedlessness of sea-

men before the mast that they were all careful to observe, and are now able to testify that the lights were burning brightly. But if, as they say, they directed their attention to their own lights after the steamer's headlight was observed, their doing so was perhaps not unnatural. But it is more singular that all those who were below and rushed on deck at the very moment of the collision, and when the vessel had been so injured that she would have sunk had she not been lumber-laden, also directed their attention to the lights, and are prepared to swear positively that they were burning brightly.

There are some points in the mate's deposition which deserve attention. He states that he observed that the red light was burning dimly. He therefore took it down, and into the cabin and pantry, where he trimmed the wick, wiped off the glass, and replaced the light. It is remarkable that no one of the crew observed this important incident, or, if they did, they have not mentioned it. Peterson testifies that it occurred more than an hour before the collision. But he seems to have made a statement or declaration, which was reduced to writing at Hull, England, to the effect that the collision occurred "at 3:35 by our clock," and that he took the light down "after three o'clock." He adds, in the same statement, that he took down the light after the steamer's green light appeared. In his deposition taken in this suit he testifies that his declaration at Hull was incorrect, or incorrectly taken down, and that in fact he trimmed and replaced the light long before the steamer's lights were discovered. Which of these statements is true it is impossible to determine with certainty. If it be true that he took the light down after the steamer's green light became visible, and he was occupied in trimming, wiping it off, and resetting it some eight or ten minutes, as seems not unlikely, the failure of the steamer to observe it during the brief but critical interval in which she could have altered her course or stopped and backed is explained. The omission of the other witnesses to make any mention of the fact is significant, if not suspicious.

One other circumstance, though of no great importance, deserves mention, as it seems to indicate carelessness or laxity of discipline on the part of the barkentine. From the moment the steamer's head-light was discovered it must have been apparent to the mate of the barkentine that the steamer was bound in, and that the two vessels were on converging courses which might bring them together; and yet the master of the barkentine was suffered to sleep undisturbed in his cabin, and was only aroused by the shouting of the men when the collision was imminent and inevitable. The lights of the barkentine are stated to have been the customary regulation lights; but neither they nor similar ones are produced in court to establish beyond controversy their sufficiency.

The foregoing is, I believe, a correct summary of the testimony bearing on the controverted point on which the decision of the cause must turn. Its solution depends, as before observed, upon an estimate of probabilities. Which is the more likely? That the red light was taken down by Peterson to be trimmed after the green light of the steamer came in view, as he is said to have stated in his declaration at Hull, or

that for some other reason the light was burning dimly; or, on the other hand, that it was burning brightly, and that the master and mate of the steamer, and especially the former, after being apprised of the proximity of a sailing vessel, were so negligent as to fail to discern the plainly visible red light of an approaching vessel, which it was the principal business of the master, when he took his station on the bridge, to look out for and detect at the earliest moment? It may be that the captain and mate were so impressed with the idea that the course of the vessel, whose sail they had discovered, was parallel to their own, that they paid no further attention to her. But they were accurately apprised of their position. The harbor lights were all visible, and there was nothing to divert their attention from the only object from which danger could be apprehended. If, on this occasion, the master failed to closely watch for the lights of the barkentine, he was guilty of gross, and, I must think, unpardonable, negligence. After mature consideration, I have reached the conclusion that the steamer failed to see the red light of the barkentine because it was either not displayed or was burning dimly.

One or two minor points remain to be noticed. It was suggested that the steamer should have moderated her speed when the sail of the barkentine was described. But the red light of the latter was not then visible, and the steamer was justified in supposing that the vessels were sailing on nearly parallel courses and were not approaching each other. It is only in the latter case that the regulations required her to moderate her speed. It is further claimed that when the steamer did discover the red light of the barkentine she should have stopped and backed, or altered her course so as to avert the collision. But the red light was not visible until, as Capt. Dedney swears, about a minute before the accident. If I am right in supposing that the red light was not previously visible through the fault of the barkentine, the captain of the steamer was by that fault placed *in extremis*, and is not responsible if he failed to adopt measures which might possibly have prevented the accident. His judgment at the time was that his only hope of avoiding the collision lay in holding his course and endeavoring to cross the bows of the barkentine. In this he very nearly succeeded. The barkentine struck him abaft his beam. Had the steamer gone less than half her length further, the vessels would have gone clear of each other. It is impossible to affirm that any other course would have been more judicious or have afforded greater chances of escape. At all events he exercised his best judgment in an emergency not due to his own fault, and this is all that the law requires.

NEW YORK, N. H. & H. R. CO. v. COCKCROFT *et al.*

(Circuit Court, D. Connecticut. July 11, 1891.)

1. REMOVAL OF CAUSES—PROCEEDINGS BEFORE RAILROAD COMMISSIONERS.

A petition filed by a railroad company with the state railroad commissioners, for the mere purpose of obtaining their consent to the taking of certain land by condemnation proceedings, is not removable, since it is not a suit within the original jurisdiction of the federal courts.

2. SAME—SEPARABLE CONTROVERSY.

In such case, the controversy between the railroad company and the owners of the land sought to be taken is separable from that between the company and the town in which the land lies, though part of the land is sought for the purpose of making a highway in lieu of another highway wanted for railroad purposes.

At Law.

Lynde Harrison, for petitioner.

Simeon E. Baldwin, for respondents.

WHEELER, J. By the laws of Connecticut, railroad companies may, with the approval of the railroad commissioners granted on notice to the owners, take land for additional tracks, and for highways in lieu of others taken for their purposes, on making compensation agreed upon or established by proceedings for that purpose. Gen. St. §§ 3420, 3461, 3464, 3479. The New York, New Haven & Hartford Railroad Company filed a petition with the railroad commissioners for their approval, of taking land of these Misses Cockcroft, who are citizens of New York, for additional railroad facilities, and for a highway in lieu of another wanted for those purposes. On notice to these land-owners they appeared, and filed a petition and bond for the removal of the proceedings into this court, and have filed copies of the proceedings here. An issue of fact as to whether the controversy between the petitioners for removal and the railroad company is separable from that between the railroad company and the town of Westport, in which the land lies, has been joined upon a plea to the petition for removal, and tried. The railroad company has to provide the substitute for the highway taken, and put it in as good situation and repair as the highway was previous to the alteration, and the town, as such, has nothing to do about it. Therefore there is no controversy between the railroad company and the town, and none from which that between the railroad company and the land-owners is not separable. This issue is for this reason found for the petitioners for removal.

While a finding on this issue the other way would have been fatal to the removal, a finding this way will not conclusively uphold it. If this "suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of" this court, it should be remanded. Section 5, Act 1875, 18 St. 470. This proceeding involves only the consent of the railroad commissioners to the taking of the land. The land cannot be taken in it, nor can the compensation for the land be fixed in it. If they approve, the railroad company can proceed further;

if they do not approve, it cannot. No issue is defined for them to try, or guide laid down for them to follow, in determining whether they shall grant or refuse their approval. All questions as to what shall be taken into consideration are left wholly to them. They render no judgment, but merely declare their own approval or disapproval of further proceedings. The state, in the exercise of its right of eminent domain, has provided this check in favor of land-owners against taking land by railroads, and nothing else can be substituted for it. This court is to proceed with suits removed here as if they had been brought here by original process. Rev. St. U. S. § 639. This petition to the railroad commissioners could not be brought here, and cannot be proceeded with here. Issues of fact here, except in equity or admiralty, are to be tried by jury, unless a jury is waived. Rev. St. §§ 648, 649. The approval of a jury, or of the court on waiver of a jury, would not be the approval of the railroad commissioners, and neither could decide whether the railroad commissioners approve or not. The question of their approval does not seem to be "a dispute or controversy properly within the jurisdiction of" this court. *Upshur Co. v. Rich*, 135 U. S. 467, 10 Sup. Ct. Rep. 651. None of the cases cited in behalf of the removing parties was confined to such a narrow and merely preliminary question as this. In all of them a final question of pecuniary compensation was to be tried, upon which judgment could be rendered. *Boom Co. v. Patterson*, 98 U. S. 403; *Pacific Railroad Removal Cases*, 115 U. S. 2, 5 Sup. Ct. Rep. 1113; *Searl v. School-Dist.*, 124 U. S. 197, 8 Sup. Ct. Rep. 460; *Railway Co. v. Jones*, 29 Fed. Rep. 193; *Kansas City, etc., R. Co. v. Interstate Lumber Co.*, 37 Fed. Rep. 3. For this reason this proceeding, as now considered, cannot properly be retained here, but must be remanded.

MILLER *et al.* v. WHEELER & WILSON MANUF'G Co.

(Circuit Court, E. D. Missouri, E. D. June 20, 1891.)

FEDERAL COURTS—RESIDENCE OF CORPORATIONS.

A corporation cannot be a resident, within the meaning of Act Cong. 1887, of a state other than that in which it was incorporated.

In Equity.

Paul Bakewell, for plaintiff.

Silas B. Jones, for defendant.

THAYER, J. Complainant, a citizen of Indiana, sues the defendant, a Connecticut corporation, for infringement of letters patent. The defendant maintains an office and agency in this district for the transaction of business, and service has been had according to state laws. On appearance day defendant obtained leave to enter a special appearance for

the purpose of moving to quash the service and contesting complainant's right to sue it in this district.

The question raised is not a new one in this circuit. Justice BREWER decided it in *Booth v. Engine, etc., Co.*, 40 Fed. Rep. 1. He held, in effect, that a corporation cannot be a resident, within the meaning of the judiciary act of 1887, of a state other than that in which it was incorporated. The same conclusion had prior thereto been reached after careful consideration by Judge SHIRAS in *Fales v. Railway Co.*, 32 Fed. Rep. 673. I understand the doctrine to be settled, for the present, at least, in this circuit, that a corporation can only be a resident and inhabitant of the state which creates it, and that it cannot change its residence or inhabitation by doing business or maintaining an office and agency in a foreign state, although it may be found there for the purpose of the service of process. And the same doctrine is adhered to in other circuits. *National Typographic Co. v. New York Typographic Co.*, 44 Fed. Rep. 711, and citations. See, also, *Myers v. Murray*, 43 Fed. Rep. 695; *Bensinger S. A. Cash Register Co. v. National Cash Register Co.*, 42 Fed. Rep. 81, and *Baughman v. Water-Works Co.*, 46 Fed. Rep. 4. I am aware that the question has been decided differently in other circuits, (*Riddle v. Railroad Co.*, 39 Fed. Rep. 290; *Zambrino v. Railroad Co.*, 38 Fed. Rep. 449; *Miller v. Mining Co.*, 45 Fed. Rep. 345;) but I must adhere to the rule that has thus far been followed in this circuit. Undoubtedly, the present case is one in which the defendant might, by a general appearance, have waived its right to be sued in Connecticut, but it has not done so.

Let the motion be sustained.

GLENN v. McALLISTER'S EX'RS *et al.*

(Circuit Court, W. D. Virginia. February 17, 1891.)

1. LIMITATION OF ACTIONS—CORPORATE STOCK—ASSESSMENTS.

Where there is a decree levying an assessment on the stockholders of an insolvent corporation in respect of their unpaid stock, the statute of limitations does not begin to run against the subscriptions until such decree is rendered.

2. CORPORATIONS—INSOLVENCY—ASSESSMENTS—ACTION—EVIDENCE.

In an action for such assessment, the decree alone is sufficient to show defendants' liability thereunder, and it is not necessary to put in evidence the whole record in the suit in which it was rendered.

3. SAME—RELEASE OF STOCKHOLDERS—COMPROMISE.

Subsequent to the entry of this decree, another was rendered, providing that if the stockholders should, within a given time, pay a certain proportion of their subscriptions, they should be fully discharged from the debts of the corporation, but that, in default of such payment, their liability under the original decree should remain unaffected. *Held*, that a stockholder who failed to take advantage of this decree cannot set it up in an action for the original assessment, as a compromise between the corporation and other stockholders, by which he is released from all liabilities.

4. SAME—EVIDENCE OF SUBSCRIPTION.

In such an action, the facts that defendant's name appears on the subscription list of the corporation, and that he paid certain assessments on the stock subscribed, are sufficient evidence that he was a stockholder.

In Equity.

John Howard and T. C. Elder, for plaintiff.

W. W. Gordon and W. C. McAllister, for defendants.

PAUL, J. This is a suit brought by John Glenn, trustee, of the National Express & Transportation Company, against the executors and distributees of the estate of Thompson McAllister, deceased. The bill alleges that Thompson McAllister, about the 1st day of November, 1865, subscribed for 40 shares of the capital stock of the National Express & Transportation Company, of the par value of \$100 for each of said shares; that at the time he subscribed for the stock aforesaid he paid to said company 1 per cent. on the amount of his said subscription; that on or about the 8th day of December, 1865, he paid to said company another call or requisition of 4 per cent. on the aforesaid subscription to the capital stock of said company; that on the 20th day of September, 1866, the said National Express & Transportation Company executed a deed of trust for the benefit of its creditors; that by a decree of the chancery court of the city of Richmond, in a suit therein pending in the name of Glenn's administrator, etc., against the National Express & Transportation Company and others, an assessment of 30 per cent. on the par value of each share was decreed against the holders of the unpaid capital stock of said company, and the said John Glenn, trustee, was directed to collect the same, and apply the proceeds to the payment of the debts of said company; and in an amended and supplemental bill it is alleged that, by a further decree in said cause of Glenn's administrator, etc., against the National Express & Transportation Company, rendered on the 26th day of March, 1886, by the circuit court of Henrico county, Va., to which the said cause had been removed, a further assessment of 50 per cent. on the par value of each share was decreed against the holders of the unpaid stock of said company; that no part of said assessments upon the unpaid stock of said Thompson McAllister has ever been paid; and the bill prays for a decree against his estate for the amount thereof.

The defendants file their answers to the original and amended and supplemental bills, in which they set up the following defenses: *First*, that the demands are barred by the statute of limitations; *second*, the plea of *nul tiel record*, alleging that the whole of the proceedings in said cause in which the said decrees were rendered should have been produced and made part of plaintiff's original and amended and supplemental bills; *third*, that, even if Thompson McAllister was a stockholder in said company, he was released from all obligations as such stockholder, by reason of a compromise or compromises made by said company with other of its stockholders prior to the rendition of any of said decrees; and, *fourth*, the defendants deny that Thompson McAllister ever was a subscriber to the capital stock of said company.

As to the first ground of defense, namely, the statute of limitations, which in Virginia, for money demands of this character, is five years, the record shows that the first assessment, of 30 per cent., was made by the decree rendered December 14, 1880; and that the second assessment,

of 50 per cent., was made by a decree rendered March 26, 1886; and that this suit was commenced on the 8th day of December, 1885. It is well settled that the statute of limitations does not commence to run, as against subscriptions to capital stock, payable as called for, until a call or its equivalent has been had. *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. Rep. 739; *Lewis' Adm'r v. Glenn*, 84 Va. 947, 6 S. E. Rep. 866; *Lehman v. Glenn*, (Sup. Ct. Ala.) 6 South Rep. 44. The first assessment made in this cause being on the 14th of December, 1880, and this suit being commenced within five years of that date, the plea of the statute of limitations cannot be sustained.

As to the second ground of defense, namely, the plea of *nul tiel record*, alleging that the whole of the proceedings in said cause in which said decrees of assessment were rendered should have been produced and made part of plaintiff's original and amended and supplemental bills, the court is very clearly of opinion that it is not necessary that the whole of the record of the chancery cause of Glenn's administrator against the National Express & Transportation Company, in which the decrees were rendered on which this suit is based, should have been made part of the original and amended and supplemental bills in this suit. The decrees, which are made part of the original and amended and supplemental bills, are binding upon the stockholders, and are not open to collateral attack. They fix the liability of the stockholders for unpaid stock due to the corporation, and decree assessments for the payment of the same. These decrees themselves are conclusive on the stockholders as to all matters involved in the suit in which they were rendered, and no further part of the record is necessary, as evidence in this cause, to establish the liability of the defendants. *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. Rep. 739. The following decisions clearly sustain this position:

"A decree of partition being a necessary link in a chain of title, if the decree and the report of the commissioners appointed to divide the land on which the decree is based sufficiently designate the land referred to in the decree, they are competent evidence, without the production of the whole record." *Wynn v. Harman's Devisees*, 5 Grat. 157.

"On the trial of an action of debt on an injunction bond, extracts from the record of the injunction case, of the decrees in the cause, are competent and sufficient evidence without producing the whole record." *White v. Clay's Ex'rs*, 7 Leigh, 68.

"It is not necessary that the administratrix of the high sheriff shall produce the whole record of the cause in which he was subjected to liability for the default of the deputy. It is sufficient to produce as much thereof as shows the fact, and in this case the judgment was sufficient; that and its recitals being *prima facie* evidence against the deputy and his sureties." *Cox v. Thomas*, 9 Grat. 312.

"The plea of *nul tiel record* brings before the court the validity of a judgment on which an action is brought, and the description of it as set forth in the declaration." 24 Myer's Fed. Dec. 629, quoting *Bergen v. Williams*, 4 McLean, 125. "*Nul tiel record* can only put in issue the fact of the judgment."

As to the question of the release of defendants on the ground that, before the rendition of any of the decrees, compromises had been entered

into with a number of the stockholders of the National Express & Transportation Company. This defense can have reference only to the decree rendered July 21, 1883, which decree provided that, by consent of parties to the cause in which it was rendered—

"John Glenn, trustee, on the payment to him within six months of the date of this decree by any of the subscribers to the stock of the defendant company, or by any other person claimed to be liable on account of said stock, of twenty-five per cent. of the original amount of said subscription, with interest thereon at the rate of six per cent. per annum from thirty days from the date of this decree, with any cost incurred heretofore, or by said trustee in any suit brought by him heretofore, or which may hereafter be brought, before tender of said twenty-five per cent. under this decree, to recover of such stockholders or other party the amount for which he may be responsible on said stock under the decree in this cause, shall execute a receipt therefor to operate as a full acquittance and discharge of all persons on account of such subscriptions, both of the original subscribers thereto and of any assignee thereof."

This same question was presented before the supreme court of appeals of Maryland in the case of *Humbleton v. Glenn*, and decided adversely to the claim now made by the defendants in this cause, the court saying:

"But the defendants not only failed or refused, within the time prescribed, to avail themselves of the liberal offer of compromise and settlement authorized by the court, but they have not even made proffer by their plea to accept and comply with the terms of the decree. They allege that because some of the stockholders did elect to accept the terms of the settlement offered, and paid the amount specified, thereby other stockholders and persons liable on the stock were released from all further liability. But is that the legal effect from this compromise decree, making offer of terms of settlement to every one alike who were liable on the stock of the company? We think not. The assessment made by the decree of December 14, 1880, was of a certain per cent. upon each and every share of stock; and each person liable therefor became severally liable, and not jointly liable with others. The failure to collect from some could not discharge others. All that each individual stockholder could insist upon was that the assessment should be equal and uniform upon all the stock alike, and that it should not exceed what was required for the payment of the debts of the company. But these were questions for the chancery court of Virginia, and they have been finally determined and adjudicated upon by the decree of December 14, 1880, and there is no power in this court to review that decree. The compromise decree was entered nearly three years after the assessment of the thirty per cent. per share was levied, and the liability of the defendants fixed, and there is no allegation or pretense that the liability of defendants for the thirty per cent. call has been enlarged by the compromise effected with some of the stockholders. Moreover, the compromise decree of July 21, 1883, did not suspend or stay the operation of the original decree of December 14, 1880; but, in express terms, it declared that such original decree should not be suspended in its operation. Each person liable upon the stock of the company had his right of election given whether he would accept the terms of the compromise or not; but, until he did accept and comply with the terms of the decree, he remained bound for the assessment imposed by the original decree of December 14, 1880." 20 Atl. Rep. 115.

The court is of opinion that in this decision the supreme court of appeals of Maryland has correctly stated the law as applicable to this question.

The fourth and last ground of defense to be considered is the denial on the part of the defendants that Thompson McAllister was ever a stockholder in the National Express & Transportation Company. The law is now well established that—

"A person is presumed to be the owner of stock when his name appears on the books of a company as a stockholder; and when he is sued as such the burden of disproving that presumption is cast upon him." *Turnbull v. Payson*, 95 U. S. 418; *Glenn v. Springs*, 26 Fed. Rep. 494; *Vanlerwerker v. Glenn*, 85 Va. 9, 6 S. E. Rep. 806; *Glenn v. Orr*, (Sup. Ct. N. C.) 2 S. E. Rep. 538.

The court in the case last cited says:

"The rule of evidence underlying this and similar decisions seems to be founded in convenience, and to rest upon the further ground that corporations in this country are the creatures of statute, with prescribed rights and powers, subject, to an important extent, to public control and supervision, and are therefore to exercise their powers as allowed and required by law, and to keep their records accordingly and truly."

The evidence shows that the name of Thompson McAllister appears upon the books of said National Express & Transportation Company; that an assessment of 1 per cent. upon the par value of each share was paid at the time the 40 shares of stock standing in his name were subscribed for; and that an additional assessment of 4 per cent. upon the par value of each of said shares was paid, as called for, on the 5th of December, 1865; the latter, as the evidence shows, being paid by check of John Echols, who, as the evidence shows, was a particular friend of said Thompson McAllister, which check embraced the assessments of said Echols and Samuel C. Luddington and said Thompson McAllister.

To disprove the presumption that said Thompson McAllister was a stockholder in said company, the defendants introduced testimony proving that the name of said Thompson McAllister, on the original capital stock subscription list of said company, was not in the handwriting of said Thompson McAllister. The evidence shows that it was in the handwriting of P. T. Moore, then secretary of said company. The entries upon the books of said company, which refer to the account of said Thompson McAllister as a stockholder in said company, are all proven to be in the handwriting of J. V. H. Allen, who succeeded the said P. T. Moore as secretary, and was also treasurer of said company. In some of said entries, subsequent to the first entry of December 15, 1865, the name is written "Thompson C. McAllister," the "C." being crossed out; but the name is manifestly that of the same person, the Christian name Thompson being an unusual one, and the insertion of the initial letter "C." being merely inadvertent. The only other evidence offered by the defendants is the deposition of William M. McAllister, one of the executors of the said Thompson McAllister and defendant in this cause. His testimony is objected to by the plaintiff as inadmissible under the provisions of section 851, Rev. St. U. S.; but, if admitted, it is merely of a negative character, and could not disprove the presumption that said Thompson McAllister was a stockholder in said National Express & Transportation Company; it being proved that all the entries relating

to his being a stockholder in said company were regularly made, in due course of business, by the proper officers of said company. The court is of opinion that the estate of said Thompson McAllister is liable for the unpaid assessments upon the 40 shares of the capital stock of the said National Express & Transportation Company subscribed for by him, and a decree will be entered accordingly.

KIMBALL *et al.* v. ATCHISON, T. & S. F. R. Co. *et al.*

(Circuit Court, E. D. Missouri, E. D. June 6, 1891.)

1. RAILROAD COMPANIES—ACQUISITION OF COMPETING ROAD.

Rev. St. Mo. § 2569, which prohibits any railroad company within the state from owning, operating, or managing any other parallel or competing railroad within the state, applies only where both the roads are situated within the state, and the competition between the two must be of some practical importance, such as is liable to have an appreciable effect on rates.

2. SAME.

Two railroads which do not touch at any two common points, and between which for a distance of 40 miles another railroad is interposed, and whose traffic, except an unimportant amount, would in no event pass over the other, are not competing lines, within the meaning of the statute.

3. SAME.

Section 2569, Rev. St. Mo., was intended to give full effect to section 7, art. 12, Const. Mo., and inasmuch as it did not satisfactorily appear that the legislature had either misconstrued or failed to give full effect to the constitution, *held*, that the court would not grant a preliminary injunction based on a construction of the constitution different from that adopted by the legislature of the state.

In Equity. On motion for preliminary injunction.

Rev. St. Mo. § 2569, provides as follows:

"It shall be unlawful for any railroad company, corporation, or individual owning, operating, or managing any railroad in the state of Missouri, to enter into any contract, combination, or association, or by any manner of means whatever consolidate the stock, property, or franchises of such company, corporation, or individual, or to lease or purchase the works or franchises of, or in any way whatever to any degree exercise control over, any railroad company, corporation, or individual owning or having under his or their control or management a parallel or competing line in this state; but each and every such railroad, whether owned, operated, or managed by a company, corporation, or individual, shall be run, operated, and managed separately by its own officers or agents, and be dependent for its support on its own earnings from its local and through business, in connection with other roads, and the facilities and accommodations it shall afford the public for travel and transportation under fair and open competition." Laws 1887, p. 102.

Const. Mo. art. 12, § 17, provides:

"No railroad or other corporation, or the lessees, purchasers, or managers of any railroad corporation, shall consolidate the stock, property, or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control, any railroad corporation owning or having under its control a parallel or competing line; nor shall any officer of such railroad corporation act as an officer of any other railroad corporation owning or having the

control of a parallel or competing line. The question whether railroads are parallel or competing lines shall, when demanded, be decided by a jury, as in other civil issues."

Henry Hitchcock, for complainants.

George R. Peck, for Atchison, T. & S. F. R. Co.

E. D. Kenna, for St. Louis & S. F. Ry. Co.

THAYER, J., (*orally*.) The matter that has been under consideration for some days past in this case, is an application for an injunction *pendente lite* to restrain the Atchison, Topeka & Santa Fe Railroad Company, hereafter called the "Atchison Company," from voting certain shares of stock which it has acquired in the St. Louis & San Francisco Railway Company, hereafter called the "Frisco Company." The case in all of its aspects has been very thoroughly argued, and the discussion has embraced some questions, particularly the question as to the meaning of the word "control," as used in the constitution and statutes of this state, which the court deems it unnecessary to decide.

I shall content myself with a brief statement of the conclusions which I have formed on some of the more vital questions involved, and, for want of time, shall be compelled to do so mainly without amplification or argument. The complainants, who are stockholders of the Frisco Company, base their right to relief on the ground that it was unlawful for the Atchison Company to acquire stock in the Frisco Company, or, at least, to acquire a majority of its stock. If this contention fails, complainants, as a matter of course, are without right to relief, and all other subsidiary and collateral questions become immaterial.

1. I entertain no doubt of the fact that the Atchison Company had, under its charter and the laws of the state of Kansas, as construed by its highest court, (*Railroad Co. v. Fletcher*, 35 Kan. 236, 10 Pac. Rep. 596; *Same v. Cochran*, 43 Kan. 225, 23 Pac. Rep. 151; *Venner v. Railroad Co.*, 28 Fed. Rep. 581,) the requisite power and authority to make a valid purchase of Frisco stock, either much or little, unless such purchase was prohibited by the laws of the state of Missouri, under which the Frisco Company was incorporated; and it goes without saying that the Atchison Company could not make a valid purchase of the stock of a Missouri corporation in contravention of the laws of the state of Missouri. The question whether the purchase of the stock was *ultra vires* when tested by the laws of Kansas, where the Atchison Company was incorporated, is therefore eliminated from the controversy, and the transaction will be considered in the light of the constitution and laws of the state of Missouri.

2. The view that the court entertains of section 17, art. 12, of the constitution of Missouri, and of section 2569 of the Revised Statutes of the state, which, as it is claimed, rendered the purchase of stock in the Frisco Company unlawful, may be substantially stated as follows: The prohibition contained in the statute (section 2569) is clearly aimed at railroad companies "owning, operating, or managing a railroad in the state of Missouri." If a railroad company owns, operates, or manages a rail-

road in this state, it is prohibited, among other things, from leasing, purchasing, or exercising any control over any other railroad in the state that is substantially parallel to, or a competitor of, the road so owned, operated, or managed. This is, in substance, the extent of the statutory inhibition. Now, while conceding, for the purposes of the present decision, that the Atchison Company at the time of its purchase managed and operated two railroads in this state, namely, one from Kansas City northeastwardly through the state to Chicago, and one from St. Louis to Union, in Franklin county, Mo., a distance of about 60 miles, yet the court concludes that neither of these roads was, in the statutory sense, parallel to, or a competitor of, the Frisco. It appears to the court obvious that the road from Kansas City to Chicago cannot, in any just sense, be said to be a competing line; and in explanation of my ruling that the St. Louis, Kansas City & Colorado Railroad, extending from St. Louis to Union, hereafter called the Colorado Company, was not in the statutory sense a competitor of the Frisco, I will say, that when the statute speaks of competing roads it evidently means roads that are substantial competitors for business; it refers to competition of some practical importance, such as is liable to have an appreciable effect on rates, and in that sense the road to Union was not, in my judgment, a competing line.

The evidence before me discloses the fact that the Atchison Company had abandoned its purpose of constructing the Colorado road beyond Union before it purchased or determined to purchase the Frisco stock. It shows that the Colorado road and the Frisco do not touch any two common points; that between the two roads, for more than 40 miles, the Missouri Pacific Railroad is interposed; that the Colorado road is in reality a suburban road; and that not more than 1 per cent. of its traffic, which is, in the aggregate, infinitesimal, when compared with the traffic over the Frisco, would, in any event, pass over the Frisco. All of these considerations lead me to the conclusion that the Colorado road was not a competing line, within the meaning of the statute, and that the Atchison Company was not disqualified from purchasing the Frisco stock, even though it be conceded that it operated and managed the Colorado road at the time of the purchase.

3. The next question that I have considered, and with a due appreciation of its importance, is whether the constitutional inhibition contained in section 17, art. 12, is any more comprehensive than the statutory prohibition last considered. According to the view that the court takes of the case it cannot, or at least it ought not, to grant an injunction, unless it clearly appears that the general assembly has failed to give full effect to the constitutional prohibition, nor unless it appears that the purchase of the Frisco stock is in violation of the constitution, though not in violation of the statute. It is sufficient to say on this point that the court is not prepared to hold that the general assembly has either misconstrued section 17, art. 12, of the constitution, or that it intentionally failed to give it full effect when it enacted section 2569 of the Revised Statutes. On the contrary, I have no doubt that the

legislature intended to make the statute as broad as the constitution, and good reasons, no doubt, exist for holding that it accomplished its purpose. It is certainly a reasonable view, and one justified by the language employed, that the constitutional inhibition, like the statutory, was aimed at railroad corporations which might at any time own, operate, manage, or secure the right to run trains over roads located in this state, and that the purpose was to prevent such a corporation from purchasing, leasing, or controlling another road of the state, that was parallel to, or that competed with, the road so owned, operated, or managed. Such an inhibition would certainly preserve the independence of, and secure competition between, rival lines of railroad crossing the state in all directions, and connecting important commercial centers within the state; and it may fairly be urged that this was the purpose had in view by those who framed the present constitution. On the other hand, it may well be doubted whether the constitutional prohibition in question was intended to have the effect of preventing a great railroad system like the Atchison, occupying, as it does, an extensive area of country to the westward of this state, from obtaining access to the city of St. Louis by the purchase of, or by consolidation with, one of the four or five trunk lines crossing the state from east to west, merely because the road so purchased touches some points in Kansas which the Atchison system also reaches. The preservation of reasonable rates was the great object in view, and, as the proof in this case abundantly shows, the acquisition by the Atchison Company of the Frisco stock has had no effect upon rates between points in this state and those points in Kansas which are reached by the Frisco; and it must be apparent to any one familiar with the railroad situation in this state and Kansas that it cannot have any tendency in the future to increase such rates. In what I have thus said on the point now under consideration I would not be understood as deciding definitely that the prohibitions contained in the constitution and in the statute are in all respects identical. It is unnecessary to decide that question at this stage of the case. I do mean to say, however, that complainants have not succeeded in showing to my satisfaction, that section 17, art. 12, is any more comprehensive than the statute, (section 2569,) or that the legislature has misconceived or misconstrued the constitution.

From the views which I have thus outlined, it follows that I must decline to grant an injunction, because the purchase of the Frisco stock was not, in my judgment, in contravention of the statute, and because it is by no means certain that such purchase was prohibited by the constitution. In a case of this character it can hardly be expected that the court will allow an injunction, thereby jeopardizing great interests, upon a construction of the constitution that is certainly doubtful, and that is at the same time contrary to the construction that has been adopted, and, as it would seem, deliberately, by the general assembly of this state.

The motion for an injunction is accordingly overruled.

PATTEN v. CILLEY.

(Circuit Court, D. New Hampshire. July 8, 1891.)

WILLS—CONTEST—UNDUE INFLUENCE—BURDEN OF PROOF.

In proceedings to establish a will, contestant, if he admits in his pleadings all the requisites of a statutory will, and contests solely on the ground of undue influence, has the burden of proof, and is entitled to open and close.

Proceeding to establish the will of Matilda P. Jenness, removed from the state court. In the issues which are made up under the direction of the court, the executor alleges that Matilda P. Jenness died leaving a will. The appellant does not expressly put in issue any question as to the mental condition of the testatrix, the fact of the will, or its due execution. His only allegation is undue influence, and upon this the executor joins issue. Upon this state of the pleadings the appellant claims the right to open and close, and, by motion in writing, asks that the question be determined by June 3d, the trial by jury having been assigned for June 9th.

Harvey D. Hadlock, W. L. Foster, and Daniel Barnard, for appellant.

Harry Bingham, John M. Mitchell, and Frank S. Streeter, for executor.
Before ALDRICH and CARPENTER, JJ.

ALDRICH, J., (after stating the facts as above.) Upon the pleadings as they now stand, the primary burden is upon the executor, and consequently the right to open and close is with him. The executor alleges the death of Mrs. Jenness, and the existence of a will. Upon these allegations, he holds the affirmative, and is therefore entitled to the open and close. It is claimed by the defendant that this question should be determined by federal rules, rather than any rule of practice in the state courts. In the absence of an express federal rule on the subject, if the right to open and close is purely a question of practice, (and I think it is,) relating to the order of trial and the manner in which it shall proceed, it should be given to the party to whom it would belong under the state practice. It seems to be pretty generally agreed that uniformity in a practical way is desirable. Uniformity would render trials less troublesome to courts as well as the bar. Again, proceedings to establish wills involve title to lands in a statutory and local sense, and for that reason the law of the state should probably govern in a contest of this character. *Sanford v. Town of Portsmouth*, 2 Flip. 105; *Swift v Tyson*, 16 Pet. 1; *Delmas v. Insurance Co.*, 14 Wall. 661.

The defendant relies on rule 6, which is a standing rule for the government of trials in the first circuit. This rule provides that the party holding the affirmative shall open and close before the jury. I understand this to be the rule in the New Hampshire state courts; and by the term "holding the affirmative" is intended the primary affirmative. True, the defendant says in argument he has relieved the executor from the statutory burden, and the necessity of maintaining his allegation of

death and will, because he has made no denial; and what is well alleged is admitted, unless denied. The right to open and close should not shift to the defendant upon situations that are debatable, nor upon any presumption of sanity which might be overcome upon an issue made upon the evidence. Under the statute, the issues are to be framed under the direction of the court. The party objecting to the will may narrow the controversy by waiving such of the statutory requirements as he pleases, or by assigning his causes, he may put the executor to affirmative proof of all the statutory prerequisites. On the several issues of due execution, insanity, and undue influence, the usage in New Hampshire is to require the executor, before reading the will, to go forward and call the subscribing witnesses on all the conditions named in section 6, c. 193, Gen. Laws N. H. *Whitman v. Morey*, 63 N. H. 455. 2 Atl. Rep. 899. This statute, and the rule requiring the executor to call all the subscribing witnesses at the outset, as to age, death, mental condition, and execution, are to prevent fraud, and are in the interest of the party objecting to the will. It being a burden placed upon the executor for the contestant's benefit, the contestant may relieve him of the burden by waiver. He may waive a part or all of the statutory essentials. When he has determined what he wants to put in controversy, he must so adjust the pleadings that the limit of his complaint will not be uncertain. Is there to be any claim or argument made that the testatrix was not of sound mind? Is there to be any question as to age, death, or execution? If not, the defendant has until June 3d to amend his issue, by admitting the primary statutory essentials. Upon such confession or admission, with the single affirmative issue of undue influence, the open and close is with the contestant.

I have reached this conclusion reluctantly. But, upon principle and reason, it seems to me that, under such circumstances, the burden is upon the contestant, and that he is consequently entitled to the open and close. The importance of the case, the fact that the question is a new one in this court, together with the result which may give the open and close to the defendant, and therefore appear to be contrary to the practice obtaining in the state courts in will proceedings, have induced me to state the reasons for such holding at considerable length. It will be observed that, under the statute, absence of undue influence is not a primary essential. So no primary burden rests with the executor in this respect. If the statutory essentials are admitted by the defendant in his pleadings, the executor would be entitled to a verdict, if no evidence were offered.

The rule seems unquestioned that the party against whom the verdict would go, in the absence of all evidence other than the admissions contained in the pleadings, takes the burden, and with it the open and close. So it follows upon such confession, unless the defendant goes forward with his evidence of undue influence, the executor gets the verdict, and, if the conscience of the court is satisfied, a decree is entered establishing the will. The executor is relieved from the burden of taking any primary step in the trial before the jury. He need not show

that Mrs. Jenness lived, was 21 years of age, and of sound mind, or that she is dead, because this is admitted. He need not put in the will, for the fact is admitted. He need not call the subscribing witnesses, because the contestant has waived that rule. From the very nature of this issue, with the defendant going forward, the trial will be more convenient and orderly, there will be less confusion, and the result would ordinarily be more intelligent and satisfactory.

The defendant holds an affirmative proposition. He goes forward, and introduces his evidence, affirmative, descriptive, and circumstantial. The executor answers by evidence of a negative, contradictory, and explanatory character. The executor cannot do this in advance. He must first hear the complaint. A rule which would give the opening and close to the executor upon an issue of this kind would either require him to go forward, and put in his whole case, or as much as he fairly could, upon the questions of mental strength, situations of parties, etc., or permit him to open nominally, and reserve the substantial part of his case, upon the evidence, for the close. Trials, under the first view of such a rule, would be troublesome, for the reason that there would always be questions as to how far the executor ought to be required to go, and what was fairly in rebuttal; and, under the second view, the order of trial would give an undue balance to the executor, because he would not only hold the closing argument, but the substantial close upon the evidence; while, under the order of trial requiring the defendant upon such an issue to put in his whole case at the outset, (which, from the nature of the issue, the executor could not do,) and giving the executor the opportunity to follow with his substantial case upon the evidence, preserves the balance and equilibrium usual in jury trials. To one side is ordinarily given the advantage of the substantial close upon the evidence; to the other is given the substantial advantage of the close upon argument. A practice which would give both advantages to one party would not be fair.

It is urged that usage in New Hampshire gives the open and close to the executor in proceedings to establish wills. This is probably true, as a general rule, in New Hampshire and elsewhere. I am not, however, aware of a practice, in any jurisdiction, which would give the open and close to the executor upon pleadings which relieve him from all the primary burdens, and contain only the single affirmative issue of undue influence tendered by the contestant. It is not known that any such question has ever been presented to the courts of New Hampshire, and hence it cannot be assumed that there is a practice upon the subject. A practice which would give the open and close to the party on whom a single primary burden rests would not necessarily give such privilege to a party relieved of all primary burden. It is said in *Hilliard v. Beattie*, 59 N. H. 464: "As a general rule, it is desirable, in determining who shall have the opening and close, to follow the rules of pleadings, and give that right to the party upon whom, by those rules, the burden of proof is placed." It is also a rule quite as generally accepted that the burden rests upon the party holding the affirmative upon the issue to be

tried. Upon the single issue of undue influence, (all other questions having been waived,) the contestant holds the affirmative, and can naturally go forward with his evidence; while the executor holds the negative, and cannot naturally or easily go forward with his evidence. By reasons of general principle and convenience, the defendant should put in his substantial case at the outset. The analogy between undue influence, as an objection to a will, and duress, as an objection to a note or contract, is very close. Each is a special and affirmative defense, going to the merits. The character of the evidence is much the same. The order of trial and the convenience of laying the situation before a jury are the same. So far as I know, it is the general, if not the uniform, rule, under the single issue of duress, to place the burden upon the defendant, and he consequently takes the open and close. *Bailey, Onus Probandi*, 111, 588, & 607; *Proff. Jury*, 214; *Best, Right, Begin & Reply*, 91; *Patton v. Hamilton*, 12 Ind. 256; *Baldwin v. Parker*, 99 Mass. 86; *Hoxie v. Green*, 37 How. Pr. 97; *Huntington v. Conkey*, 33 Barb. 218.

The New Hampshire cases, commencing with *Judge of Probate v. Stone*, 44 N. H. 593, and ending with *Hardy v. Merrill*, 56 N. H. 227, only go so far as to hold that, if the burden is upon the executor upon one of several issues, he shall hold the burden throughout the trial. For instance, in *Hardy v. Merrill*, issue was joined on mental condition and undue influence. Under such issues, the primary burden is upon the proponent, as mental soundness is a statutory requisite. The same reasoning applies to *Boardman v. Woodman*, 47 N. H. 120. The conclusion reached in this case in no way involves a criticism of the New Hampshire state practice.

In the cases cited the proponent had something to prove at the outset to make his paper a statutory will. In the case at bar everything is admitted necessary to make it a statutory will, and a verdict would go for the proponent, unless the contestant, upon an affirmative issue, makes such a case upon affirmative matter as will satisfy the jury that the verdict should be the other way. I am not aware of any rule of public policy applicable to wills which would justify an arbitrary practice of giving the right to open and close to the proponent at the expense of convenience, reason, and the generally accepted rules of pleading and evidence. The idea is expressed by good authority that will proceedings are an exception to the general rules as to burden and open and close, for the reason that the real question is whether the deceased person died testate or intestate, and that the subscribing witnesses, therefore, are in a sense the witnesses of the law; and I agree that this reasoning applies with great force to such proceedings in the preliminary stages. Doubtless at preliminary stages, where all interested parties may not be present, the true rule is to require all the statutory essentials to be affirmatively shown by the propounder, and, upon proceedings to prove the will in solemn form, to require all the subscribing witnesses (unless dead, insane, or beyond the jurisdiction) to be called before admitting the will. These provisions are for the prevention of fraud, and for the protection of all per-

sons interested in the estate. But when, upon proper statutory notice, these preliminary steps have been taken, and the controversy limited upon appeal to a contest between the executor and a party who admits the existence of a statutory will, but tenders a single issue in avoidance, (to the whole will or some specific legacy,) upon which he takes the affirmative, no reason is seen why the ordinary rules governing the trial of issues by jury should not be observed. Indeed, it has been often held that, upon the single issue of undue influence, the contestant takes the burden. In *Baldwin v. Parker*, 99 Mass. 85, HOAR, J., says:

"But when all is proved that the statute requires; when a testator of sound mind has intentionally made and published a will according to the forms of law,—his will is as much a legal conveyance and disposition of his property as any other lawful instrument of conveyance. It may be impeached or made invalid by proof of fraud, duress, or undue influence, which have caused it to contain provisions which he has been wrongfully induced to insert in it; but so may a deed or other contract be impeached for the like reason."

Again he says, (page 87:)

"The whole result of the reasoning would seem to be that upon the separate issue of undue influence the burden of proof is upon the party alleging it."

Brooke v. Townshend, 7 Gill, 26, was a case where the fact of the will was assumed by the issues; and the question was whether the proponent should introduce the subscribing witnesses. The court says, (page 26:)

"The introduction of evidence to establish a conceded fact was an act of supererogation, and therefore to be treated as irrelevant and inadmissible. * * * It was proposed to prove, by the testimony of the attesting witnesses, the *factum* of a paper, the execution of which was admitted by the pleadings and issues in the cause. This could not be done."

The effect of this reasoning was to require the contestant, who admitted the due execution of the paper, to introduce the will in evidence as a part of his case. See, also, *Davis v. Davis*, 123 Mass. 590; *Tyler v. Gardiner*, 35 N. Y. 559; *Armstrong v. Armstrong*, 63 Wis. 162, 23 N. W. Rep. 407; *Chandler v. Ferris*, 1 Har. (Del.) 461; *Edelen v. Edelen*, 6 Md. 293; *Stocksdale v. Cullison*, 35 Md. 324; *McClintock v. Curd*, 32 Mo. 411; *Vancleave v. Beam*, 2 Dana, 155; *Boyse v. Rossborough*, 6 H. L. Cas. 2, 49; *Hutley v. Grimstone*, 41 Law T. (N. S.) 531; 9 Reporter, 224.

It must be understood that this condition of the pleadings narrows the issues upon the evidence. Under such an issue, it will not be open to the defendant to show that the essential primary condition of mental soundness did not exist. At most, he can only show the influence of a stronger mind upon a weaker sound mental condition.

CARPENTER, J., (*concurring*.) This motion was first heard by my Brother ALDRICH, who intimated his opinion as above. Afterwards the appellant amended his answer so that it specifically admits all the other requirements of a valid will, and alleges that the supposed will of Matilda P. Jenness ought not to be proved, because the said Jenness was induced to execute the same by undue influence, overpersuasion, and artful misrepresentations. On these amended pleadings the motion was

reargued before my Brother ALDRICH, with whom I sat at his request and by consent of the counsel. I entirely concur in his conclusion.

I do not find that the question here raised has ever been decided by the supreme court of New Hampshire. The uniform practice in that court, as I understand from the cases, has been that on appeal from the probate of a will the issues in the first instance to be tried are whether the testator was of lawful age, of sane mind, whether the alleged will was duly executed, and, in case the question is raised, whether there was undue influence, or fraud, or whatever other thing may be alleged. These issues are tried by the court, unless one or more of them be put in dispute by the appeal. In the latter case the issues are sent to a jury; and on trial, although the appellant may offer evidence only on those issues which he has put in dispute, still the proponent of the will must establish, by proof which the trial judge shall deem competent, all the allegations of fact which go to establish the existence of a valid will. This being the case, it is evident that the proponent, who stands in the position of plaintiff, has always the affirmative of some of the issues, and hence, according to the universal rule in all our courts, has the right to open and close. These issues having been determined, the court in the light of those findings, and from an inspection of the alleged will, determines the main issue in the case, and thereupon makes the final decree. The issue whether the propounded instrument is or is not the last will of the person deceased is therefore for the court alone.

In the present case the appellant admits on the record that every issue shall be found for the proponent, excepting only the issue of undue influence. Upon that issue he evidently has the affirmative, and, as that is the sole issue for the jury, he ought to open and close. It has, indeed, been argued that it is contrary to the policy of the law to allow the appellant to admit any of the allegations which go to establish the validity of the will, and that they are public questions to be found by inquisition of the court. On this question I can add little to the lucid observations of the foregoing opinion. The requirements of the law and of public policy have been fully met by the inquisition heretofore had in the probate court. The decree of that court is in full force, and is itself competent evidence to this court of the facts thereby determined. Gen. Laws N. H. p. 484, § 12. And, as to the rights of the appellant, it is doubtless competent for him to waive them.

UNITED STATES *v.* ENGEMAN *et al.*¹

(District Court, E. D. New York. July 7, 1891.)

1. EMINENT DOMAIN—CONDEMNATION PROCEEDINGS—INTEREST ON AWARD.

After the commissioners have reported the value of land condemned to the use of the United States, under Act Cong. Aug. 18, 1890, (26 St. at Large, 316,) the owner of the land is entitled to interest on the amount reported, from the time when the right of the government to take the same attaches to the time when payment for the land is made.

2. SAME—COSTS—ALLOWANCE.

In such proceeding, the owner of the property condemned is entitled to costs and an allowance, in accordance with the provisions of the laws relating to the condemnation of property of the state wherein the property is situated.

At Law. See 45 Fed. Rep. 546, and 46 Fed. Rep. 176.

Jesse Johnson, U. S. Dist. Atty.

Thomas E. Pearsall, (*R. D. Benedict*, of counsel,) for defendants.

BENEDICT, J. The report of the commissioners appointed to ascertain the compensation to be made to the above-named owners for property at Plum island, to be taken for the use of the United States, having been filed, the district attorney now moves for its confirmation. No opposition being made, an order will be entered confirming the report. The owners of the property at the same time apply for the insertion in the order of confirmation of a provision for the payment of interest from the date of the confirmation of the report. The district attorney opposes the allowance of interest. In my opinion, however, interest should be allowed from the date of the confirmation of the report. The commissioners have ascertained the present value of the land to be taken, and the owners of the land should have interest on the present value of the land from the time when the right of the United States to take the same attaches to the time when payment for the land is made. The owners of the property likewise apply for costs under the provision in the statute of the state of New York, in accordance with which this proceeding is, by the statute of the United States, required to be prosecuted. The district attorney objects upon the ground that, in proceedings in the courts of the United States, only the costs provided by the statute of the United States can be allowed. My opinion, however, is that the rule applied in ordinary suits does not apply to a proceeding like this, which is required by the statute "to be prosecuted in accordance with the laws relating to condemnation of property of the states (*sic*) wherein the property may be situated." 26 St. at Large, p. 316. This statute requires the present proceeding to be in accord with the general condemnation act of the state of New York, passed in 1890. That act provides as follows:

"If the compensation awarded shall exceed the amount of the offer, with interest from the time it was made, or, if no offer was made, the court shall,

¹Reported by E. G. Benedict, Esq., of the New York bar.

in the final order, direct that the defendant recover of the plaintiff the costs of the proceeding, at the same rate as is allowed, of course, to the defendants when he is the prevailing party in an action in the supreme court, including the allowances for proceedings before and after notice of trial; and the court may also grant an additional allowance of costs, not exceeding five per centum upon the amount awarded."

If under the statute of the United States above quoted, which omits the words "as near as may be," any provision of the state statute can be rejected, I see no occasion to reject the provision for costs, which fails to come within the description of provisions that may be rejected as given by the United States supreme court in *Railroad Co. v. Horst*, 93 U. S. 301. This provision, which it will be observed requires costs to be paid by the plaintiff to the defendant, as of course, in a case like this, when presented in a court of the state, should, in my opinion, be given effect in a proceeding in a court of the United States, which is required by a statute of the United States to proceed in accord with the statute of the state. The property owners also ask for the allowance provided for in the state statute. That statute permits an allowance of 5 per cent. upon the amount awarded. In this case the amount awarded is \$90,000, but, as the United States were willing to pay \$50,000, all the land-owners are properly entitled to is an allowance to be calculated upon the difference between \$50,000 and the amount of the award, which is \$90,000. Five per cent. on this difference is \$2,000, and an allowance of this amount is granted.

BANGOR SAV. BANK v. CITY OF STILLWATER.

(Circuit Court, D. Minnesota, Third Division. July 20, 1891.)

MUNICIPAL CORPORATIONS—POWER TO ISSUE NEGOTIABLE CERTIFICATES.

In the absence of any special statutory authority, a city has no right to issue certificates of indebtedness in negotiable form, even in payment for property which it had authority to buy.

At Law.

F. H. Lemon & Co. contracted with the city of Stillwater, in December, 1887, to vest title in the city to two parcels of land, which were to be used by the city for the purposes of a public street; also to widen Main street for a certain distance, so that it should be 50 feet in width; and to do the necessary excavation and filling to make the strip which was added for the purpose of widening the highway conform to the established grade of Main street. They also agreed to obtain certain sewer privileges for the city, and to secure the relocation of certain railroad tracks. For the land so to be acquired, and the services to be rendered, the city, on its part, agreed to dismiss certain condemnation proceedings that appear to have been then pending; also to vacate and surrender all of its rights to certain parts of Main, Laurel, Cherry, and Linden streets; and,

in addition, and on completion of the contract by Lemon & Co., to pay them \$21,250 in three certificates of indebtedness, to become due, respectively, July 1, 1889, July 1, 1890, and July 1, 1891. Subsequently, in October, 1888, before the contract was fully performed by Lemon & Co., the city council authorized the certificates of indebtedness to be executed and delivered to the Bangor Savings Bank, to whom Lemon & Co. had contracted to sell the same. They were executed and delivered in the following form:

"CERTIFICATE OF INDEBTEDNESS.

"\$7,500.

STILLWATER, MINN., July 1, 1888.

"Know all men by these presents, that in consideration of the performance by F. H. Lemon & Co. of a certain contract between them and the city of Stillwater, for the purchase of certain rights of way for streets and sewers, and the grading of certain streets, dated December 21st, A. D. 1887, said city of Stillwater, at the request of F. H. Lemon & Co., hereby acknowledges itself to be indebted to the Bangor Savings Bank, of Bangor, in the state of Maine, or order, in the sum of seven thousand five hundred dollars, (\$7,500.00,) with interest thereon at the rate of 6% per annum from the date hereof, payable semi-annually on the 1st days of January and July of each year, which said sum said city hereby undertakes and promises to pay to the said Bangor Savings Bank or order on the 1st day of July, A. D. 1890, at the 5th Avenue Bank, of New York city, together with semi-annual interest thereon, as aforesaid. This certificate is made and delivered in accordance with a resolution of the city council of said city of Stillwater, passed on the 27th day of October, A. D. 1888, and duly approved by the mayor, and published in the official paper of said city on the 29th day of October, A. D. 1888. In witness whereof there is hereunto affixed the corporate seal of the city of Stillwater, and the signature of its mayor, attested by the signature of its clerk, by and with the authority of its city council, on this 29th day of October, A. D. 1888.

"G. M. SEYMOUR, Mayor of the City of Stillwater.

Attest: "E. A. HOPKINS, Jr., Clerk of the City of Stillwater."
[Corporate Seal of the City of Stillwater.]

By resolution of the city council authorizing the delivery of the certificates, it was provided, in substance, that they should be placed in the possession of F. M. Prince, who was authorized to deliver them to the bank, and receive the proceeds, and hold the same, subject to the further order of the city council. At a later date, (November 9, 1888,) after Lemon & Co. had fully completed their contract, Prince was authorized by the city council to pay the proceeds of the certificates then in his hands to Lemon & Co., which he accordingly did. The city now contests payment of the so-called "certificates" on the ground that it had no authority to issue them.

Sanders & Bowers and O. Morris, for plaintiff.

Fayette Marsh, for defendant.

THAYER, J., (*after stating the facts as above.*) We think it clear that the city of Stillwater had the right to contract with Lemon & Co. for the acquisition of the strips of land in question, the sewer privileges, the widening of Main street, the vacation of certain streets, and the relocation of railroad tracks. It had such right, we think, under power conferred

upon the city council by various provisions of the city charter "to open, establish, vacate, and widen streets, to construct, maintain, and extend sewers, and to condemn or purchase the lands necessary to be used for street and sewer purposes." *Vide* City Charter, c. 8, § 11; *Id.* c. 9, §§ 1, 2; *Id.* c. 4, § 16. These powers were sufficient to authorize the city council to contract with Lemon & Co. to procure the lands in question, and to render the services which they undertook to render for and in behalf of the city. But it is a different question whether the city had authority to pay for such services in the manner proposed; that is to say, by the issue of certificates of indebtedness, payable to order, and running one, two, and three years. Plaintiff's attorneys strenuously insist, and in that we agree with them, that the so-called "Certificates of Indebtedness" are in reality negotiable bonds or notes, which, under the law-merchant, may be transferred by indorsement from hand to hand, so as to cut off equities of defense. In a recent case, which contains an elaborate review of previous decisions on the same subject, the doctrine was restated, that municipal corporations have no power to utter commercial paper, unless it is expressly conferred upon them by law, or is clearly implied from some other power expressly given. It was further held that no implication arises that a municipality may make commercial paper, and put the same on the market, from the fact that it is expressly authorized to borrow money. "To borrow money," say the court, "and to give a bond or obligation therefor which may circulate in the market as a negotiable security, freed from any equities that may be set up by the maker of it, are, in their nature and in their legal effect, essentially different transactions." *Merrill v. Town of Monticello*, 138 U. S. 673, 11 Sup. Ct. Rep. 441, 448. See, also, *Claiborne Co. v. Brooks*, 111 U. S. 400, 406, 4 Sup. Ct. Rep. 489; *Police Jury v. Britton*, 15 Wall. 566, and *Young v. Clarendon Tp.*, 132 U. S. 340, 10 Sup. Ct. Rep. 107. In the present instance it appears that the so-called "certificate" or "bond" remains in the hands of the original payee, the Bangor Savings Bank; it has not been negotiated; and it contains on its face a recital that it was issued in consideration of the "performance by F. H. Lemon & Co. of a certain contract, * * * dated December 21, 1887," which is notice to the holder of the provisions of that contract. No question of estoppel, or touching the superior rights of a transferee for value, can arise in this case. The point to be determined is simply whether the city of Stillwater had any authority, under its charter, to issue negotiable bonds to Lemon & Co. for the land to be procured and the services to be rendered, and this question, we think, must be answered in the negative. By section 3a of chapter 3 of its charter "the committee on finances of the city council, * * * upon order of the council, may, from time to time, borrow for and in behalf of said city such sums of money as may be necessary for temporary purposes, and to anticipate the current revenue only." It is obvious, we think, that the issue of bonds to Lemon & Co., under the circumstances and for the purpose explained, cannot be supported under this clause. Short, temporary loans, in anticipation of, and to be paid out of the current revenue for the year,

is all that this section contemplates. Again, by sections 26, 26a, and 26b of chapter 5 the city was authorized to issue and sell bonds, and put the avails thereof in the city treasury, to create what is termed a "Permanent Improvement Fund." Whether the city had already issued all the bonds authorized to create the permanent improvement fund does not appear, but that is immaterial, as, in our view, it could not issue the so-called "certificates" under the sections of the charter last referred to, its duty having been, in our judgment, to pay Lemon & Co. in money out of the "permanent improvement fund," as the charter seems to contemplate, instead of issuing to them negotiable bonds. The only other authority to be found in the city charter to issue negotiable paper is contained in section 25 of chapter 5. This section authorized an issue of bonds to meet other maturing bonds of the city, when there was a deficiency in the "sinking fund;" but it also contains the following important prohibition in the concluding paragraph of the section, to wit:

"But neither said city council, nor any officer or officers of said city, shall otherwise, without special authority of law, have authority to issue any bonds, or create any debt or liability against said city in excess of the amount of revenue actually levied and applicable to the payment of such liability."

We are forced to the conclusion, after a careful study of the charter, that the so-called "certificates" issued under the Lemon & Co. contract were issued without authority of law, and are void, at least in the hands of the payee. But it does not follow that because the certificates are void the plaintiff is without a remedy against the city. It has received lands for street purposes, and sewer privileges, and other services, that it was authorized to contract for and pay for. It has attempted to pay for them in bonds which it had no right to issue, and that are, accordingly, worthless, and do not operate as payment. The city is most likely liable to pay for what it has received under the Lemon & Co. contract, but it is not necessary to express a definite opinion on that point at this time, as the case has been submitted merely upon the question whether a recovery can be had on the bonds, under a stipulation between counsel that the case should remain open for further testimony on the other issue if the court held the bonds void. All we determine now is that the so-called "certificates" are void, and that no recovery can be had thereon. On that issue all the testimony has been heard, and the issue is determined in favor of the city and against the plaintiff.

ARMSTRONG v. BROLASKI.

(Circuit Court, E. D. Missouri, E. D. June 22, 1

1. CHECKS—LOSS—SUIT BY INDORSEE—WITHDRAWAL OF FUNDS.

Defendant gave a check signed by him as "Agent." He did not disclose for whom he was acting as agent, if for any one, and he afterwards withdrew the money deposited to himself, as agent, and deposited it to his individual account. *Held*, that an action by an indorsee who had lost the check was properly brought against defendant individually as drawer.

2. SAME—LIABILITY OF DRAWER.

Defendant having received full credit from the payee, and the indorsee being a holder for value, defendant, on withdrawing the funds, became liable to the indorsee for the amount of the check, without presentment or notice of non-payment.

3. SAME—DEFENSES.

Directions of defendant to the bank to pay checks drawn by him as agent from his individual account will not avail against a suit by the indorsee without notice thereof to him.

At Law.

The case made by the evidence is as follows: Defendant on April 4, 1887, drew a check on the St. Louis National Bank, payable to the order of H., S. & H., a Boston firm, and remitted the same to them in payment of an account. The check was signed, "H. Brolaski, Agent." It was deposited by the payees in a Boston bank, and by the latter was indorsed for value to the Fidelity National Bank of Cincinnati, by which latter bank it was remitted to a St. Louis bank for collection. It was not paid when presented to the St. Louis National Bank, because it had not been properly indorsed by the payees, although the latter had received full value for the same when they deposited it. After the payees had properly indorsed the check at the request of the Fidelity Bank, it was again remitted by the latter to its St. Louis correspondent for collection, but was lost in the mail. It was so lost about May 5, 1887. Some time after the loss of the check, the receiver of the Fidelity Bank, which had in the mean time become insolvent, advised the defendant of the loss, and requested him to draw a duplicate check, which he failed to do; and some months thereafter he withdrew all the money then on deposit with the St. Louis National Bank to the credit of "H. Brolaski, Agent," and deposited it to the credit of "H. Brolaski." When the account was so changed by the defendant, it appears that he gave directions to the St. Louis National Bank to pay all outstanding checks drawn by "H. Brolaski, Agent," out of moneys deposited to the credit of "H. Brolaski," but, if any notice of such direction was given to the holders of outstanding checks, the fact does not appear. This suit was filed in August, 1890, after the account of "H. Brolaski, Agent," with the St. Louis National Bank had been closed. The proof does not show for whom Brolaski was acting as agent (if for any one) at the time the check was drawn.

J. C. Orrick and Horton Pope, for plaintiff.

R. J. Delano, for defendant.

THAYER, J., (*after stating the facts as above.*) 1. The first question to be considered is whether this action is brought against the drawer of the lost check. Inasmuch as defendant did not disclose by his signature to the check for whom he was acting as agent, if for any one, and inasmuch as the proof shows that he subsequently treated the deposit against which the check was drawn as his own, by withdrawing it and depositing it to the credit of H. Brolaski, I must conclude that defendant in drawing the check was acting for himself, and not as agent for some other person.

2. The next question is whether the defendant is liable, assuming that the action is properly brought against him as drawer? The Fidelity Bank was the holder of the check for value at the time it was lost in the mail. Defendant has received full credit for the amount of the check in his account with H., S. & H., in whose favor it was drawn, and on the state of facts above disclosed the plaintiff has no recourse against prior indorsers. It is well settled that the drawer of a check, who withdraws the fund against which the same is drawn, thereby renders himself personally liable to the holder of the check for the amount thereof without presentment to the drawee, and without notice of non-payment. The drawer of a check is not entitled to presentment or notice, when by his own act he has rendered presentment useless. Daniel, Neg. Inst. § 1596, and citations.

3. Some stress was laid on the fact that defendant ordered all checks signed, "H. Brolaski, Agent," to be paid out of money standing to the credit of H. Brolaski, but I am compelled to regard that fact as immaterial. To entitle a bank to pay a check out of a given deposit, the check should bear the signature of the depositor in precisely the same form that the deposit is entered on the bank's books. Id. § 1612, and citations. I have no doubt that the directions given by Brolaski were ample to protect the bank in paying the lost check out of his account, if it had been presented, but, to render such directions of any avail as against the plaintiff, he should have had notice that such directions had been given. Upon the whole, I conclude that the defendant made himself liable to the plaintiff by withdrawing the deposit, and there seems to be no necessity of requiring the plaintiff to give bond as a condition of recovery, as the loss occurred so long ago, and the check was so indorsed that no one can acquire a title thereto. Judgment will be entered for \$327.50, with interest only from this date, June 22, 1891.

*In re KING.**(Circuit Court, W. D. Tennessee. August 1, 1891.)*

1. CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—SUNDAY LAWS—RELIGIOUS LIBERTY.

The fourteenth amendment of the constitution of the United States has not abrogated the Sunday laws of the states, and established religious freedom therein. The states may establish a church or creed, and maintain them, so far as the federal constitution is concerned.

2. SAME—DUE PROCESS OF LAW.

When a state court of competent jurisdiction in due form has convicted the defendant of a crime, the verdict and judgment are conclusive evidence of the fact that it is, according to the law of the state, a crime to do the thing that was done, when the question is whether or not it be a crime at common law; and it is due process of law, under the fourteenth amendment of the federal constitution, if the state court deprive the defendant of his liberty by imprisonment under a lawful sentence upon such a conviction.

3. SAME—WORKING ON SUNDAY A NUISANCE—SEVENTH-DAY ADVENTISTS.

Whatever opinion the federal court in Tennessee may have upon the question whether or not it be, at common law, an indictable nuisance in that state to work on Sunday, whenever the defendant has been convicted by the state court upon such an indictment, in due form of law, he cannot be discharged upon *habeas corpus* by the federal court, because the conviction itself is, for that case, the final and conclusive evidence of the law of the state, necessarily so, by the common law itself; and therefore there has been due process of law in procuring the conviction of a Seventh-Day Adventist who had conscientiously worked on Sunday from his belief that Saturday was the Sabbath of the Christians, and not Sunday; and this, although the federal court was of a contrary opinion as to the nuisance.

4. SAME—HABEAS CORPUS—FEDERAL COURT INQUIRY—EVIDENCE—PROOF OF THE COMMON LAW.

The federal court, upon *habeas corpus* by a defendant convicted of crime in a state court, proceeds to inquire independently whether the constitutional guaranty of the fourteenth amendment has been violated, but in making the inquiry must take the fact of conviction as evidence of the existence of an unwritten common law that the thing done was a crime. The federal court cannot review and correct any error of law or fact upon such a proceeding, and can only discharge the prisoner when it is shown that some fundamental principle has been violated, and not a merely erroneous conviction secured. The guilty or the innocent would be alike discharged upon the inquiry of the federal court, and under the same circumstances, always. The guilt or innocence of the defendant is not a legitimate inquiry in the federal court.

On Habeas Corpus.

The petitioner, R. M. King, a citizen of Obion county, Tenn., was indicted in the circuit court of that county for creating a common nuisance by working on Sunday. He plowed in his fields on that day, he being a farmer, and that his daily vocation. Being arrested and taken before a justice of the peace, he was fined three dollars, repeatedly, under section 2289, Code Tenn., (Mill. & V. Ed.,) which is the only legislation in Tennessee forbidding work on Sunday of this particular kind. These fines he paid, but continued to plow on Sunday as before. His neighbors had him indicted as a common nuisance, for a crime at common law, with the purpose of having him more severely punished for the misdemeanor than the penalty under the statute. He proved that he belonged to the religious sect of Seventh-Day Adventists, which denies that there has been any divine sanction of the change from the seventh to the first day of the week, and that he conscientiously and very strictly observed always the seventh day, as required by the fourth

commandment; that he was a poor man, and could not well give up two days in the week from work; that he did not work near any place of worship, or disturb any one engaged in worship by his work, which was done in a secluded place; and he set up his right to religious freedom of thought as a defense, and relied upon the statute as exclusive of all other offense or punishment; and denied, under his plea of not guilty, that it was an offense at common law to plow in one's fields on Sunday. The court having charged the jury that in Tennessee it is a nuisance at common law to work in one's fields on Sunday, and that the defendant's being a Seventh-Day Adventist did not exempt him, he was convicted by the jury, which fixed his fine at \$75, and was committed to jail upon the sentence of the court until the fine and costs were paid. He appealed to the supreme court, taking, among others, exceptions to a very bitter and denunciatory speech of the prosecuting attorney severely arraigning him and his sect for its wickedness and immorality, comparing them to the Mormons, etc. The conviction was affirmed, but without any written opinion by the court, and the petitioner again sentenced to jail until the fine and costs were paid. Thereupon he filed this petition for *habeas corpus*, alleging that he had been deprived of his liberty without due process of law, denied the equal protection of the law, contrary to the fourteenth amendment of the constitution of the United States, and denied the religious freedom guarantied to him by the federal constitution. The sheriff of Obion county answered with the record of the proceedings in the state court, and denied the illegality of the imprisonment. The proof was taken before the circuit court of the United States, and substantially the same facts proved as those set out in the bill of exceptions in the state court. The petitioner moved for his discharge upon the return of the sheriff, upon the same grounds as those mentioned in the petition for *habeas corpus*.

Thos. E. Richardson and Don M. Dickinson, for petitioner.

Smith & Collier, for respondent.

HAMMOND, J. The petitioner, R. M. King, was in due form indicted in the circuit court for Obion county, for that "he then and there unlawfully and unnecessarily engaged in his secular business and performed his common avocation of life, to-wit, plowing on Sunday," which said working was charged to be "a common nuisance." Upon a formal trial by a jury, he was convicted and fined \$75, which conviction was, upon appeal, affirmed by the supreme court, and, the fine not being paid, he was imprisoned, all in due form of law. He thereupon sued this writ of *habeas corpus*, alleging that he is held in custody in violation of the constitution of the United States, and the sheriff of Obion county sets up in defense of the writ the legal proceedings under which he has custody of the prisoner. The petitioner moves for his discharge upon the ground that he is held in violation of the fourteenth amendment of the constitution. He proves that he is a Seventh-Day Adventist, keeps Saturday according to his creed, and works on Sunday for that reason alone. The contention is "that there is not any law in Tennessee"

to justify the conviction which was had, and that the proceedings must be not only in legal form, but likewise grounded upon a law of the state, statute or common, making the conduct complained of by the indictment an offense; otherwise the imprisonment is arbitrary, and "without due process of law," just as effectually within the purview of the fourteenth amendment as if the method of procedure had been illegal and void. If there be no law in Tennessee, statute or common, making the act of working on Sunday a nuisance, then, indeed, the conviction is void, for the amendment is not merely a restraint upon arbitrary procedure in its form, but also in its substance, and, however strictly legal and orderly the court may have proceeded to conviction, if the act done was not a crime, as charged, there has been no "due process of law" to deprive the person of his liberty. This is, undoubtedly, the result of the adjudicated cases, and it is not necessary to cite them.

It is also true that congress has furnished the aggrieved person with a remedy by writ of *habeas corpus* to enforce in the federal courts the restrictions of this amendment, and protect him against arbitrary imprisonment, in the sense just mentioned; but it has not and could not constitute those courts tribunals of review to reverse and set aside the convictions in the state courts that may be illegal in the sense that they are founded on an erroneous judgment as to what the statute or common law of the state may be. If so, every conviction in the state courts would be reversible in the federal courts where errors of law could be assigned. To say that there is an absence of any law to justify the prosecution is only to say that the court has erred in declaring the law to be that the thing done is criminal under the law, and all errors of law import an absence of law to justify the judgment. I do not think the amendment or the *habeas corpus* act has conferred upon this court the power to overhaul the decisions of the state courts of Tennessee, and determine whether they have, in a given case, rightly adjudged the law of the state to have affixed a criminal quality to the given act of the petitioner.

It is urged that, if the judgment of conviction by the state court be held conclusive of the law in the given case, the amendment and the act of congress are emasculated, and there can be no inquiry in any case, of value to him who is imprisoned, as to whether he is deprived of his liberty without due process of law; that the federal court must, necessarily, make an independent inquiry to see whether there be any law, statute or common, upon which to found the conviction; or else the prisoner is remediless under federal law to redress a violation of this guaranty of the federal constitution. It is said that we make the same inquiry into the law of the state under the fourteenth amendment that we do into the law of the United States under the fifth amendment, containing precisely the same guaranty against the arbitrary exercise of federal power, and that the one is as plenary as the other; that this case does not fall within the category of those wherein, by act of congress, the federal courts must give effect to local law as declared by the state tribunals; and that, while

we may not review errors of judgment, we must, in execution of this amendment, vacate, by discharge on *habeas corpus*, any void judgment or sentence,—made void by the amendment itself.

The court concedes fully the soundness of this position, but not the application of it. It is quite difficult to draw the line of demarkation here between a line of judgment that shall protect the integrity of the state courts against impertinent review, and one that shall maintain the full measure of federal power in giving effect to the amendment; but, as has been said in other cases of like perplexity, we must confine our efforts to define the power and its limitations within the boundaries required for the careful adjudication of actual cases as they arise; and I think it more important still that we shall not overlook the fact that we have a dual and complex system of government, which fact of itself and by its necessary implications must modify the judgment on such questions as this, by conforming it to that fact itself; and we find here in this case an easy path out of this perplexity by doing this. Let us imagine a state without any common law, and only a statutory code of criminal law, and we have an example at hand in our federal state, where we are accustomed to say that the United States has no common law of crimes, and that he who accuses one of any offense must put his finger on some act of congress denouncing that particular conduct as criminal. If we were making the very inquiry so much argued in this case, whether it can be punishable as a crime to work in one's field on Sunday, within the domain of federal jurisprudence, say under the fifth amendment, instead of the fourteenth amendment, it would be easily resolved, and the prisoner would be discharged, unless the respondent could point to a statute making it so, and precisely according to the accusation or indictment. If such a simple condition of law existed in the state of Tennessee, we could have no trouble with this case. But it does not. There we have a vast body of unwritten laws, civil and criminal, as to which an entirely different method of ascertaining what is and what is not the law obtains. What is that method? It is not essential to go into any legal casuistry to determine whether, when a point of common law first arises for adjudication, the judges who declare it make the law, or only testify to the usage or custom which we call law, for it is equally binding in either case as a declaration. 1 Bl. Comm. 69. The judges are the depositaries of that law, just as the statute book is the depository of the statute law, and when they speak the law is established, and none can gainsay it. They have the power, for grave reasons, to change an adjudication, and re-establish the point, even reversely, but generally are bound and do adhere to the first precedent. This is "due process of law" in that matter. Moreover, when the mooted point has been finally adjudicated between the parties, it is absolutely conclusive as between them. Other parties, in other cases, may have the decision reversed as a precedent for all subsequent cases; but there is no remedy in that case or for that party, unless it may be by executive clemency, if a criminal case, against the erroneous declaration of the law. In that celebrated "disquisition," as he calls

it in the preface, of Mr. Jefferson, in which he so angrily combats the dictum of Sir MATTHEW HALE, that "Christianity is parcel of the laws of England," he accurately expresses this principle in these words: "But in later times we take no judge's word for what the law is, further than is warranted by the authorities he appeals to. His decision may bind the unfortunate individual who happens to be the particular subject of it, but it cannot alter the law." Jeff. Rep. (Va.) Append. 139. And Mr. Chief Justice CLAYTON, in his equally celebrated reply to Mr. Jefferson, states that this was the very point decided by the case cited from the Year Books (34 Hen. VI. 38) by Mr. Jefferson, and misunderstood by him; namely, that when the ecclesiastical court, in a case within its jurisdiction, had decided a given matter, the common law of England recognized it as conclusive, when collaterally called in question in the common-law courts. *State v. Chandler*, 2 Har. (Del.) 553, 559.

But the application of this principle should not be misunderstood here, and it should be remembered that in a case like this we apply it as a matter of evidence. The verdict of the jury, and the judgment of the state circuit court thereon, and its affirmance by the supreme court of Tennessee, (a mere incident this affirmance is, however, in the sense we are now considering the principle,) is to us here, and to all elsewhere, necessarily conclusive testimony as to what the common law of Tennessee is in the matter of King's plowing in his fields on the Sundays mentioned in the indictment, and proved in the record. As to the petitioner, whether he be an unfortunate victim of an erroneous verdict and decision or not, it is due process of law, and according to the law of the land, that he shall be bound by it everywhere, except in a court competent to review and reverse the verdict, and the judgment upon it; and, surely, it was not the intention of the fourteenth amendment to confer upon this court, or any other federal court of any degree whatever, *that* power. It was due process of law for the jury, having him properly in hand, to render the verdict, and for the court to pass judgment upon it; and the declaration of the judges that to do that which he did was a common nuisance, according to the common law of Tennessee, is conclusive evidence, as to *that* act of his, that it was so. This is not holding that the federal courts shall not, upon a *habeas corpus*, inquire independently as to whether the act complained of was a crime as charged in the indictment or not, but only that in making that inquiry, however independently, the verdict and judgment, if the state court had jurisdiction and the procedure has been regular, must be conclusive evidence on the point of law. It is not binding like the decisions which are rules of property are binding, because our federal statute says they shall be, nor like a matter of local law which the federal courts administer, because it is local law and binding between the parties,—these are inherently binding on us,—but binding as we are bound by the unimpeachable testimony of a witness, as we are bound by the conclusive evidence of a certificate of the secretary of state that certain given words constitute a statute of the state, or by the printed and authorized book of statutes, or by that judicial notice which we take that certain given words do constitute a statute, or as we might, under

some circumstances, be bound by the oral testimony of witnesses as to what is the law of a foreign state. In the very nature of the common law, and, indeed, as that very "due process of law" after which we are looking so concernedly in this case, this principle is fundamental. We have no other possible method of ascertaining what is the common law of Tennessee in this case than that of looking to the verdict and judgment as our witness of it. If we go to former precedents and other authorities, like those of the opinions of the sages and text-writers, we do that which no other court has power to do, in that case, except the court which had pending before it the indictment and the plea of the defendant thereto, making the technical issue as to what the law of the case was, and we usurp the functions of the trial judge and jury, or of the appellate court having authority to review the trial judge and jury. The guilt or innocence of the petitioner cannot be in the federal court a legitimate inquiry; either the guilty or the innocent would be alike discharged, on the *habeas corpus*, under the same circumstances, always; and neither can be discharged when the procedure is lawful and regular, however just or unjust the conviction might be. In the state court the question is—"Guilty or Not Guilty," in its widest scope. In the federal court there is a narrower and far less comprehensive inquiry, not like the other including both these questions and all that it is possible to bring within any adjudication, but only this—Is the proceeding lawful and regular in its relation to those essential and indispensable principles which are necessary to secure "life, liberty, or property?"

It is my opinion that this principle of establishing the common law by the authoritative judgment of its judges reaches even further than this, and that, evidentially, we are quite as conclusively bound, upon this independent inquiry we are making, by the testimony of the decision of *Parker v. State*, 16 Lea, 476, 1 S. W. Rep. 202, that it is a common nuisance in Tennessee, according to its common law, to work on Sunday; notwithstanding it somewhat ignominiously overrules, without mentioning it, the former precedents in that court of *State v. Lorry*, 7 Baxt. 95; because it is likewise a part of the principle itself that the last precedent is controlling; and we do not, as suggested by counsel, take this conflict of precedent as authorizing an independent judgment, as we do in an entirely different class of cases involving the construction of contracts made by the state in the form of statutes. In that class of cases it is a mere conflict of opinion as to the intention of the parties in using certain words in their form of contract, generally as much open to the federal as the state courts; where the conflict has resulted in diverse opinions; but here there is not any such latitude of action because of the conclusive effect of a precedent at common law as evidence of the common law itself. This is what the supreme court means when it says, in cases like this and other cases there by writ of error from the state courts, that we are bound by the decisions of the state courts as to the criminal laws of the state. Whether it be a question as to whether there be a common-law crime or an offense under the proper construction of a doubtful statute, or whether the constitution of the state has been properly construed, it

is all the same. *In re Duncan*, 139 U. S. 449, 11 Sup. Ct. Rep. 573; *Leeper v. Texas*, 139 U. S. 462, 467, 11 Sup. Ct. Rep. 577; *In re Converse*, 137 U. S. 624, 11 Sup. Ct. Rep. 191; *Baldwin v. State*, 129 U. S. 52, 9 Sup. Ct. Rep. 193; and numerous other cases of like import might be cited. The result of them all is that in enforcing the fourteenth amendment the federal courts will confine themselves to the function of seeing that the fundamental principle that the citizen shall not be arbitrarily proceeded against contrary to the usual course of the law in such cases, nor punished without authority of law, nor unequally, and the like, shall not be violated in any given case; but they will not substitute their judgment for that of the state courts as to what are the laws of the state in any case. A proper adjustment of the two parts of our dual system of government requires this, and the utmost care should be taken not to impair the rightful operations of the state government, although they may, in a given case, appear to have wrought injustice or oppression. No government is free from such misfortunes occasionally arising, nor should they ever provoke the greater misfortune of the usurpation of unauthorized power by either of the branches of our system, state or federal. This view of the case disposes of it, for when the petitioner was, by lawful process, arraigned upon indictment, and by lawful trial convicted of a crime in a court having the lawful right to declare his conduct to have been a crime, he has had "due process of law," and has been made to suffer "according to the law of the land," albeit the court may have made a mistake of fact or law in the progress of that particular administration of the "law of the land." That mistake we cannot correct, nor can any court after final judgment; and this itself is one of the fundamental principles, essential to be preserved as one of the elements of that "due process of law," secured by the fourteenth amendment.

Perhaps this judgment should end here, and that, technically, nothing more should be said. Yet it may be due to counsel to give some response to their extended and really very able arguments upon other questions which they think are involved, and which they wish to have decided in this case. As we do not refuse their motion to discharge the petitioner because of any want of jurisdiction, but only because we decide that he has not been convicted without due process of law, as he alleges, it may not be improper, and, at least, it will emphasize our judicial allegiance to the principle already adverted to of the conclusiveness, as a matter of evidence, of the verdict against him, if we say that but for that allegiance we should have no difficulty in thinking that King has been wrongfully convicted. Not because he has any guaranty under the federal or state constitutions against a law denouncing him and punishing him for a nuisance in working on Sunday, for he has not. It was a belief of Mr. Madison and other founders of our government that they had practically established absolute religious freedom and exemption from persecution for opinion's sake in matters of religion; but while they made immense strides in that direction, and subsequent progress in freedom of thought has advanced the liberalism of the conception these

founders had, as a matter of fact they left to the states the most absolute power on the subject, and any of them might, if they chose, establish a creed and a church and maintain them. The most they did, as they confessed, was to set a good example by the federal constitution, and happily that example has been substantially followed in this matter, and by no state more thoroughly than Tennessee, where sectarian freedom of religious belief is guarantied by the constitution; not in a sense argued here, that King, as a Seventh-Day Adventist, or some other as a Jew, or yet another as a Seventh-Day Baptist, might set at defiance the prejudices, if you please, of other sects having control of legislation in the matter of Sunday observances, but only in the sense that he should not himself be disturbed in the practices of his creed, which is quite a different thing from saying that in the course of his daily labor, disconnected with his religion, just as much as other people's labor is disconnected with their religion, labor not being an acknowledged principle or tenet of religion by him, nor generally or anywhere, he might disregard laws made in aid, if you choose to say so, of the religion of other sects. We say not acknowledged by him, because, although he testifies that the fourth commandment is as binding in its direction for labor on six days of the week as for rest on the seventh, he does not prove that that notion is held as a part of the creed of his sect and religiously observed as such, and we know, historically, that generally it has not been so considered by any religionists or their teachers. But if a non-conformist of any kind should enter the church of another sect, and those assembled there were required, every one of them, to comply with a certain ceremony, he could not discourteously refuse because his mode was different, or because he did not believe in the divine sanction of that ceremony, and rely upon this constitutional guaranty to protect his refusal. We do not say Sunday observance may be compelled upon this principle, as a religious act, but only illustrate that the constitutional guaranty of religious freedom does not afford the measure of duty under such circumstances, nor does it any more, it seems to us, protect the citizen in refusing to conform to Sunday ordinances. It was not intended to have that effect any more than under our federal constitution, the polygamists may defy the Christian laws against bigamy upon the ground of religious feeling or sentiment, the freedom of which has been guarantied. Nor do we believe King was wrongfully convicted, because Christianity is not a part of the law of the land; for, in the sense pointed out by Mr. Chief Justice CLAYTON in *State v. Chandler*, *supra*, and more recently by Dr. Anderson, a clergyman before the Social Science Association, (20 Alb. Law J., 265, 285,) it surely is; but not in the dangerous sense so forcibly combated by Mr. Jefferson and other writers following him in the controversy over it. The fourth commandment is neither a part of the common law or the statute, and disobedience to it is not punishable by law; and certainly the substitution of the first day of the week for the seventh as a part of the commandment has not been accomplished by municipal process, and the substitution is not binding as such. The danger that lurks in this application of the aphorism has been noted by every intelligent writer under

my observation, and all agree that this commandment, either in its original form, as practiced by petitioner, or in its substituted application to the first day of the week, is not more a part of our common law than the doctrine of the Trinity or the Apostles' creed. Nevertheless, by a sort of factitious advantage, the observers of Sunday have secured the aid of the civil law, and adhere to that advantage with great tenacity, in spite of the clamor for religious freedom and the progress that has been made in the absolute separation of church and state, and in spite of the strong and merciless attack that has always been ready, in the field of controversial theology, to be made, as it has been made here, upon the claim for divine authority for the change from the seventh to the first day of the week. Volumes have been written upon that subject, and it is not useful to attempt to add anything to it here. We have no tribunals for its decision, and the efforts to extirpate the advantage above mentioned by judicial decision in favor of a civil right to disregard the change seem to me quite useless. The proper appeal is to the legislature. For the courts cannot change that which has been done, however done, by the civil law in favor of the Sunday observers. The religion of Jesus Christ is so interwoven with the texture of our civilization, and every one of its institutions, that it is impossible for any man, or set of men, to live among us, and find exemption from its influences and restraints. Sunday observance is so essentially a part of that religion that it is impossible to rid our laws of it, quite as impossible as to abolish the custom we have of using the English language, or clothing ourselves with the garments appropriate to our sex. The logic of personal liberty would allow, perhaps demand, a choice of garments, but the choice is denied. So civil or religious freedom may stop short of its logic in this matter of Sunday observance. It is idle to expect in government perfect action or harmony of essential principles, and whoever administers, whoever makes, and whoever executes the laws must take into account the imperfections, the passions, the prejudices, religious or other, and the errings of men because of these. We cannot have in individual cases a perfect observance of Sunday, according to the rules of religion; and, indeed, the sects are at war with each other as to the modes of observance. And yet no wise man will say that there shall be therefore no observance at all. Government leaves the warring sects to observe as they will, so they do not disturb each other; and as to the non-observer, he cannot be allowed his fullest personal freedom in all respects. Largely, he is allowed to do as he pleases, and generally there is no pursuit of him, in these days, as a mere matter of disciplining his conscience; but only when he defiantly sets up his non-observance by ostentatious display of his disrespect for the feelings or prejudices of others.

If the human impulse to rest on as many days as one can have for rest from toil is not adequate, as it usually is, to secure abstention from daily vocations on Sunday, one may, and many thousands do, work on that day, without complaint from any source; but if one ostentatiously labors for the purpose of emphasizing his distaste for or his disbelief in the custom, he may be made to suffer for his defiance by persecutions, if you

call them so, on the part of the great majority, who will compel him to rest when they rest, as it does in many other instances compel men to yield individual tastes to the public taste, sometimes by positive law, and sometimes by a universal public opinion and practice far more potential than a formal statute. There is scarcely any man who has not had to yield something to this law of the majority, which is itself a universal law, from which we cannot escape in the name of equal rights or civil liberty. As before remarked, one may not discard his garments, and appear without them, or in those not belonging to the sex, and this illustration is used rather than others frequently given, based on the laws of sanitation, education, immoral practices, cruelty, blasphemy, and the like, because it seems somewhat freer from the inherent element of injury to others, and contains likewise the element of a selection that would seem to be harmless in itself; so that it illustrates, pertinently, that one must observe the general custom as to a day of public rest, just as he must reasonably wear the garments of his sex selected by general custom. Therefore, while out of our 64,000,000 of people there are a comparatively very few thousands who prefer the seventh day to the first as a day of rest and for religious observances, according to the strict letter of the commandment, and who, possibly with good reason, resent the change that has been made as being without divine sanction, the fact remains that the change has been made by almost universal custom, and they must conform to it so far as it relates to its quality as a day of public rest.

And here it may be noted that sometimes too little heed is given in the consideration of the question to this quality of associated rest from labor. It is not altogether an individual matter of benefit from the rest, for undoubtedly to each individual one day of the seven would answer as well as another, but it is the benefit to the population of a general and aggregate cessation from labor on a given day, which the law would secure, because for good reason, no doubt, found in our practice of it, it is beneficial to the population to do this thing, and they have established the custom to do it. The fact that religious belief is one of the foundations of the custom is no objection to it, as long as the individual is not compelled to observe the religious ceremonies others choose to observe in connection with their rest days. As we said in the outset, not one of our laws or institutions or customs is free from the influence of our religion, and that religion has put our race and people in the very front of all nations in everything that makes the human race comfortable and useful in the world. This very principle of religious freedom is the product of our religion, as all of our good customs are, and if it be desirable to extend that principle to the ultimate condition that no man shall be in the least restrained, by law or public opinion, in hostility to religion itself, or in the exhibition of individual eccentricities or practices of sectarian peculiarities of religious observances of any kind, or be fretted with laws colored by any religion that is distasteful to anybody, those who desire that condition must, necessarily, await its growth into that enlarged application. But the courts cannot, in cases like this, ig-

nore the existing customs and laws of the masses, nor their prejudices and passions even, to lift the individual out of the restraints surrounding him because of those customs and laws, before the time has come when public opinion shall free all men in the manner desired. Therefore it is that the petitioner cannot shelter himself just yet behind the doctrine of religious freedom in defying the existence of a law, and its application to him, which is distasteful to his own religious feeling or fanaticism, that the seventh day of the week, instead of the first, should be set apart by the public for the day of public rest and religious practices. That is what he really believes and wishes, he and his sect, and not that each individual shall select his own day of public rest and his own day of labor. His real complaint is that his adversaries on this point have the advantage of usage and custom, and the laws founded on that usage and custom, not that religious freedom has been denied to him. He does not belong to the class that would abrogate all laws for a day of rest because the day of rest is useful to religion, and aids in maintaining its churches, for none more than he professes the sanctifying influence of the fourth commandment, the literal observance of which by himself and all men is the distinguishing demand of his own peculiar sect. His demand for religious freedom is as disingenuous here as is the argument of his adversary sects that it is the economic value of the day of rest, and not its religious character, which they would preserve by civil law. The truth is, both are dominated by their religious controversy over the day, but, like all other motives that are immaterial in the administration of the law, the courts are not concerned with them. Malice, religious or other, may dictate a prosecution, but if the law has been violated this fact never shields the law-breaker. Neither do the courts require that there shall be some moral obloquy to support a given law before enforcing it, and it is not necessary to maintain that to violate the Sunday observance custom shall be of itself immoral, to make it criminal in the eyes of the law. It may be harmless in itself, because, as petitioner believes, God has not set apart that day for rest and holiness, to work on Sunday, and yet if man has set it apart, in due form, by his law, for rest, it must be obeyed as man's law, if not as God's law; and it is just as evil to violate such a law, in the eyes of the world, as one sanctioned by God,—I mean just as criminal in law. The crime is in doing the thing forbidden by law, harmless though it be in itself. *U. S. v. Jackson*, 25 Fed. Rep. 548; *In re Coy*, 31 Fed. Rep. 794, 127 U. S. 731, 733, 8 Sup. Ct. Rep. 1263. Therefore all that part of the argument that it is not hurtful in itself to work on Sunday, apart from the religious sanctity of the day, is beside the question; for it may be that the courts would hold that repeated repetitions of a violation of law, forbidding even a harmless thing, could be a nuisance, as tending to a breach of the peace. 2 Bish. Crim. Law, § 965; 1 Bish. Crim. Law, § 812. Neglecting to do a thing is sometimes a nuisance. 1 Russ. Crimes, 318. That is to say, a nuisance might be predicated of an act harmless in itself, if the will of the majority had lawfully forbidden the act, and rebellion against that will would be the *gravamen* of the offense,—or, to

express it otherwise, there is in one sense a certain immorality in refusing obedience to the laws of one's country, subjection to which God himself has enjoined upon us.

But whatever plenary power may exist in the state to declare repeated violations of its laws and the usages of its people a nuisance and criminal, until the case of *Parker v. State*, *supra*, and until this case of King, to which we yield our judicial obedience, there seems not to have been any law, statute or common, declaring the violation of the statutes against working on Sunday a common nuisance. Mr. Chief Justice RUFFIN has demonstrated, we think, that there was no such common law of the mother state of North Carolina, from which we have derived our common law and these Sunday statutes. Mill. & V. Code, §§ 2009-2013, 2289; Act 1741 (N. C.) 1 Scott, Rev. 55, 795; Car. & Nich. 638; *State v. Williams*, 4 Ired. 400; *State v. Brooksbank*, 6 Ired. 73. The case of *State v. Lorry*, 7 Baxt. 95, is in accordance with these authorities; and I may say that, with some patience, I have traced as far as I have been able the common-law authorities, and, if the judgment rested with me, should say that there is not any foundation in them for the ruling that it is a common-law nuisance to work in one's fields on Sunday; and the supreme court of North Carolina so decided. MAULE, J., said in *Rawlins v. West Derby*, 2 C. B. 74, that "in the time of Charles II. an act of parliament passed providing that certain things that formerly might have been done on Sunday should no longer be done on that day, all other things being left to the freedom of the common law." This act was not adopted by North Carolina or by Tennessee as part of their common law, but was by North Carolina, and afterwards by Tennessee, substantially re-enacted, and is the foundation of our Sunday laws. The precedent for a common-law indictment taken by Chitty from a manual known as the "Circuit Companion" was omitted from subsequent editions. 2 Chit. Crim. Law, (6th Ed.) 20, and note. And while many American courts have laid hold of the statements in the old text-writers that such an indictment was known at common law, and upon their authority subsequent writers have proceeded to state the text-law to be so, it is quite certain that no adjudicated case in England can be found to establish the statement that, strictly and technically, there was any such offense known to the common law. In this sense it may be said that King was wrongfully convicted, the *State v. Lorry* wrongfully overruled, and *Parker v. State* wrongfully decided; but it does not belong to this court to overrule these decisions, and it does belong to the state court to make them, and King's conviction under them is "due process of law." Remand the prisoner.

UNITED STATES v. BOESE.

(District Court, N. D. California. April 1, 1891.)

SENDING OBSCENE LETTER THROUGH THE MAILS.

A person cannot be convicted of mailing an obscene letter when the only evidence that it was deposited in the mail is his uncorroborated confession.

At Law.

Trial of William J. Boese for sending an obscene letter through the mails contrary to Act Cong. Sept. 26, 1888. The district attorney offered to prove that the letter was obscene; that it was placed in the hands of a local officer; that the envelope did not accompany the letter, and that the prosecution would be unable to produce any evidence of the name of the lady to whom it was addressed; that the officer, by means of a decoy letter, discovered defendant, who, in the presence of three officers, voluntarily confessed that he wrote the letter, and deposited it in the mails. Defendant's counsel moved for an acquittal on the ground that the offered evidence, if true, would be insufficient to justify a conviction. The court directed the jury to return a verdict of not guilty.

C. A. Shurtleff, Asst. U. S. Atty.

Carroll Cook, for defendant.

HOFFMAN, J. Whether the depositing of an obscene letter in the post-office with no address to it at all would constitute an offense under that act of June 18, 1888, amending section 3893, Rev. St. U. S., it is not necessary now to decide. I do not contend or suppose that the sole object of the act was to protect the feelings of parties to whom the obscene letter might be addressed. I do not think it was to protect the post-office clerks, either, from being contaminated by reading such objectionable communications. I suppose, though, that, should it appear that a man had a mistress or other person, and that they indulged in such letters and corresponded with each other, and each were sending the letters without objection, and in fact pleasure, I think they could be both indicted and punished for using the mails and carrying on the correspondence. It is not necessary that the feelings of the party to whom it is addressed be lacerated; nor would the fact that it was a pleasure and gratification to the person to receive it,—that would not absolve the prisoner from punishment for sending it on through the mail. But all the cases seem to show that further proof must be exacted in addition to the confession, and there must be corroborative circumstances, not amounting by themselves to absolute proof, but taken with the confession, and be sufficient to satisfy the jury beyond a reasonable doubt that a crime has been committed, and that the prisoner is the guilty person; because, if full proofs of the commission of crime were exacted, they might not be sufficient of themselves, wholly irrespective of the confession, to establish beyond a doubt that the crime has been committed; but in some way the jury has got to be satisfied, either by con-

fession and corroborative proof or by corroborative proof alone,—some way,—of the guilt of the defendant. It is wholly unreasonable to suppose that a jury could convict a person of crime unless they reached the conclusion that a crime had been committed, and that the defendant is the guilty person. I do not think it necessary to delay the decision of this case, but some light might have been thrown upon it, as to the degree and sufficiency of the corroborative proof, by referring to those cases where an accomplice has been put upon the stand, and where the law directs—sometimes the statute, and always the instructions of the court—that it is not safe to convict a person of crime upon the unsupported testimony of an accomplice. The degree of corroboration that the accomplice must receive must be treated of in many of those cases, and if the question were to arise as to what the jury should accept as the statutory corroboration, or the corroboration required by law, those cases would have to be explored. But here I see no proof whatever. The body of the offense is the putting of this letter in the mail. Of course a person may write as many such letters as he pleases, and send them by hand. Providing he does not use the mail for the purpose, the offense has not been committed that we have jurisdiction to punish. It is no corroboration to admit that he did write the letter, and that it is in his handwriting, which could be proved irrespective of his confession, I apprehend, by a comparison of the handwriting,—the writing which he made and comparing that with the letter, the handwriting of the obscene letter,—and by the fact that he knew the contents—must have known the contents—of the obscene letter, because he applies to the boy and gets the decoy letter in reply, which is found in his possession. Those facts can be proved independently of relating a single word that fell from his lips by the witnesses. But that does not go to the proof of the *corpus delicti*. Did he use the mail? On that there is not a particle of evidence. The party to whom the letter is addressed is not here to testify. The officer can only tell that the person who gave him the letter had stripped off the envelope, and that would be hearsay, and his testimony would be refused admission if offered. All the young man who appears to be affianced to this young lady can tell is what the mother of the young lady told him. He does not know that it was received through the mails; nothing tending to show that he could testify on that point at all. Nobody can testify to it, that I can see, excepting the person who took it from the box, or to whom it was delivered,—the father of the young lady. The mother, even her testimony would probably be hearsay. She did not know anything excepting what her daughter told her,—that that letter had just arrived. So that the whole testimony appears to be barren of any positive proof that this letter was ever sent through the mail. That constitutes the essence of the crime, and we must not be led away by our abhorrence of this gross and senseless outrage that has been perpetrated, and we must not punish a man for sending a libelous communication or making obscene or improper proposals unless he uses the mail for the purpose. The rest the state law will take care of. We have nothing to do with

it, except, as I have said, to prevent the mails being used as a medium for carrying on such correspondence.

Supposing all you say you can prove were proved, and I were to charge the jury, as I certainly would, that they must be satisfied that this letter was mailed, what proof would they have, what solitary fact tends to show that, in this case, independently of this confession? The *corpus delicti*, therefore, rests entirely upon his confession. There is no proof that this letter went through the mail; not a particle. It was answered through the mail, by whom we do not know; and it was taken out of the mail, (the decoy letter was, by him,) but the original letter, which led to the writing of the decoy, was not proved by a *scintilla* of proof to have been mailed. It is not necessary that there should be some proof, or half proof; but that there must be some corroborative circumstances, when the existence of the crime itself depends on a confession, is a fundamental proposition; and, unless the jury was satisfied of that fact by competent proof, a verdict of acquittal must follow. You cannot punish a person unless you are satisfied beyond a reasonable doubt that a crime has been committed, and also that he is the only one who committed it. I do not know that there is anything more to be said about it. Considering all the proofs that you have presented or are in your power to produce, I do not see a particle of proof as to how the letter reached that young lady's hand, and her mother's, etc., and found its way into the policeman's possession; nothing, I say, except his confession.

A good many of the decisions turned upon the general idea of the caution with which confessions should be received. The rule does not stand upon the ground merely that the testimony is unreliable, and liable to mistake, or that it is given under circumstances of duress, or something approaching duress. The slightest thing, say, "You had better confess," "Make a clean breast of it,"—causes a confession to be rejected. Why? Not because it affords a reasonable ground that an innocent person at such invitation confesses himself guilty of a crime which he never committed, because a rational person can see that no innocent person would be induced to say that he was guilty of a crime of which he was innocent, but the law will not allow a confession to be extracted from a person unless under the fullest guaranty that it is spontaneous and free, and without any influence brought to bear upon him; not that it raises a presumption that perhaps a person has confessed a crime of which he is innocent, but because the law won't allow it. There are now no thumb-screws, and those practices which prevailed on the continent, so no one can betray him but himself; and unless it is spontaneous beyond all doubt, and voluntary, it is rejected, as I say, not because the confession may not be true, but because the law will not allow what falls from a prisoner to be received in evidence, on the ground that he is not bound to betray himself. Perhaps they press it a great deal too far, and even by the state statute here and elsewhere the committing magistrate is bound to caution the man that he need not answer any questions; that he has a right to hold his peace; and that, if he does so answer, his con-

fessions will be used against him; and it must appear that he did so caution and advise the prisoner before he made his confession or statement, before it can be used against him. It shows the tenderness of the law, and many of these authorities treat of the point as to when the confession shall be received in evidence. That has nothing to do with this case. I doubt not that you would be able to show from Mr. Irving and those other gentlemen that this confession was entirely spontaneous, and that he was not induced to make it by appealing to his hopes, or anything else. That could be shown when the cause was tried, but the law says that a confession, no matter how freely given, shall not be used unless it is shown that a crime has been committed. As I say, I look in vain in the proofs you have offered for any corroborative circumstances to show that that letter was dropped by him into the mail for transmission. That he wrote it I have no doubt. I have no moral doubt that he dropped it into the mail. That he wrote it may be a very reprehensible act. It is no offense under the act of congress, and no act of which this court has jurisdiction; and, striking out his confession, I do not see a particle of evidence that would suggest whether it was sent by express or dropped by himself under the door of her residence, or sent by a messenger boy, or anything that throws the least light as to how it reached her, except his confession that he mailed it. And even the envelope, which probably would have been accepted as sufficient corroboration,—that is, the stamp, with the evidence of the post-office of cancellation on the stamp, showing that it passed through the post-office,—that might be sufficient, but even the envelope is not here, and, if justice fails in this case, (as I believe it does and will,) it is the fault of those people who had the means and knowledge of making the proof so strong as to prove conclusively the man's guilt. From what motives? It is suggested from motives of delicacy; but a veil of secrecy has been thrown over this whole case, and the court is invited to protect these people who are full of fanciful horror of notoriety or exposure. The prosecution is not to blame for it, or the court.

If this case had any corroborative proof I would be inclined to leave it to the jury. It would be well to look at the cases that require the jury to accept the proof of accomplices. I do not suppose they have full proof of the man's crime or they would not put the accomplices on the stand; but it must be to satisfy the jury that the testimony is true beyond a reasonable doubt. If I told the jury, "Gentlemen, the confession must be corroborated in this matter, so far as it relates to the *corpus delicti*, or that the crime has been committed, and I see no proof of that whatever," and I should charge them that way, what is the use of detaining them? I might as well instruct them to render a verdict right now; and, if I am satisfied that the circuit court would grant a writ of error, and set the verdict aside if rendered, there is no use of going through a proceeding which I see would be abortive and useless at this time. I do not know of any technical or other objection to the court saying, at the beginning of the cause, upon the district attorney's opening: "If the district attorney proves to your absolute sat-

isfaction all that he says he can prove, still the proof would be defective for the want of a certain fact which he is bound to establish,"—say so at the beginning and say so at the end,—I see no objection to it, and I do not know that you want to try a case if you are satisfied that I am going to treat it that way. If we once get into the merits, Mr. Cook made a threat to me that he had another defense,—that his client was not responsible for his action; that he was insane.

Mr. Cook. I think the letter is pretty good proof of that.

The Court. I don't want to go into the question of insanity. The jury will come in to-morrow morning, and I will tell them that if the facts stated were proved no conviction could be had.

Here a recess was taken until the next day, at 11 A. M.

HAWLEY, J., (*charging jury.*) You have been sworn to try this case. Judge HOFFMAN, upon hearing the statement of the district attorney, setting forth the facts which he expected to prove, has become convinced that there is not sufficient corroborative evidence to justify a jury in finding a verdict of guilty, and that it would be his duty to instruct the jury to find a verdict in favor of the defendant. As Judge HOFFMAN is unable to be present to-day, I am here simply to speak for him, to announce to you his conclusion in the matter, and to instruct you to appoint some one of your number as foreman, and to find a verdict of not guilty.

The jury thereupon returned a verdict of not guilty.

SOCIETE ANONYME v. WESTERN DISTILLING Co.

(*Circuit Court, E. D. Missouri, E. D. June 20, 1891.*)

TRADE-MARKS—INFRINGEMENT—PROFITS—EXPENSES.

In the computation of profits realized by defendant in imitating complainant's labels, brands, trade-marks, etc., deduction for expenses will not be made where the business was conducted in connection with defendant's regular business, increasing the gross profits without increasing the gross expenses.

In Equity. On exceptions to master's report.

F. N. Judson, for complainant.

Rassieur & Schnurmacher, for defendant.

THAYER, J., (*orally.*) The chief contention in this case arises over the refusal of the master to make allowance for certain expenses, in his computation of the profits realized by the defendant by imitating complainant's labels, brands, trade-marks, etc. I have looked into this matter,

and reached the following conclusion: That while it is customary in the computation of profits in this class of cases to make allowance for expenses, yet the expenses so allowed must be expenses necessarily incurred in the unlawful venture, which would not have been incurred but for engaging in such venture. When an unlawful business is carried on in connection with the defendant's regular business, and the same agencies are employed in doing that which is lawful and that which is unlawful, no rule of law of which I am aware requires any deduction for expenses in estimating the profits of the unlawful business. In this case defendant was a distilling company. It had a place of business, a license for doing business, traveling salesmen, etc. The proof does not convince me that any additional expenses were incurred by the defendant in the manufacture and sale of Benedictine, other than such as the master has allowed. The manufacture of Benedictine was carried on in connection with its ordinary business, by the usual number of employes. The unlawful venture increased the gross profits without swelling the gross expenses. Furthermore, the wrongful act in question was committed knowingly, without a shadow of excuse.

Under the circumstances, I am compelled to agree with the master on this and all other points covered by the report.

STROBRIDGE *et al.* v. L. H. SMITH WOODEN-WARE Co., Limited.

(Circuit Court, D. Pennsylvania. May 11, 1891.)

PATENTS FOR INVENTION—INFRINGEMENT—COFFEE-MILL.

Reissued letters patent No. 7,583, dated March 27, 1877, granted to Turner Strobridge for a coffee-mill having a detachable hopper and grinding shell formed in a single piece, and suspended within the box by the upper part of the hopper or a flange thereon, are not infringed by a coffee-mill having such a hopper and grinding shell, kept in place within the box by a clamping mechanism, whereby the flange of the hopper is pressed up against the under side of the top of the box. The cases of *Strobridge v. Lindsay*, 2 Fed. Rep. 632, and *Same v. Landers*, 11 Fed. Rep. 880, distinguished.

In Equity.

W. Bakewell & Sons, for complainants.

Wm. L. Pierce, for defendant.

Before ACHESON and REED, JJ.

ACHESON, J. The bill charges the defendant with the infringement of reissued letters patent No. 7,583, dated March 27, 1877, being a re-issue, on application filed March 1, 1877, of original patent of February 2, 1875, to Turner Strobridge, for an improvement in coffee-mills. The specification and drawings of the reissued patent describe and show a coffee-mill in which the hopper and grinding shell are formed in a single piece, and suspended within the box by means of lugs formed upon the

upper margin of the hopper, and resting upon the upper surface of the top of the box. The specification also mentions "a projecting flange" as an alternative means for effecting the suspension of the combined hopper and grinding shell. "The top, C, of the box, is cut away, so that the hopper may be suspended therein by means of a projecting flange or lugs on the hopper. * * * D represents the hopper or grinding shell, provided with a flange or lugs, d, by which it is suspended in the box, A." No other method of suspension is shown or suggested in the drawings or specification, except that the patentee states that, to facilitate the suspension of the hopper, he preferably bevels the opening in top, C, to correspond with the curve of the hopper, which he provides with a series of projections for the purpose of taking hold upon the beveled edge of the top, C, to assist in preventing any movement of the hopper. The plaintiffs insist that the defendant infringes the first four claims of the patent, which are as follows:

"(1) A coffee or similar mill, having a detachable hopper and grinding shell formed in a single piece, and suspended within the box by the upper part of the hopper or a flange thereon, substantially as and for the purpose specified. (2) In a coffee-mill, the combination, with the box and its top, of a detachable hopper suspended within the box by its upper part, and a bridge supported on the box, substantially as and for the purpose specified. (3) In coffee and spice mills, the combination of the box, having a top, with the hopper suspended therein, by means of a projecting flange or lugs, which rest upon or take into the top, substantially as described. (4) The combination of the box, having a top, with the hopper suspended therein, by means of a projecting flange or lugs, which rest upon or take into the top, and a cover, substantially as described."

In the mill sold by the defendant, and here complained of, there is a detachable hopper and grinding shell formed in a single piece, and suspended or held in place within the box in the manner following: The hopper near its upper edge has a flange which rests against the lower surface of the wooden top of the box, and the bottom of the hopper is provided with a cross-bar or diametrical bridge having a central opening. On the upper surface of the top of the box rests a cover or a bridge having a corresponding central opening. Through these two openings passes a hollow spindle or sleeve, having at its upper end a collar resting upon a seat on the cover, or the bridge above the top, and at its lower end two laterally projecting lugs. By the rotation of the spindle these lugs move along two inclined faces on the under surface of the lower bridge, and thus the two bearings are drawn together, and the wooden top of the box is firmly clamped between the annular flange of the cover or rim of the bridge and the flange of the hopper.

Two defenses are set up: *First*, non-infringement; and, *secondly*, the invalidity of the reissue by reason of its undue expansion. The reissue was sustained by this court in *Strobridge v. Lindsay*, 2 Fed. Rep. 692, and by Judge BLATHFORD in *Strobridge v. Landers*, 11 Fed. Rep. 880; and the first claim held to be infringed by a mill which embodied the substance of the invention, but in which the hopper was cast with a flange projecting from its upper edge sufficiently to cover and form the

top of the box, this structural change being adjudged formal and colorable. Judge BLATCHFORD also passed on the objection "that the reissue was not for the same invention as that described in the original, and that the reissue contains new matter not found, suggested, or described in the original;" and he held that this defense was not tenable. In view, then, of those decisions, we think the only question to be regarded as here open arises upon the defense of non-infringement.

In considering this question, which involves the true scope of the claims, we are first to consider the terms of the patent itself. Now, a careful study of the specification and the illustrative drawings leads us to the conviction that the only conception which the inventor had in his mind was the suspension or support of the combined hopper and grinding shell by the projecting flange or lugs resting upon the top of the box. Certainly no other method of suspending the hopper is disclosed by the patent. The words, "suspended within the box by the upper part of the hopper or a flange thereon," indicate not simply the point of connection between the hopper and the top of the box, but the means or mechanical device by which the suspension is effected. The natural meaning of the language (especially when read in connection with the specification and drawings) is that the hopper is held up or sustained in place by its engagement with the upper side of the top of the box. But, if this be the correct rendering, then is it plain that the defendant's coffee-mill is not within any of the claims of the patent. Then, again, the prior state of the art was such as to preclude any broad claim. *Caster Co. v. Spiegel*, 133 U. S. 360, 10 Sup. Ct. Rep. 409. In the old and very familiar elevated hopper-mill, the hopper and grinding shell were formed in a single piece, with a flange at the bottom resting upon the top of the box. It must be conceded, too, that all the other elements of the combination were old in coffee and spice mills. Furthermore, Strobridge was not the first to devise a coffee-mill with the hopper suspended within the box. Such mills had already been in public use and upon sale. Strobridge was no more than a mere improver of an old mechanism, and therefore entitled only to his own specific form of device. *Railway Co. v. Sayles*, 97 U. S. 554; *Duff v. Pump Co.*, 107 U. S. 636, 2 Sup. Ct. Rep. 487.

Once more, the patented improvement does not relate to the operation of the mill. It introduced no new method of grinding, nor did it add to the efficiency of the grinding mechanism previously in use. The improvement, indeed, was merely one in construction. Now, in our judgment, the device embodied in the defendant's coffee-mill for suspending or supporting the hopper within the box is not a mere colorable departure from the form of the Strobridge improvement, but the difference between the two devices is substantial. Our conclusion then is that the charge of infringement is not sustained. Let a decree be drawn dismissing the bill, with costs.

WILKIN v. COVEL.

(Circuit Court, N. D. Illinois. July 7, 1891.)

PATENTS FOR INVENTIONS—NOVELTY—CONSTRUCTION OF CLAIM.

Letters patent No. 259,068 granted June 6, 1882, to Theodore S. Wilkin, for an improvement in machines for stretching saws, are void for want of novelty in the device therein described as a whole, and the claim cannot be limited to the convex or crowned rolls used therein, which are nowhere mentioned in the claims or specifications, though shown in the drawings.

In Equity.

W. G. Rainey, for complainant.

Peirce & Fisher, for defendant.

GRESHAM, J. Letters patent No. 259,068, for an "improvement in machines for stretching saws," were granted to the complainant June 6, 1882, and this suit was brought against the defendant for infringement. The machine and its mode of operation are thus described in the specifications:

"Saws of the class above named are usually hung, as shown, by strap, J, and hook, K, on saw, L, in Fig. 2, on a line very near the cutting edge of the saw. Therefore, when strained ready for labor, the greatest strain comes on a line with the hook, K, and strap, J, in Fig. 2, and very near the cutting edge of the saw, and by this constant straining on the front or cutting-edge of the saw the metal gradually yields to the strain, and soon becomes longer on the edge than on the back of the saw. Consequently it becomes weak, and in a short time fails to perform the labor required of it. To obviate this, my invention is particularly adapted, for by placing the back of the saw, L, as shown in Fig. 2, between the rollers, B, B', (shown in Fig. 1,) and turning the wheel, G, and by it the screw, *f*, the cross-head, C, is caused to slide on the ways, *e, e*, and thereby compress the saw between the rollers, B, B'. The mechanism is such that, by turning the crank-arm, *h*, the cog-wheel, *i*', and the roller, B', are revolved, the upper cog-wheel, *i*', coming in contact with the lower cog-wheel, *i*, causing the shaft, *d*, and roller, B, to revolve in an opposite direction, whereby the saw, L, is caused to move in a direction with the rollers, B, B'. The saw being compressed while passing between the rollers, B, B', and keeping the pressure nearer the back than the cutting edge, the saw is drawn out on the back, or stretched until the back becomes longer than the cutting edge of the saw. Therefore, when the saw is strained for labor in a sash or gate, the cutting-edge receives a greater tension than the back; thus enabling the saw to perform a greater amount of and much better work. * * * A represents the frame, *d, d'*, two shafts, upon which are fixed rollers, B, B', and cog-wheels, *i, i'*, and crank-arm, *h*. The upper shaft, *d'*, is mounted on cross-head, C, which is made to slide on ways, *e, e*, by means of the wheel, G, and the screw, *f*, thus adjusting upper roll, B'. The shaft, *d*, is mounted in frame, A, the cog-wheel, *i*, coming in contact with the cog-wheel, *i'*, so that when the shaft, *d'*, is made to revolve by means of the crank-arm, *h*, or other suitable power, the lower shaft, *d*, is made to revolve in an opposite direction from that of upper shaft, *d'*."

The single claim reads:

"The improved machine herein described and shown for stretching saws, consisting essentially of the frame, A, the rolls, B, B', the gears and crank

for operating the rolls, the cross-head, C, and the screw, *f*, substantially as specified."

All the elements of the claim are old. The prior art shows a frame, rolls, gears, crank, cross-head, and screw in a single machine, and, if the patent is construed broadly, it describes a device which any skilled mechanic, familiar with the prior art, might have made. The complainant's counsel, however, insists that the language of the specifications, read in connection with the drawings, shows that the claim was allowed for convex or crowned rolls, which are unlike anything found in the same combination in the prior art, and that, thus limited, the patent is valid. It will be observed that neither the specifications nor the claim describe or speak of rolls with convex or crowned surfaces. The specifications do not say that the invention consists in the use of convex rolls, or rolls of any specific construction. Such rolls are not mentioned as part of the invention. The drawings do show rolls with convex surfaces, but that of itself is not sufficient to justify the court in limiting the claim in order to save the patent. In describing his invention, the complainant did not make convex rolls a distinctive feature of it, and he pointed out no advantage to be derived from the use of that particular form of rolls. The patent must be construed broadly for a machine containing the parts mentioned in the claim, regardless of their specific construction, or so as to limit it to the precise construction of parts shown in the specifications. If it can be limited to the precise shape of the rolls illustrated in the drawings, and not otherwise described, it can be limited to the precise shape of all the other parts of the combination so illustrated, and thus limited it is not infringed. Aside from the drawings, there is nothing in the patent which shows the invention is to be found in the form of the rolls, any more than in the form of the other parts covered by the claim. Specifications, which do not clearly describe an invention, may be aided by the drawings, but, if the invention is not described or alluded to in the specifications, the drawings which illustrate it will avail nothing. If there was patentable invention in substituting convex or crowned rolls for flat-faced rolls with beveled edges found in the prior art, the complainant failed to comply with the statute (section 4888) by making a written description of his invention. He failed to particularly point out and distinctly claim the improvement or combination which he now says constitutes his invention. The bill is dismissed for want of equity.

THE UMBRIA.¹

SWITZERLAND MARINE INS. CO. v. THE UMBRIA.

(District Court, E. D. New York. June 8, 1891.)

COLLISION—DAMAGES—CARGO OF DATES—RENT OF HOUSE USED BY DATE PICKERS.

In gathering dates on the river Euphrates, the intending shipper sent an agent up the river, who bought the dates on the trees, and caused them to be picked and boxed there. A house was necessary to do the work in, and board the men while picking the dates. This house was hired by the year, though used for about six weeks only. This is the most economical, if not the only, way to procure the dates. The entire product of one season having been lost on the steam-ship Iberia by collision with the steam-ship Umbria, the shipper claimed as an item of his damage the rent of the house on the Euphrates, and the expenses of the agent. On exceptions to the report of the commissioner allowing the items, *held*, that the allowance was proper.

In Admiralty. On exceptions to commissioner's report.

Butler, Stillman & Hubbard, for libellant.

Owen, Gray & Sturges, for claimant.

BENEDICT, J. This case comes before the court upon exceptions to the commissioner's report. The action is to recover for the loss of a shipment of dates that became a total loss by reason of a collision between the steam-ship Iberia and the steam-ship Umbria, for which loss, by the decision of this court, the libelants are entitled to recover of the steam-ship Umbria. The measure of the damages arising from the loss of the dates is the cost at the port of shipment, with expenses, charges, and interest. *The Aleppo*, 7 Ben. 121. The facts brought out before the commissioner are these: The dates were shipped at Busrah, or Bussora, in Arabia. The method of business in dates there is for the intending shipper to send up the river Euphrates, to where dates are grown, an agent, who buys the dates there on the trees, causes them to be picked, collected, sorted so far as may be, the rejections to be sold, and the rest packed in boxes and other packing material, which have been previously procured from New York. They are then sent by a steam-launch to Bussora, the place of shipment. The process lasts about six weeks. The cost of these dates to the shipper at the time of shipment at Bussora therefore includes the price paid to the natives for the dates upon the tree, the cost of packing material, the labor, cost of collecting and sorting and packing, and incidentals. A house on the river Euphrates is necessary to do the work in, and board the men while employed in collecting and packing the dates. Such a house is hired for a term of years, and maintained, though used only during the date season. This is necessary, because there are no accommodations for men or business at the river Euphrates, and the method pursued is the most economical, if not the only, way to procure the dates. The amount paid in this instance for the rent of the house was 5,000 rupees per year.

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

The commissioner has allowed, as part of the cost of the dates, house-rent, 5,000 rupees, and also the expenses of the agent, 1,274 rupees. To these items the claimant objects, upon the ground that they are part of the regular expenses of the shipper's business, which he takes the risk of providing for out of his profits, and therefore are not recoverable against the Umbria. Under the peculiar circumstances of this trade, where an expedition must be sent from the port of shipment to the country where the dates grow, and where commercial facilities do not exist, and where the business is special and temporary, I am of the opinion that the items objected to were properly allowed by the commissioner. Those who conduct the business are doubtless the best judges of the most economical method of carrying it on, and I find nothing in the testimony calculated to cast doubt upon the conclusion that these items are proper items, going to make up the cost of the dates at the place of shipment.

The exceptions are therefore overruled, and the report is confirmed.

END OF VOLUME 46.